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BOOK XLVII.

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BURDETT A. RICH, EDITOR, HENRY
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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 47,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

Adams v. Beloit (105 Wis. 363)	441	Godbout v. St. Paul Union Depot Co.	
Adkins v. Richmond (98 Va. 91)	583	(79 Minn. 188)	532
Allen v. Board of State Auditors (122 Mich. 324)	117	Goldberg v. Ahnapee & W. R. Co. (105 Wis. 1)	221
Aslanian v. Dostumian (174 Mass. 328)	495	Grundel v. Union Iron Works (127 Cal. 438)	467
Austin v. Augusta Terminal R. Co. (108 Ga. 671)	755	Gulf, C. & S. F. R. Co. v. Hayter (93 Tex. 239)	325
Auten v. Manistee Nat. Bank (67 Ark. 243)	329	Hanley v. California Bridge & Construction Co. (127 Cal. 232)	597
Bagwell v. Atlanta Consolidated St. R. Co. (109 Ga. 611)	486	Henderson v. Heyward (109 Ga. 373)	386
Bank of Commerce v. Wiltale (153 Ind. 460)	489	Hoffman v. Maffioli (104 Wis. 630)	427
Bennett v. Pulaaki (Tenn. Ch. No Off. Rep.)	278	Holmes v. Phenix Ins. Co. (39 C. C. A. 45, 98 Fed. 240)	308
Benton v. Collins (125 N. C. 83)	33	Hopkins v. Cowen (90 Md. 152)	124
Bigham v. Madison (103 Tenn. 358)	267	Houghton v. Rice (174 Mass. 366)	310
Blair v. Ostrander (109 Iowa, 204)	469	Howarth v. Angle (162 N. Y. 179)	725
Boston Excelsior Co. v. Bangor & A. R. Co. (93 Me. 52)	82	Janvrin, Re (174 Mass. 514)	319
Bowen v. Port Huron Engine & Thresher Co. (109 Iowa, 255)	131	Johnson v. Goodyear Min. Co. (124 Cal. 4)	338
Brown v. Southern Pac. R. Co. (36 Or. 128)	409	Keller v. St. Louis (152 Mo. 596)	391
Bullock v. Sprowls (93 Tex. 188)	326	Knowlton v. Williams (174 Mass. 476)	314
Cahill v. Maryland Life Ins. Co. (90 Md. 333)	614	Lebus v. Boston (107 Ky. 98)	79
Cole v. Union Central Life Ins. Co. (22 Wash. 26)	201	Lewis v. Tapman (90 Md. 294)	385
Colton v. Mayer (90 Md. 711)	617	Lion v. Baltimore City Passenger R. Co. (90 Md. 266)	127
Covington v. Buffett (90 Md. 569)	622	Lynn v. Hooper (93 Me. 46)	752
Coyle v. A. A. Griffing Iron Co. (68 N. J. L. 609)	147	McCabe v. Aetna Ins. Co. (9 N. D. 19)	641
Dalton, Re (81 Kan. 257)	380	May v. Poindexter (98 Va. 143)	538
Drew v. Tift (79 Minn. 176)	525	Michigan Teleph. Co. v. Benton Harbor (121 Mich. 512)	104
Farley v. Lavery (107 Ky. 523)	383	v. St. Joseph (121 Mich. 502)	87
Felt v. Felt (59 N. J. Eq. 606)	546	Milton v. Johnson (79 Minn. 170)	529
Fingley v. Prescott (104 Wis. 614)	695	Morgan, Re (26 Colo. 415)	52
First National Bank v. Elliott (125 Ala. 646)	742	Nanz v. Cumberland Gap Park Co. (103 Tenn. 299)	273
v. McGuire (12 S. D. 226)	413	Nevins v. Fitchburg (174 Mass. 545)	312
Fleetwood v. Read (21 Wash. 547)	205	Nichols v. Eaton (110 Iowa, 509)	483
Galusha v. Sherman (105 Wis. 263)	417	North Springs Water Co. v. Tacoma (21 Wash. 517)	214
Galveston, H. & S. A. R. Co. v. Zant-singer (93 Tex. 64)	282	Northern Pac. R. Co. v. McClure (9 N. D. 73)	149
Givan v. Bank of Alexandria (Tenn. Ch. No Off. Rep.)	270	Noyes v. Ross (23 Mont. 425)	400
		Oren v. Abbott (121 Mich. 540)	92
		Owen v. Cook (9 N. D. 134)	646
		Paul v. Cragnas (25 Nev. 293)	540
		People v. Youngs (121 Mich. 512)	108

SUPPLEMENTAL TABLE OF CASES.

Phillips v. Rector & Visitors of U. of Va. (97 Va. 472)	284	State, Crow v. Smith (152 Mo. 512)	560
Pullman's Palace Car Co. v. Hunter (107 Ky. 519)	286	Stovall v. McCutchen & Co. (107 Ky. 577)	287
Ricketson v. Milwaukee (105 Wis. 591)	685	Sullivan v. Strahorn-Hutton-Evans Commission Co. (152 Mo. 268)	859
Robinson v. Bierce (102 Tenn. 428)	275	Tall v. Baltimore Steam Packet Co. (90 Md. 248)	120
Rogers v. St. Paul (79 Minn. 5)	537	Thibert v. Supreme Lodge, Knights of H. (78 Minn. 448)	136
Romeo v. Martucci (72 Conn. 504)	601	Thomas v. Flint (123 Mich. 10)	499
Rutledge, Re (162 N. Y. 31)	721	Tirrell v. Tirrell (72 Conn. 507)	750
St. Lawrence v. Gross (12 S. D. 350)	572	Tod, Ex parte (12 S. D. 386)	566
Schroder v. Overman (61 Ohio St. 1)	156	Turner v. St. Clair Tunnell Co. (121 Mich. 616)	112
Selleck v. Janesville (104 Wis. 570)	691	Valparaiso v. Bozarth (153 Ind. 536)	487
Shute v. Hinman (34 Or. 578)	265	Walling v. Christian & Craft Grocery Co. (41 Fla. 479)	608
Smith v. Furbish (68 N. H. 123)	226	Walrod v. Webster County (110 Iowa, 349)	480
v. Jackson (103 Tenn. 673)	416	Ward, Re (127 Cal. 489)	466
v. Postal Teleg. Cable Co. (174 Mass. 576)	323	Wilbey Casualty Co. v. Sheppard (61 Kan. 351)	650
Stanton v. Singleton (126 Cal. 657)	334	Wittenberg v. Onsgard (78 Minn. 342)	141
State v. Bradford (78 Minn. 387)	144	Wyant v. Central Teleph. Co. (123 Mich. 51)	497
v. Haun (61 Kan. 146)	369	Young v. State (36 Or. 417)	548
v. Hoskins (109 Iowa, 656)	223		
v. Schuman (36 Or. 16)	153		
v. Wilson (61 Kan. 32)	71		
State, McCaffery v. Aloe (152 Mo. 466)	393		
Tompkins v. Chicago, St. P. M. & O. R. Co. (12 S. D. 305)	569		
McCausland v. Freeman (61 Kan. 90)	67		
Weinberg v. Pacific Brewing & M. Co. (21 Wash. 451)	208		

TABLE

OF

CASES REPORTED

IN

LAWYERS' REPORTS, ANNOTATED, BOOK XLVII.

A

A. A. Griffing Iron Co., Coyle v. (N. J. Err. & App.)	147
Abbott, Oren v. (Mich.)	92
Adams v. Beloit (Wis.)	441
Adkins v. Richmond (Va.)	583
Etna Ins. Co., McCabe v. (N. D.)	641
Ahnapee & W. R. Co., Goldberg v. (Wis.)	221
Allen v. State Auditors (Mich.)	117
Aloe, State ex rel. McCaffery v. (Mo.)	393
Angle, Howarth v. (N. Y.)	725
Aslanian v. Dostumian (Mass.)	495
Atchison, T. & S. F. R. Co. v. Clark (Kan.)	77
Atlanta Consol. Street R. Co., Bagwell v. (Ga.)	486
Augusta Terminal R. Co., Austin v. (Ga.)	755
Austin v. Augusta Terminal R. Co. (Ga.)	755
Auten v. Manistee Nat. Bank (Ark.)	329

B

Bagwell v. Atlanta Consol. Street R. Co. (Ga.)	486
Baltimore City Pass. R. Co., Lyon v. (Md.)	127
Baltimore Steam Packet Co., Tall v. (Md.)	120
Bangor & A. R. Co., Boston Excelsior Co. v. (Me.)	82
Bank, First Nat., v. Elliott (Ala.)	742
First Nat., v. McGuire (S. D.)	413
Manistee Nat., Auten v. (Ark.)	329
Merchants' & M. Nat., v. Barnes (Mont.)	737
of Alexandria, Givan v. (Tenn.)	270
of Commerce v. Wiltzie (Ind.)	489
Barnes, Merchants' & M. Nat. Bank v. (Mont.)	737
Beloit, Adams v. (Wis.)	441
Bennett v. Pulaski (Tenn.)	278
Benton v. Collins (N. C.)	33
Benton Harbor, Michigan Teleph. Co. v. (Mich.)	104
Bierce, Robinson v. (Tenn.)	275
Bigham v. Madison (Tenn.)	267
Blaine County, Robertson v. (C. C. App. 9th C.)	459
Blair v. Early (Iowa)	469
v. Ostrander (Iowa)	469

Board of State Auditors, Allen v. (Mich.)	117
Boston, Lebus v. (Ky.)	79
Boston Excelsior Co. v. Bangor & A. R. Co. (Me.)	82
Bowen v. Port Huron Engine & T. Co. (Iowa)	131
Bozarth, Valparaiso v. (Ind.)	487
Bradford, State v. (Minn.)	144
Brennan, Strong v. (Ill.)	792
Bridgewater Gas Co., McKenna v. (Pa.)	790
Brown v. Southern P. Co. (Or.)	409
Chicago Title & T. Co. v. (Ill.)	798
Buffett, Covington v. (Md.)	622
Bullock v. Sprowls (Tex.)	326
Butler, Rice v. (N. Y.)	303

C

Cahill v. Maryland L. Ins. Co. (Md.)	614
California Bridge & C. Co., Hanley v. (Cal.)	597
Camp, Thomas for Use of, United Firemen's Ins. Co. v. (C. C. App. 7th C.)	450
Central Teleph. Co., Wyant v. (Mich.)	497
Chicago, Lake Street Elev. R. Co. v. (Ill.)	624
Chicago, St. P. M. & O. R. Co., State ex rel. Tompkins v. (S. D.)	569
Chicago Title & T. Co. v. Brown (Ill.)	798
Christian & C. Grocery Co., Walling v. (Fla.)	608
Clark, Atchison, T. & S. F. R. Co. v. (Kan.)	77
Cole v. Union C. L. Ins. Co. (Wash.)	201
Coleman, Sanders v. (Va.)	581
Collins, Benton v. (N. C.)	33
Colton v. Mayer (Md.)	617
Cook, Owen v. (N. D.)	646
Covington v. Buffett (Md.)	622
Cowen, Hopkins v. (Md.)	124
Cox v. Nanz & Neuner (Tenn.)	273
Coyle v. A. A. Griffing Iron Co. (N. J. Err. & App.)	147
Cragnas, Paul v. (Nev.)	540
Crow, State ex rel. v. Smith (Mo.)	560
State, upon Information of, v. Kramer (Mo.)	551
Crowley v. West (La.)	652
Cumberland Gap Park Co., Nanz & Neuner v. (Tenn.)	273

D

Dalton, Re (Kan.)	380
Davis v. Forbes (Mass.)	170
Dostumian, Aslanian v. (Mass.)	495
Drew v. Tift (Minn.)	525
Dunham, Sullivan v. (N. Y.)	715

E

Earley, Blair v. (Iowa)	469
Eastern State Hospital, Maia v. (Va.)	577
Eaton, Nichols v. (Iowa)	483
Elliott, First Nat. Bank v. (Ala.)	742
Ex parte Tod (S. D.)	566

F

Farley v. Lavary (Ky.)	383
Felt v. Felt (N. J. Err. & App.)	546
Field v. Siegel (Wis.)	433
Finley v. Prescott (Wis.)	695
First Nat. Bank v. Elliott (Ala.)	742
v. McGuire (S. D.)	413
Fitchburg, Nevins v. (Mass.)	312
Fleetwood v. Read (Wash.)	205
Flentge, Hope v. (Mo.)	806
Flint, Thomas v. (Mich.)	499
Forbes, Davis v. (Mass.)	170
Freeman, State ex rel. McCausland v. (Kan.)	67
Furbish, Smith v. (N. H.)	226

G

Galusha v. Sherman (Wis.)	417
Galveston, H. & S. A. R. Co. v. Zant-zinger (Tex.)	282
Givan v. Bank of Alexandria (Tenn.)	270
Godbout v. St. Paul Union Depot Co. (Minn.)	532
Goldberg v. Ahnapee & W. R. Co. (Wis.)	221
Goodyear Min. Co., Johnson v. (Cal.)	338
Graham v. People (Ill.)	731
Gross, St. Lawrence v. (S. D.)	572
Grundel v. Union Iron Works (Cal.)	467
Gulf, C. & S. F. R. Co. v. Hayter (Tex.)	325

H

Hanley v. California Bridge & C. Co. (Cal.)	597
Harrison v. Hartford F. Ins. Co. (Iowa)	709
Hartford F. Ins. Co., Harrison v. (Iowa)	709
Haun, State v. (Kan.)	369
Hayter, Gulf, C. & S. F. R. Co. v. (Tex.)	325
Heard, State ex rel. New Orleans Canal & B. Co. v. (La.)	512
Henderson v. Heyward (Ga.)	366
Heyward, Henderson v. (Ga.)	366
Hinman, Shute v. (Or.)	265
Hoffman v. Maffioli (Wis.)	427
Holmes v. Phenix Ins. Co. (C. C. App. 8th C.)	308
Hooper, Lynn v. (Me.)	752
Hope v. Flentge (Mo.)	806
Hopkins v. Cowen (Md.)	124
Hoskins, State v. (Iowa)	223
Houghton v. Rice (Mass.)	310
Howarth v. Angle (N. Y.)	725
47 L. R. A	

Hudson v. Wilber (Mich.)	345
Hunter, Pullman's Palace Car Co. v. (Ky.)	286

I

Insurance Company, Aetna, McCabe v. (N. D.)	641
Hartford F., Harrison v. (Iowa)	709
London & L. F., Sample v. (S. C.)	696
Maryland L., Cahill v. (Md.)	614
Phenix, Holmes v. (C. C. App. 8th C.)	308
Traders' F., People ex rel., v. Van Cleave (Ill.)	795
Union C. L., Cole v. (Wash.)	201
United Firemen's, v. Thomas, Camp (C. C. App. 7th C.)	450

J

Jackson, Smith v. (Tenn.)	416
Janesville, Selleck v. (Wis.)	691
Janvrin, Re (Mass.)	319
Johnson v. Goodyear Min. Co. (Cal.)	338
Milton v. (Minn.)	529
Jones v. Williamsburg (Va.)	294

K

Keller v. St. Louis (Mo.)	391
Knowlton v. Williams (Mass.)	314
Kramer, State upon Information of Crow v. (Mo.)	551

L

Lake Street Elev. R. Co. v. Chicago (Ill.)	624
Lasher v. People (Ill.)	802
Lavary, Farley v. (Ky.)	383
Lebus v. Boston (Ky.)	79
Lewis v. Tapman (Md.)	385
Lion v. Baltimore City Pass. R. Co. (Md.)	127
London & L. F. Ins. Co., Sample v. (S. C.)	696
Lynn v. Hooper (Me.)	752

M

McAnally v. Pennsylvania R. Co. (Pa.)	788
McCabe v. Aetna Ins. Co. (N. D.)	641
McCaffery, State ex rel., v. Aloe (Mo.)	393
McCausland, State ex rel., v. Freeman (Kan.)	67
McClure, Northern P. R. Co. v. (N. D.)	149
McCooy v. Northwestern Mut. Relief Asso. (Wis.)	681
McCutchen, Stovall v. (Ky.)	287
McGraw v. Marion (Ky.)	593
McGuire, First Nat. Bank v. (S. D.)	413
McKenna v. Bridgewater Gas Co. (Pa.)	790
McMahon v. Polk (S. D.)	830
Madison, Bigham v. (Tenn.)	267
Maffioli, Hoffman v. (Wis.)	427
Maia v. Eastern State Hospital (Va.)	577
Manistee Nat. Bank, Auten v. (Ark.)	329
Marion, McGraw v. (Ky.)	593
Martucci, Romeo v. (Conn.)	601

Maryland L. Ins. Co., Cahill v. (Md.)	614
May v. Poindexter (Va.)	588
Mayer, Colton v. (Md.)	617
Merchants' & M. Nat. Bank v. Barnes (Mont.)	737
Meyer, Russell v. (N. D.)	637
Michigan Teleph. Co. v. Benton Harbor (Mich.)	104
v. St. Joseph (Mich.)	87
Milton v. Johnson (Minn.)	529
Milwaukee, Ricketson v. (Wis.)	685
Morgan, Re (Colo.)	52

N

Nanz & Neuner v. Cumberland Gap Park Co. (Tenn.)	273
Cox v. (Tenn.)	273
Nevins v. Fitchburg (Mass.)	312
New Orleans Canal & B. Co., State ex rel v. Heard (La.)	512
Nichols v. Eaton (Iowa)	483
Norfolk v. Young (Va.)	574
Northern P. R. Co. v. McClure (N. D.)	149
North Springs Water Co. v. Tacoma (Wash.)	214
Northwestern Mut. Relief Asso., McCoy v. (Wis.)	681
Noyes v. Ross (Mont.)	400

O

Ohio Oil Co., State v. (Ind.)	627
O'Maley v. South Boston Gaslight Co. (Mass.)	161
Onsgard, Wittenberg v. (Minn.)	141
Oren v. Abbott (Mich.)	92
Ostrander, Blair v. (Iowa)	469
Overman, Schroder v. (Ohio)	156
Owen v. Cook (N. D.)	646

P

Pacific Brewing & M. Co., State ex rel. Weinberg v. (Wash.)	208
Page, Re (Kan.)	68
Paul v. Oragnas (Nev.)	540
Pennsylvania R. Co., McAnally v. (Pa.)	788
Pennsylvania S. V. R. Co., Rudolph v. (Pa.)	782
People, Graham v. (Ill.)	731
Lasher v. (Ill.)	802
Reichwald v. (Ill.)	802
v. Youngs (Mich.)	108
ex rel. Traders' F. Ins. Co. v. Van Cleave (Ill.)	795
Phenix Ins. Co., Holmes v. (C. C. App. 8th C.)	308
Phillips, Slaymaker v. (Wyo.)	842
v. University of Virginia (Va.)	284
Poindexter, May v. (Va.)	588
Polk, McMahon v. (S. D.)	830
Port Huron Engine & T. Co., Bowen v. (Iowa)	131
Postal Teleg. Cable Co., Smith v. (Mass.)	323
Prieto v. St. Alphonsus Convent of Mercy (La.)	656
Prescott, Finley v. (Wis.)	695
Pulaski, Bennett v. (Tenn.)	278
Pullman's Palace Car Co. v. Hunter (Ky.)	286

R

Railroad Company, Atchison, T. & S. F., v. Clark (Kan.)	77
Bangor & A., Boston Excelsior Co. v. (Me.)	82
Lake Street Elev., v. Chicago (Ill.)	624
Pennsylvania, McAnally v. (Pa.)	788
Pennsylvania S. V., Rudolph v. (Pa.)	782
Railway Company, Ahnapsee & W., Goldberg v. (Wis.)	221
Atlanta Consol. Street, Bagwell v. (Ga.)	486
Augusta Terminal, Austin v. (Ga.)	755
Baltimore City Pass., Lyon v. (Md.)	127
Chicago, St. P. M. & O., State ex rel. Tompkins v. (S. D.)	569
Galveston, H. & S. A., v. Zant-zinger (Tex.)	282
Gulf, C. & S. F., v. Hayter (Tex.)	325
Northern P., v. McClure (N. D.)	149
Raymond, Rochester & K. F. Land Co. v. (N. Y.)	246
Read, Fleetwood v. (Wash.)	205
Re Dalton (Kan.)	380
Janvrin (Mass.)	319
Morgan (Colo.)	52
Page (Kan.)	68
Rutledge (N. Y.)	721
Ward (Cal.)	466
Reichwald v. People (Ill.)	802
Rice v. Butler (N. Y.)	303
Houghton v. (Mass.)	310
Richmond, Adkins v. (Va.)	583
Ricketson v. Milwaukee (Wis.)	685
Robertson v. Blaine County (C. C. App. 9th C.)	459
Robinson v. Bierce (Tenn.)	275
Rochester & K. F. Land Co. v. Raymond (N. Y.)	246
Rogers v. St. Paul (Minn.)	537
Romeo v. Martucci (Conn.)	601
Ross, Noyes v. (Mont.)	400
Rudolph v. Pennsylvania S. V. R. Co. (Pa.)	782
Russell v. Meyer (N. D.)	637
Rutledge, Re (N. Y.)	721

S

St. Alphonsus Convent of Mercy, Prieto v. (La.)	656
St. Clair Tunnel Co., Turner v. (Mich.)	112
St. Joseph, Michigan Teleph. Co. v. (Mich.)	87
St. Lawrence v. Gross (S. D.)	572
St. Louis, Keller v. (Mo.)	391
St. Paul, Rogers v. (Minn.)	537
St. Paul Union Depot Co., Godbout v. (Minn.)	532
Sample v. London & L. F. Ins. Co. (S. C.)	696
Sanders v. Coleman (Va.)	581
Schroder v. Overman (Ohio)	156
Schuman, State v. (Or.)	153
Selleck v. Janesville (Wis.)	691
Sheppard, Wildey Casualty Co. v. (Kan.)	650

Sherman, Galusha v. (Wis.)	417	Tift, Drew v. (Minn.)	525
Shute v. Hinman (Or.)	265	Tirrell v. Tirrell (Conn.)	750
Siegel, Field v. (Wis.)	433	Tod, Ex parte (S. D.)	566
Singleton, Stanton v. (Cal.)	334	Tompkins, State ex rel., v. Chicago, St.	
Slaymaker v. Phillips (Wyo.)	842	P. M. & O. R. Co. (S. D.)	569
Smith v. Furbish (N. H.)	226	Traders' F. Ins. Co., People ex rel., v.	
v. Jackson (Tenn.)	416	Van Cleave (Ill.)	795
v. Postal Tele. Cable Co. (Mass.)	323	Turner v. St. Clair Tunnel Co. (Mich.)	112
State ex rel. Crow v. (Mo.)	560		
South Boston Gaslight Co., O'Maley v.		U	
(Mass.)	161	Union C. L. Ins. Co., Cole v. (Wash.)	201
Southern P. Co., Brown v. (Or.)	409	Union Iron Works, Grundel v. (Cal.)	467
Sprowls, Bullock v. (Tex.)	326	Union Traction Co., Taylor v. (Pa.)	289
Stanton v. Singleton (Cal.)	334	United Firemen's Ins. Co. v. Thomas,	
State v. Bradford (Minn.)	144	Camp (C. C. App. 7th C.)	450
v. Haun (Kan.)	369	University of Virginia, Phillips v. (Va.)	284
v. Hoskins (Iowa)	223		
v. Ohio Oil Co. (Ind.)	627	V	
v. Schuman (Or.)	153	Valparaiso v. Bozarth (Ind.)	487
v. Wilson (Kan.)	71	Van Cleave, People ex rel. Traders' F.	
Young v. (Or.)	548	Ins. Co. v.	795
State ex rel. McCaffery v. Aloe (Mo.)	393		
Tompkins v. Chicago, St. B. M.		W	
& O. R. Co. (S. D.)	569	Walling v. Christian & C. Grocery Co.	
McCausland v. Freeman (Kan.)	67	(Fla.)	608
New Orleans Canal & B. Co. v.		Walrod v. Webster County (Iowa)	480
Heard (La.)	512	Ward, Re (Cal.)	466
Weinberg v. Pacific Brewing &		Webster County, Walrod v. (Iowa)	480
M. Co. (Wash.)	208	Weinberg, State ex rel., v. Pacific Brew-	
Crow v. Smith (Mo.)	560	ing & M. Co. (Wash.)	208
State, Information of Crow v. Kramer		West, Crowley v. (La.)	652
(Mo.)	551	Wilber, Hudson v. (Mich.)	345
State Auditors, Allen v. (Mich.)	117	Wilkey Casualty Co. v. Sheppard (Kan.)	650
Stovall v. McCutchen (Ky.)	287	Williams, Knowlton v. (Mass.)	314
Strahorn-Hutton-Evans Commission Co.,		Williamsburg, Jones v. (Va.)	294
Sullivan v. (Mo.)	859	Wilson, State v. (Kan.)	71
Strong v. Brennan (Ill.)	792	Wiltzie, Bank of Commerce v. (Ind.)	489
Sullivan v. Dunham (N. Y.)	715	Wittenberg v. Onsgard (Minn.)	141
v. Strahorn-Hutton-Evans Com-		Wyant v. Central Teleph. Co. (Mich.)	497
mission Co. (Mo.)	859		
Supreme Lodge K. of H., Thibert v.		Y	
(Minn.)	136	Young, Norfolk v. (Va.)	574
		v. State (Or.)	548
T		Youngs, People v. (Mich.)	108
Tacoma, North Springs Water Co. v.			
(Wash.)	214	Z	
Tall v. Baltimore Steam Packet Co.		Zantlinger, Galveston, H. & S. A. R. Co.	
(Md.)	120	v. (Tex.)	282
Tapman, Lewis v. (Md.)	385		
Taylor v. Union Traction Co. (Pa.)	289		
Thibert v. Supreme Lodge K. of H.			
(Minn.)	136		
Thomas, Camp, United Firemen's Ins.			
Co. v. (C. C. App. 7th C.)	450		
v. Flint (Mich.)	499		
47 L. R. A.			

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Aben v. Ecorse Twp. 118 Mich. 9, 71 N. W. 329.....	506	Arnold v. Jewett, 125 Mo. 241, 28 S. W. 614.....	864
Abercrombie v. Redpath, 1 Iowa, 111.....	151	Arthur v. Homestead F. Ins. Co. 78 N. Y. 462, 84 Am. Rep. 550.....	714
Ackley v. Black Hawk Gravel Min. Co. 112 Cal. 42, 44 Pac. 330.....	345	Ashby v. White, 2 Ld. Raym. 938, 1 Smith, Lead. Cas. 454.....	580
Adam v. Briggs Iron Co. 7 Cush. 368.....	542	Ashcroft v. Eastern R. Co. 126 Mass. 196, 30 Am. Rep. 672.....	241
Adams v. Ohio Falls Car Co. 131 Ind. 375, 31 N. E. 57.....	488	Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 0 Sup. Ct. Rep. 1.....	586
v. Minor, 121 Cal. 372, 53 Pac. 815.....	415	Ashford v. Watkins, 70 Ala. 156.....	612
v. Woods, 8 Cal. 308.....	795	Askew v. Hale County, 54 Ala. 639, 25 Am. Rep. 730.....	333
Adams Express Co. v. Indiana, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991.....	631	Aslin v. Parkin, 2 Burr. 668.....	237
Adle v. Com. 25 Gratt. 712.....	550	Atchison v. Lucas, 83 Ky. 451, 465.....	94, 95
Adler v. Clafin, 17 Iowa, 89.....	408	Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356.....	843
Etna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395.....	640	Atchison, T. & S. F. R. Co. v. Clark, 60 Kan. 831, 58 Pac. 561.....	79
Ahern v. Steele, 155 N. Y. 203, 5 L. R. A. 449, 22 N. E. 193, 12 Am. St. Rep. 778, note 800.....	488	v. Howe, 82 Kan. 737, 5 Pac. 397.....	70
Ah Fong, Re, 3 Sawy. 144, Fed. Cas. No. 102.....	372	v. Meyers, 24 U. S. App. 295, 63 Fed. Rep. 793, 11 C. C. A. 439.....	454
Ah Lim v. Territory, 1 Wash. 156, 9 L. R. A. 395, 24 Pac. 588.....	58	Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885.....	773
Alken v. Bridgeford, 84 Ala. 295, 4 So. 266.....	748	Atkins v. Anderson, 63 Iowa, 741, 19 N. W. 323.....	714
Albany v. Sikes, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257.....	753	Atkinson v. Asheville Street R. Co. 113 N. C. 581, 18 S. E. 254.....	91
Albany Street, Re, 11 Wend. 149, 25 Am. Dec. 618.....	523	Atlanta & F. R. Co. v. Kimberly, 87 Ga. 169, 13 S. E. 277.....	764
Alcock v. Little (decided in 1815).....	228	Atlantic & P. Teleg. Co. v. Union P. R. Co. 1 Fed. Rep. 745.....	91
Alderman v. Eastern R. Co. 115 Mass. 233.....	127	Atlantic City Waterworks Co. v. Consumers' Water Co. 44 N. J. Eq. 427, 15 Atl. 581.....	107
Alford v. Braden, 1 Nev. 228.....	543	Atty. Gen. v. Abbott, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 340.....	319
Alkan v. New Hampshire Ins. Co. 53 Wis. 186, 10 N. W. 91.....	457	v. Algonquin Club, 153 Mass. 447, 11 L. R. A. 500, 27 N. E. 2.....	318
Allen, Re, 96 N. Y. 327.....	725	v. Boston Wharf Co. 12 Gray, 553.....	318
v. Baker, 86 N. C. 91, 40 Am. Rep. 444.....	582	v. Cockermouth Local Board, L. R. 18 Eq. 172.....	318
v. Boston, 159 Mass. 824, 34 N. E. 519.....	814	v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 188.....	319
v. Culver, 8 Denio, 284.....	152	v. Ely, 4 Wis. 420.....	826
v. Goodnow, 71 Me. 420.....	408	v. Gardner, 117 Mass. 492.....	318
v. New Gas Co. L. R. 1 Exch. Div. 251.....	115	v. Jamaica Pond Aqueduct Corp. 133 Mass. 361.....	316, 335
v. Scott, 21 Pick. 25, 32 Am. Dec. 238.....	230	v. Metropolitan R. Co. 125 Mass. 515, 28 Am. Rep. 264.....	319
Alley v. Lanier, 1 Coldw. 540.....	273	v. Mid-Kent R. Co. L. R. 3 Ch. 100.....	318
Aligeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.....	61	v. Old Colony R. Co. 180 Mass. 62, 22 L. R. A. 112, 35 N. E. 252.....	318, 321
Allison v. Allison, 1 Yerg. 16.....	276	v. Revere Copper Co. 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605.....	319
Alston v. State, 92 Ala. 124, 18 L. R. A. 659, 9 So. 732.....	266	v. Shrewsbury (Kingsland) Bridge Co. L. R. 21 Ch. Div. 752.....	318
American Exch. Nat. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451.....	333	v. Tarr, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358.....	319
American F. Ins. Co. v. Brooks, 88 Md. 22, 34 Atl. 373.....	455	v. Williams, 140 Mass. 329, 54 Am. Rep. 468, 2 N. E. 80, 3 N. E. 214.....	318
Anderson v. Goff, 72 Cal. 65, 13 Pac. 73.....	541	v. Woods, 108 Mass. 436, 11 Am. Rep. 380.....	318
v. Rodgers, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248.....	272	Atty. Gen. ex rel. Branston v. Birmingham & O. Junction R. Co. 3 Macn. & G. 453.....	318
v. Talbot, 1 Helsk. 407.....	278	Conely v. Detroit, 78 Mich. 545, 7 L. R. A. 90, 44 N. W. 388.....	858
v. Wellington, 40 Kan. 173, 19 Pac. 719.....	281	Seavitt v. McQuade, 94 Mich. 439, 53 N. W. 944.....	853
Andover & M. Turnpk. Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 80.....	319	Atwood v. Bangor, O. & O. T. R. Co. 91 Me. 399, 40 Atl. 67.....	87
Andrews v. Bacon, 38 Fed. Rep. 777.....	462	Augusta v. Lombard, 101 Ga. 727, 28 S. E. 994.....	762
Angell v. Hartford F. Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322.....	644		
v. Davis, 42 Geo. III.....	152		
Anson v. Townsend, 78 Cal. 418, 15 Pac. 49.....	335		
Appel v. Buffalo, N. Y. & P. R. Co. 111 N. Y. 350, 19 N. E. 98.....	177		
Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676.....	92		
Archer v. Chicago, B. & Q. R. Co. 65 Iowa, 612, 22 N. W. 824.....	715		
Arents v. Weir, 89 Ill. 25.....	621		
Armstrong v. Mudd, 10 B. Mon. 144, 50 Am. Dec. 545.....	245		
47 L. R. A.			

CITATIONS.

Austin v. Barrows, 41 Conn. 287.....	440	Barton's Hill Coal Co. v. Reid, 8 Macq. H. L. Cas. 268.....	116
v. Boston & M. R. Co. 164 Mass. 282, 41 N. E. 288.....	177	Bassett v. Barbin, 11 La. Ann. 672.....	521
v. Huntsville Coal & Min. Co. 72 Mo. 535, 37 Am. Rep. 448.....	640	v. El Paso, 88 Tex. 168, 80 S. W. 893.....	465
v. McKinney, 5 Lea, 499.....	276	Basshor v. Forbes, 36 Md. 154.....	620
v. Nalle, 85 Tex. 520, 22 S. W. 668.....	415	Bates v. Westborough, 151 Mass. 174, 7 L. R. A. 156, 28 N. E. 1070.....	314
v. Richards, 7 Helsk. 665.....	276	Bauble v. Aetna Ins. Co. 2 Dill. 156, Fed. Cas. No. 1111.....	644
Auten v. United States Nat. Bank, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628.....	853	Baxter v. Chicago & N. W. R. Co. (Wis.) 80 N. W. 644.....	693
Aycrigg v. New York & E. R. Co. 30 N. J. L. 460.....	149	Baylor v. Baltimore & O. R. Co. 9 W. Va. 270.....	521
Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396.....	755	Days v. Hunt, 60 Iowa, 251, 14 N. W. 785.....	225
B.			
Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181.....	455	Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369.....	410
v. Walker, 77 Ga. 380.....	760, 761	Bendell v. Eastern Counties R. Co. 2 C. B. N. S. 509.....	536
Badger v. Phinney, 15 Mass. 363, 8 Am. Dec. 105.....	329	Bean v. Brackett, 34 N. H. 102.....	230
Balle v. St. Joseph F. & M. Ins. Co. 78 Mo. 371.....	645	v. French, 140 Mass. 229, 3 N. E. 206.....	241
Bailey v. A. Siegel Gas Fixture Co. 54 Mo. App. 50.....	640	Bearce v. Bass, 88 Me. 521, 84 Atl. 411.....	485
v. Austrian, 19 Minn. 535, Gil. 465.....	430	Beck v. Allison, 56 N. Y. 367, 15 Am. Rep. 430.....	336
v. Bailey, 8 Ohio, 239.....	800, 802	v. Jackson, 43 Mo. 117.....	522
v. Smith, 43 N. H. 141.....	233	Beebe v. Buxton, 99 Ala. 117, 12 So. 567.....	746
Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.....	597	Beers v. Haughton, 9 Pet. 329, 9 L. ed. 145.....	474
v. Dening, 8 Ad. & El. 94.....	696	Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120.....	269
Baldwin v. Porter, 12 Conn. 473.....	605, 607	Bell v. Farwell, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346.....	621
v. Greenwoods Turnp. Co. 40 Conn. 238, 16 Am. Rep. 33.....	482	v. Great Northern R. Co. Ir. L. R. 26 C. L. 428.....	326
Ball v. Chesapeake & O. R. Co. 93 Va. 44, 32 L. R. A. 792, 24 S. E. 467.....	122	v. Morse, 6 N. H. 205.....	232
v. Woodbine, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846.....	301	v. Packard, 69 Me. 105, 31 Am. Rep. 231.....	612
Ballard v. Lippman Bros. 32 Fla. 481, 14 So. 154.....	613	v. Peabody, 63 N. H. 233, 56 Am. Rep. 506.....	233
Balleny v. Cree, 11 Sess. Cas. 3d Ser. 626.....	113	v. Ohio & P. R. Co. 25 Pa. 161, 175, 64 Am. Dec. 687.....	763, 764
Baltimore & O. R. Co. v. Barger, 80 Md. 30, 26 L. R. A. 220, 30 Atl. 560.....	122	Belles v. Burr, 76 Mich. 1, 4 L. R. A. 734, 43 N. W. 24.....	99
v. State ex rel. Hauer, 60 Md. 449.....	122	Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 318, 43 L. ed. 462, 19 Sup. Ct. Rep. 206.....	576
Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 332, 27 L. ed. 744, 2 Sup. Ct. Rep. 719.....	774	Bellows v. Denison, 9 N. H. 293.....	230
.....	762, 763, 765,	Benedick v. Potts, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.....	123
Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed. Rep. 159.....	92	Benedict v. Glilman, 4 Paige, 58.....	747
Banbury v. Arnold, 91 Cal. 608, 27 Pac. 934.....	335	Benner v. Atlantic Dredging Co. 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328.....	719
Bank of Hamilton v. Dudley, 2 Pet. 492, 7 L. ed. 496.....	523	Bennett v. Bennett, 43 Conn. 313.....	752
Louisiana v. Williams, 46 Miss. 618, 12 Am. Rep. 319.....	612	v. Council Bluffs Ins. Co. 70 Iowa, 600, 31 N. W. 948.....	458
Louisville v. First Nat. Bank, 8 Baxt. 101, 35 Am. Rep. 691.....	271	Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 238.....	605
The Republic v. Millard, 10 Wall. 152, 19 L. ed. 897.....	266	Berg v. Parsons, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957.....	720
United States v. Halstead, 10 Wheat. 51, 6 L. ed. 264.....	474	Berger v. Jacobs, 21 Mich. 215.....	694
Barber v. Fire & Marine Ins. Co. 16 W. Va. 658.....	707	Bermudez v. Bermudez, 2 Mart. (La.) 181.....	678
Barbier v. Connelly, 113 U. S. 27, 28 L. ed. 923, 6 Sup. Ct. Rep. 357.....	61, 62	Berridge v. Ward, 10 C. B. N. S. 400.....	228
Barker v. Midland E. Co. 18 C. B. 46.....	536	Bettys v. Denver Twp. 115 Mich. 228, 73 N. W. 138.....	506, 512
v. People, 3 Cow. 703, 15 Am. Dec. 322.....	101	Bifle v. Pullam, 114 Mo. 50, 21 S. W. 450.....	393
Barling v. Bank of British N. A. 7 U. S. App. 194, 50 Fed. Rep. 260, 1 C. C. A. 510.....	463	Blgaouette v. Paulet, 134 Mass. 124, 45 Am. Rep. 807.....	694
Barnard v. Campbell, 58 N. Y. 73.....	607	Bileu v. Paisley, 18 Or. 47, 4 L. R. A. 840, 21 Pac. 934.....	592
Barnes v. Brown, 69 N. C. 439.....	37	Billings v. Robinson, 94 N. Y. 415.....	237
v. Gregory, 1 Head, 231.....	269	Bingham v. Barley, 55 Tex. 285, 40 Am. Rep. 801.....	328
v. Northern Trust Co. 160 Ill. 112, 43 N. E. 31.....	151	Birdsall v. Russell, 29 N. Y. 220.....	509
v. Thompson, 2 Swan, 314.....	273	Blackburn v. Mann, 85 Ill. 222.....	388
Barnett v. Clark, 5 Sneed, 436.....	276	v. St. Paul F. & M. Ins. Co. 116 N. C. 821, 21 S. E. 922.....	37
Barney v. Oyster Bay & H. S. B. Co. 67 N. Y. 301, 23 Am. Rep. 115.....	536	Black River Improv. Co. v. Holway, 87 Wis. 584, 59 N. W. 126.....	492, 494
v. The D. R. Martin, 11 Blatchf. 234, Fed. Cas. No. 1030.....	536	Blaine v. Chambers, 1 Serg. & R. 169.....	230
Barrett v. Seward, 22 Vt. 176.....	95	Blake v. Clark, 6 Me. 436.....	230
v. Thorndike, 1 Me. 73.....	640	v. Hubbard, 45 Mich. 1, 7 N. W. 204.....	353
Barron v. Richard, 3 Edw. Ch. 96.....	152	Blakemore v. Kimmons, 8 Baxt. 473.....	269
Barrow S. S. Co. v. Mexican C. R. Co. 134 N. Y. 24, 17 L. R. A. 359, 31 N. E. 261.....	429, 430	Blanchard v. Ames, 60 N. H. 404.....	230
47 L. R. A.		Blank v. Livonia, 95 Mich. 229, 54 N. W. 877.....	505, 507
		v. Livonia Twp. 79 Mich. 1, 44 N. W. 157.....	503, 504, 507, 511
		Bloomer v. Todd (Wash.) 1 L. R. A. 113, note.....	96

Bhant v. Alkin, 15 Wend. 523, 30 Am. Dec. 72.....	488	Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.....	585
Board of Liquidation v. McComb, 92 U. S. 541, 23 L. ed. 828.....	523	v. Massachusetts, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757.....	156
Boden v. Maher, 95 Wis. 65, 69 N. W. 980.....	431	v. New York C. & H. R. R. Co. 75 Illun, 355, 27 N. Y. Supp. 73....	536
Bodwell v. Nutter, 63 N. H. 446, 3 Atl. 421.....	243	v. Peck, 2 Wis. 261.....	424
Body v. Hartford F. Ins. Co. 68 Wis. 157, 23 N. W. 182.....	457	v. Social Circle, 105 Ga. 834, 32 S. E. 141.....	368
Bohan v. Fort Jervis Gaslight Co. 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246.....	719	v. Wyman, 56 Iowa, 452, 9 N. W. 344.....	274
Boing v. Raleigh & G. R. Co. 91 N. C. 199.....	37	Brown's Case, 91 Va. 762, 28 L. R. A. 110, 21 S. E. 837.....	584
Bonetti v. Treat, 91 Cal. 123, 14 L. R. A. 151, 27 Pac. 612.....	151	Brown Paper Co. v. Dean, 123 Mass. 269.....	488
Boody v. Watson, 64 N. H. 162, 9 Atl. 794.....	231, 232, 284	Bruce v. Baxter, 7 Lea. 477.....	273
Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592.....	719	Brydon v. Stewart, 2 Macq. H. L. Cas. 30.....	115
Borst v. Emple, 5 N. Y. 83.....	235	Buccleuch v. Metropolitan Bd. of Works, L. R. 3 Exch. 306.....	759
Boston C. & M. R. Co. v. State, 23 N. H. 215.....	244	Buck v. Squires, 22 Vt. 484.....	228
Boston Rolling Mills v. Cambridge, 117 Mass. 896.....	814	Buckner v. Lynip, 22 Nev. 426, 30 L. R. A. 354, 41 Pac. 762.....	855
Bothwell v. Farwell, 74 Iowa, 324, 37 N. W. 392.....	483	Buck-Reimer Co. v. Beatty, 82 Iowa, 353, 48 N. W. 96.....	135
Bourland v. Hildreth, 26 Cal. 188.....	401	Buckstaff v. Hicks, 94 Wis. 34, 68 N. W. 403.....	225
Bourn v. Hart, 93 Cal. 321, 15 L. R. A. 481, 28 Pac. 951.....	119	Budd v. New York, 148 U. S. 517, 36 L. ed. 247, 4 Intern. Com. Rep. 45, 12 Sup. Ct. Rep. 468.....	380
Bowen v. Allen, 113 Ill. 53, 55 Am. Rep. 398.....	800	Buel v. Boughton, 2 Denio, 91.....	740
v. Conner, 6 Cush. 182.....	235	Bufum v. Hutchinson, 1 Allen, 58.....	240
Bowles v. Field, 78 Fed. Rep. 742.....	612	Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121.....	462, 463
Boyd v. Mills (1894), 53 Kan. 594, 25 L. R. A. 486, 37 Pac. 16.....	848	Bullock v. Consumers' Lumber Co. (Cal.) 81 Pac. 367.....	143
v. Milwaukee, 92 Wis. 456, 66 N. W. 603.....	448	Bunn v. People ex rel. Laffin, 45 Ill. 397.....	805
v. Moss, 15 Tex. Civ. App. 222, 39 S. W. 983.....	269	Burbank v. Crooker, 7 Gray, 158, 66 Am. Dec. 470.....	606
Boyer v. Austin, 54 Iowa, 402, 6 N. W. 585.....	714	v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.....	410
Boylard v. New York, 1 Sandf. 27.....	301	Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665.....	655
Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.....	375	Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571.....	302
Brackett v. Harvey, 91 N. Y. 214.....	407	Burge v. Dyersburg, Jackson, April Term, 1896.....	281
Bradley v. Fuller, 118 Mass. 239.....	440	Burgees v. Gray, 1 C. B. 578.....	755
v. Phoenix Ins. Co. 28 Mo. App. 14.....	705	v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.....	63
Bradwell, Re, 55 Ill. 535.....	95	Burke v. Breascale, 1 Rob. (La.) 78.....	143
Braem v. Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597.....	441	Burnham v. Milwaukee, 98 Wis. 128, 78 N. W. 1018.....	448
Bragdon ex rel. Loranger v. Navarre, 102 Mich. 259, 60 N. W. 277.....	849	Burr v. Burton, 18 Ark. 214.....	423
Branch v. Doane, 17 Conn. 418.....	488	Burritt v. State Contract Comrs. 120 Ill. 322, 11 N. E. 180.....	119
Brand v. Williams, 29 Minn. 239, 18 N. W. 42.....	531	Burrus v. Columbus, 105 Ga. 45, 31 S. E. 124.....	762
Brantley v. Wolf, 60 Miss. 420.....	329	Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516.....	390
Braun v. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657.....	326	Burton v. Wilmington & W. R. Co. 84 N. C. 192.....	87
Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470.....	314	Bush v. Callis, 1 Show. 389.....	152
Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Intern. Com. Rep. 658, 14 Sup. Ct. Rep. 829.....	586	Butcher v. Creel, 9 Gratt. 201.....	232
Brent v. Haddon, Cro. Jac. 555.....	488	Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.....	61
Brick v. Gannor, 86 Hun. 52.....	388	Butler v. Ashworth, 110 Cal. 614, 43 Pac. 4, 386.....	468
Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 518.....	225, 485	v. Thomasville, 74 Ga. 570.....	763
Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515.....	740	Bybee v. State, 94 Ind. 443, 48 Am. Rep. 175.....	488
Britton v. Atlanta & C. Air Line R. Co. 88 N. C. 536, 43 Am. Rep. 740.....	122	Byers v. Wallace, 87 Tex. 503, 28 S. W. 1050, 29 S. W. 760.....	550
Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671.....	225	C.	
v. Coffin, 108 Mass. 175, 11 Am. Rep. 335.....	152, 244, 410	Cadwell v. King, 84 Iowa, 228, 50 N. W. 975.....	206
Brooks v. Cook, 8 Mass. 246.....	351	Caldwell v. Gale, 11 Mich. 77.....	488
Brown v. Bartlett, 58 N. H. 511.....	243	v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.....	156
v. Brown (Tex. Civ. App.) 36 S. W. 918.....	550	California State Teleg. Co. v. Alta Teleg. Co. 22 Cal. 393.....	91
v. Butchers' & D. Bank, 6 Hill, 443.....	696	Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020.....	862
v. Cayuga & S. R. Co. 12 N. Y. 492.....	488	Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.....	599, 601
v. Eastern & M. R. Co. L. R. 22 Q. B. Div. 391.....	754	Callis v. Cogbill, 9 Lea. 137, 268, 276, 277, 278	268
v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.....	586	Camp v. Norfleet, 83 Va. 380, 5 S. E. 375.....	269
v. Hummel, 6 Pa. 86.....	851	Campbell v. American F. Ins. Co. 73 Wis. 100, 40 N. W. 661.....	644
v. McCollum (1889), 76 Iowa, 479, 41 N. W. 197.....	828		
v. Manter, 21 N. H. 528, 58 Am. Dec. 223.....	244		
47 L. R. A.			

Campbell v. Campbell, 13 N. H. 492.....	231	Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 120.....	584
v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1.....	429	v. Elmhurst, 165 Ill. 148, 46 N. E. 437.....	627
v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078.....	759, 779, 781	v. Forest County, 95 Wis. 85, 70 N. W. 78.....	448, 449
v. People, 109 Ill. 565, 50 Am. Rep. 621.....	736	Chicago Bd. of Trade v. People ex rel. Sturges, 91 Ill. 60.....	804
v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320.....	482	Chicago City R. Co. v. People ex rel. Story, 73 Ill. 541.....	804
Canyon County v. Ada County (Idaho), 61 Pac. 748.....	464	Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93.....	778
Capron v. Kingman, 64 N. H. 571, 14 Atl. 868.....	228	Chicago Lumber Co. v. Comstock, 34 U. S. App. 414, 71 Fed. Rep. 477, 13 C. C. A. 207.....	453
Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722.....	754	Chicago, M. & St. P. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750.....	778
Carman v. Franklin Bank, 61 Md. 467.....	266	v. Hall, 90 Ill. 42.....	778
Carn v. Haisley, 22 Fla. 317.....	614	v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Intern. Com. Rep. 209, 10 Sup. Ct. Rep. 462.....	322
Carpenter v. People, 5 Ill. 197.....	735	Chicago, P. & St. L. R. Co. v. Nix, 187 Ill. 141, 27 N. E. 81.....	778
Carpentier v. Mitchell, 29 Cal. 830.....	543	Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 36 L. ed. 277, 12 Sup. Ct. Rep. 479.....	235
v. Webster, 27 Cal. 550.....	542	v. Joliet, 79 Ill. 25.....	760
Carraway v. Merchants' Mut. Ins. Co. 26 La. Ann. 208.....	705	Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641.....	843
Carroll v. Carroll, 16 How. 275, 14 L. ed. 936.....	508	Childress v. Monette, 54 Ala. 317.....	748
v. Winconsin C. R. Co. 40 Minn. 168, 41 N. W. 661.....	776	Chorlton v. Lings, L. R. 4 C. P. 374.....	95
Carter v. Humboldt F. Ins. Co. 12 Iowa, 287.....	714	Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.....	780
v. Louisville, N. A. & C. R. Co. 98 Ind. 552, 49 Am. Rep. 780.....	288	Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104.....	613
Cartwright v. Gray, 12 Grant, Ch. (U. C.) 399.....	772	Christy, Ex parte, 3 How. 292, 11 L. ed. 603.....	503
Carver v. Detroit & S. Pl. Road Co. 61 Mich. 585, 28 N. W. 721.....	502	Chumaseiro v. Potta, 2 Mont. 242.....	212
Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370.....	405	Church v. La Fayette F. Ins. Co. 66 N. Y. 222.....	645
v. Sun Ins. Co. 83 Cal. 476, 8 L. R. A. 48, 23 Pac. 534.....	707	v. Walker, 10 S. D. 90, 72 N. W. 101.....	836
Catlin v. Bell, 4 Campb. 183.....	605	Cicero & P. Street R. Co. v. Chicago, 176 Ill. 501, 52 N. E. 866.....	626
v. Savings Bank, 7 Conn. 487.....	266	Cincinnati v. Oliver, 31 Ohio St. 371.....	160
Caulkins v. Matthews, 5 Kan. 199.....	592	Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.....	57
Cavin v. Gleason, 105 N. Y. 262, 11 N. E. 504.....	266	Citizens' State Bank v. Council Bluffs Fuel Co. 89 Iowa, 618, 57 N. W. 444.....	134
Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693.....	266	City Nat. Bank v. Kusworm, 91 Wis. 166, 44 N. W. 843.....	424
Central R. Co. v. English, 73 Ga. 366.....	762	Clafin v. Boston & A. R. Co. 157 Mass. 489, 20 L. R. A. 638, 32 N. E. 660.....	241
Chamberlin v. Gilman, 10 Colo. 94, 14 Pac. 107.....	741	Clark v. Dasso, 34 Mich. 86.....	499
Chambers v. Atlas Ins. Co. 51 Conn. 17, 51 Am. Rep. 1.....	705	v. Lamb, 2 Allen, 306.....	415
Champer v. Greencastle, 46 Am. St. Rep. 390, note, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.....	281	v. Pennsylvania R. Co. 145 Pa. 452, 22 Atl. 989.....	786
Chandler v. Atlantic Coast Electric R. Co. 61 N. J. L. 328, 39 Atl. 674.....	140	v. Stipp, 75 Ind. 114.....	592
v. St. Paul F. & M. Ins. Co. 21 Minn. 85, 18 Am. Rep. 385.....	707	v. Washington, 12 Wheat. 40, 6 L. ed. 544.....	597
v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.....	329	v. Wood, 34 N. H. 447.....	231
Chapman v. Kirby, 49 Ill. 211.....	544	Clarno v. Grayson, 30 Or. 144, 46 Pac. 426.....	336
Chapman's Case, 88 Ga. 770, 17 L. R. A. 430, 15 S. E. 901.....	760	Clayton v. Ellis, 50 Iowa, 590.....	744
Chappell v. New York, N. H. & H. R. Co. 62 Conn. 195, 17 L. R. A. 420, 24 Atl. 997.....	236, 237	Cleveland, Re, 52 N. J. L. 188, 7 L. R. A. 431, 19 Atl. 17, 20 Atl. 317.....	446
Chase v. Chase, 15 Nev. 259.....	592	Clifford v. State, 10 Ga. 422.....	735
Chemical Nat. Bank v. City Bank, 160 U. S. 626, 40 L. ed. 568, 16 Sup. Ct. Rep. 417.....	156	Clinton v. Howard, 42 Conn. 294.....	755
Cheney v. Eastern Transp. Line, 59 Md. 565.....	126	Cloud v. Needles, 6 Md. 501.....	389
Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64.....	432	Coal & Min. Co. v. Clay, 51 Ohio St. 542, sub nom. Consolidated Coal & Min. Co. v. Floyd, 25 L. R. A. 848, 38 N. E. 610.....	600
Chesapeake & O. R. Co. v. Mullins, 94 Ky. 357, 22 S. W. 558.....	508	Coal Co. v. McGuire, 3 Macq. H. L. Cas. 300.....	115
Cheyenne County Comrs. v. Bent County Comrs. 15 Colo. 320, 25 Pac. 508.....	464	Coast Line R. Co. v. Cohen, 50 Ga. 462, 762.....	765
Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.....	778	Coburn v. Currens, 1 Bush, 242.....	135
v. Union Stock-Yards & T. Co. 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430.....	760	Cockburn v. Union Bank, 13 La. Ann. 289.....	213
Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460.....	778	Cockson v. Cock, Cro. Jac. 125.....	152
v. McAuley, 121 Ill. 160, 11 N. E. 67.....	778	Coffin v. Anderson, 4 Blackf. 395.....	266
Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240.....	429, 430	v. United States, 156 U. S. 482, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.....	734
Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.....	322	Cohen v. Continental F. Ins. Co. 67 Tex. 325, 60 Am. Rep. 24, 8 S. W. 206.....	644, 645
		v. Wollner, 72 Ala. 238.....	612
		Cohnen v. Sweeney, 105 Mich. 643, 63 N. W. 641.....	352, 354
		Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347.....	773
		Colby University v. Canandaigua, 69 Fed. Rep. 671.....	219

Cole v. Cottingham, 8 Car. & P. 75.....	391	Cook v. Lowry, 95 N. Y. 103.....	723
v. Lake Co. 54 N. H. 242, 235, 239, 240, 242		v. Meyer Bros. 73 Ala. 580.....	612
v. Ryan, 52 Barb. 168.....	257	v. Stark, 14 Sess. Cas. 4th Ser. 1.....	115
v. Singler, 60 Md. 348.....	358	v. Sumner Spinning & Mfg. Co. 1 Sneed, 716.....	269
Coleman v. Gernet (1893), 3 Pa. Dist. R. 500.....	828	Coombs v. Davis, 2 Wash. Terr. 466, 7 Pac. 860.....	741
v. Scott, 27 Neb. 77, 42 N. W. 898.....	741	v. Fitchburg R. Co. 156 Mass. 200, 30 N. E. 1140.....	177
Collet v. Allison, 1 Okla. 42, 25 Pac. 518.....	212	Cooper v. Lansing Wheel Co. 94 Mich. 272, 54 N. W. 39.....	430, 432
Collier v. Pulliam, 13 Lea, 114.....	278	v. Pena, 21 Cal. 404.....	335, 336, 337
Collins v. Jessor, 110 Ill. 458.....	386	Coosaw Min. Co. v. South Carolina, 144 U. S. 566, 36 L. ed. 543, 12 Sup. Ct. Rep. 689.....	635
v. Mott, 45 Mo. 100.....	274	Cork v. Baker, 1 Strange, 84.....	386
v. North British & M. Ins. Co. 91 Tenn. 432, 19 S. W. 525.....	277	Cork & B. R. Co. v. Goode, 13 C. B. 826.....	462, 463
v. Riggs, 14 Wall. 491, 20 L. ed. 723.....	747	Corwin v. Hood, 58 N. H. 401.....	230, 232
Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302.....	66, 375	Cotton v. Mississippi & R. River Boom Co. 22 Minn. 372.....	492, 498
Colonial & U. S. Mortg. Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108.....	835	Countess of Warwick's Case, Callis, Sewers, 4th ed. *250.....	99
Columbia v. Beasley, 1 Humph. 241, 34 Am. Dec. 640.....	281	Couse v. Boyles, 4 N. J. Eq. 212, 38 Am. Dec. 514.....	268, 269
Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 558.....	758, 759, 776	Couthway v. Berghaus, 25 Ala. 393.....	743
Columbian Athletic Club v. State ex rel. McMahon, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914.....	633, 636	Cowenhoven v. Middlesex County Freeholders, 44 N. J. L. 232.....	462
Comfort v. Young, 100 Iowa, 627, 69 N. W. 1032.....	486	Cowles v. Cromwell, 25 Barb. 418.....	257
Commercial F. Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34.....	645	Cox v. People, 82 Ill. 191.....	111, 785
Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co. 19 How. 818, 15 L. ed. 636.....	643	Craig v. Van Debbler, 100 Mo. 584, 13 S. W. 906.....	329
Commercial Nat. Bank v. Helbronner, 108 N. Y. 439, 15 N. E. 701.....	606	v. Wells, 11 N. Y. 815.....	236
Commercial Union Assur. Co. v. State ex rel. Smith, 113 Ind. 331, 15 N. E. 518.....	643	Cramer v. Watson, 73 Ala. 127.....	743, 744, 746-749
Com. v. Clark, 10 Pa. Co. Ct. 444.....	110	Crandon v. Forest County, 91 Wis. 289, 64 N. W. 847.....	448
v. Clary, 8 Mass. 72.....	837	Crane v. Meginnis, 1 Gill & J. 474, 19 Am. Dec. 237.....	387
v. Cooper, 15 Mass. 187.....	735	Cranford v. Tyrrell, 128 N. Y. 344, 28 N. E. 515.....	635
v. Denworth, 145 Pa. 172, 22 Atl. 820.....	446	Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106.....	535
v. Dudley, 10 Mass. 403.....	640	Crawford v. Geiser Mfg. Co. 88 N. C. 554.....	37
v. Erie & N. E. R. Co. 27 Pa. 339.....	764	v. Parsons, 63 N. H. 438.....	232
v. Green, 17 Mass. 515.....	612	Crease v. Babcock, 10 Met. 525.....	731
v. Hamilton Mfg. Co. 120 Mass. 883.....	60	Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587.....	424
v. McDonald, 5 Cush. 367.....	109	Crocker v. McGregor, 76 Me. 282.....	754
v. Perry, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126.....	60, 842	Crofoot v. Bennett, 2 N. Y. 258.....	233
v. Pittsburgh & C. R. Co. 24 Pa. 159.....	634	Croft v. Hanover F. Ins. Co. 40 W. Va. 508, 21 S. E. 854.....	644, 645
v. Roby, 12 Pick. 496.....	735	Crommelin v. Cox, 30 Ala. 318, 68 Am. Dec. 120, note, p. 126.....	488
v. Savage, 155 Mass. 278, 29 N. E. 468.....	155	Cromwell v. Winchester, 2 Head. 390.....	269
v. Wilkinson, 139 Pa. 298, 21 Atl. 14.....	155	Crosby v. Hanover, 38 N. H. 404.....	229
v. Wilkinson, 16 Pick. 175, 26 Am. Dec. 654.....	318	v. Loop, 13 Ill. 625.....	151
Com. ex rel. Sellers v. Phoenix Iron Co. 105 Pa. 111.....	213	Crouse v. Chicago & N. W. R. Co. (Wis.) 80 N. W. 752.....	693
Concord Mfg. Co. v. Robertson, 66 N. H. 1, 18 L. R. A. 679, 25 Atl. 718.....	233, 240	Crow v. Red River County Bank, 52 Tex. 362.....	408
Conchocton Stone Road v. Buffalo, N. Y. & E. R. Co. 51 N. Y. 573, 10 Am. Rep. 646.....	488	Crutcher v. Stump, 5 Hayw. (Tenn.) 100.....	276
Conkling v. Shelley, 28 N. Y. 360, 84 Am. Dec. 348.....	408	Cuddy v. Brown, 78 Ill. 415.....	550
Conlin v. San Francisco City & County Supers. 99 Cal. 17, 21 L. R. A. 474, 33 Pac. 753.....	119	Cullen v. Glendora Water Co. 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047.....	343
Connecticut River Lumber Co. v. Columbia, 62 N. H. 286.....	229	Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356.....	101
v. Olcott Falls Co. 65 N. H. 290, 13 L. R. A. 826, 21 Atl. 1090.....	229, 231, 237	v. Powell, 8 Tex. 88.....	328, 329
Connell v. Chesapeake & O. R. Co. 93 Va. 43, 32 L. R. A. 792, 24 S. E. 467.....	122	Cunliffe v. Branner, L. R. 3 Ch. Div. 393.....	238
Connor v. State, 29 Fla. 455, 10 So. 891.....	786	Cunningham v. Pinkham, 1 N. H. 353.....	235
Connors v. Carp River Iron Co. 54 Mich. 108, 19 N. W. 938.....	108	Cunningham, Re, 9 Cent. L. J. 208.....	349
Consolidated Coal & Min. Co. v. Floyd, 25 L. R. A. 848, 38 N. E. 610, sub nom. Coal & Min. Co. v. Clay, 51 Ohio St. 542.....	600	Currier v. Janvrin, 58 N. H. 374.....	244
Content v. New York, N. H. & H. R. Co. 165 Mass. 207, 43 N. E. 94.....	177	Curtice v. Thompson, 19 N. H. 471.....	488
Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77.....	453, 454, 457	Curtis v. Cutler, 40 U. S. App. 233, 76 Fed. Rep. 16, 22 C. C. A. 16, 37 L. R. A. 737.....	744
Continental Nat. Bank v. McGooch, 92 Wis. 286, 66 N. W. 606.....	420	v. Gardner, 18 Met. 457.....	240
Converse v. Blumrich, 14 Mich. 120, 90 Am. Dec. 230.....	502, 511	v. Whitney, 13 Wall. 68, 20 L. ed. 513.....	219
47 L. R. A.		Curtiss, Re, 9 App. Div. 285, 37 N. Y. Supp. 586, 41 N. Y. Supp. 1111.....	721
		Cushing v. Bedford, 125 Mass. 526.....	753
		v. Perot, 175 Pa. 60, 34 L. R. A. 737, 34 Atl. 447.....	621
		Cusick's Election, 180 Pa. 459, 10 L. R. A. 228, 20 Atl. 574.....	850
		Custer County Comrs. v. Yellowstone County Comrs. 6 Mont. 39, 9 Pac. 586.....	464

- D.
- Daggett v. Hudson, 48 Ohio St. 548, 8 N. E. 838..... 851
- Dakin v. Demming, 6 Paige, 95..... 724
- Daniels v. Cheshire R. Co. 20 N. H. 85..... 228
- v. Miller, 8 Colo. 642, 9 Pac. 18..... 522
- Darcy v. San Jose, 104 Cal. 645, 38 Pac. 500..... 343
- Darling v. Crowell, 6 N. H. 421..... 232, 233
- Darrow v. Family Fund Soc. 42 Hun, 245..... 735
- v. Family Fund Soc. 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093..... 684
- Dartmouth College Case, 4 Wheat. 519, 4 L. ed. 630..... 387
- Davenport v. Peoria Marine & F. Ins. Co. 17 Iowa, 270..... 645
- Davidson v. Old People's Mut. Ben. Soc. 39 Minn. 303, 1 L. R. A. 842, 39 N. W. 803..... 684
- Davies v. Mann, 10 Mees. & W. 546..... 87
- Davis v. Bangor, 42 Me. 522..... 754
- v. Handy, 37 N. H. 65..... 230
- v. Montgomery, 51 Ala. 139, 28 Am. Rep. 545..... 301
- v. Winalow, 51 Me. 264, 31 Am. Dec. 573..... 754
- Dawe v. Morris, 149 Mass. 188, 4 L. R. A. 153, 21 N. E. 313..... 440
- Dawson v. Schloss, 93 Cal. 199, 29 Pac. 31..... 468
- Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612..... 645
- Dayton, W. Valley & X. Turnpk. Co. v. Coy, 13 Ohio St. 84..... 430
- Deaderick v. Wilson, 8 Baxt. 108..... 214
- Deal v. Mississippi County, 107 Mo. 464, 14 L. R. A. 622, 18 S. W. 24..... 397
- Dean v. Ann Arbor Street R. Co. 93 Mich. 330, 53 N. W. 396..... 498
- v. Charlton, 23 Wis. 590, 99 Am. Dec. 205..... 690
- DeCels v. Brunson, 53 Cal. 372..... 795
- Dejarnett v. Haynes, 23 Miss. 600..... 523
- Delaney v. Errickson, 11 Neb. 583, 10 N. W. 451..... 592
- Delaware & A. Teleg. & Teleph. Co. v. Delaware Postal Teleg. Cable Co. 3 U. S. App. 30, 50 Fed. Rep. 677, 2 C. C. A. 1..... 107
- Demarest v. Willard, 8 Cow. 206..... 152
- Den ex dem. Gaskin v. Gaskin, 2 Cowp. 657..... 242
- Moor v. Mellor, 5 T. R. 558..... 242
- Dennis v. Caughlin, 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 768..... 840
- v. Dennis, 68 Conn. 197, 34 L. R. A. 459, 36 Atl. 37..... 751
- Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177..... 343
- Deposit Bank v. Berry, 2 Bush, 286..... 278
- Derby v. Phelps, 2 N. H. 515..... 388
- Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 5 N. W. 275..... 344
- v. Mutual Gas Co. 43 Mich. 594, 5 N. W. 1039..... 92
- Detroit City R. Co. v. Mills, 85 Mich. 654, 48 N. W. 1007..... 498, 499
- Devens v. Mechanics' & T. Ins. Co. 83 N. Y. 168..... 456
- De Voss v. Richmond, 18 Gratt. 344, 98 Am. Dec. 647..... 578
- Dibble v. Bellingham Bay Land Co. 163 U. S. 83, 41 L. ed. 72, 16 Sup. Ct. Rep. 938..... 156
- Dickhaut v. State, 85 Md. 451, 36 L. R. A. 765, 37 Atl. 21..... 155
- Dillon v. Connecticut Mut. L. Ins. Co. 44 Md. 392..... 390
- Dimock v. Suffield, 30 Conn. 129..... 755
- Dinning v. Phoenix Ins. Co. 68 Ill. 414..... 646
- District Attorney v. Lynn & B. R. Co. 16 Gray, 242..... 635
- District Court Case, 34 Ohio St. 431..... 75
- Dixon, Ex parte, L. R. 4 Ch. Div. 133..... 605
- v. Buell, 21 Ill. 203..... 151
- v. Nicollis, 39 Ill. 372, 39 Am. Dec. 312..... 151
- v. Yates, 5 Barn. & Ad. 313..... 126
- Doane v. Broadstreet Assn. 6 Mass. 332..... 230
- v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520..... 626
- Dobson v. Philadelphia, 7 Pa. Dist. R. 321..... 693
- Dodd v. Home Mut. Ins. Co. 22 Or. 3, 28 Pac. 881, 29 Pac. 3..... 646
- Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401..... 523
- Doe ex dem. Winter v. Ferratt, 6 Mann. & G. 314..... 229, 232, 243
- Dolph v. White, 12 N. Y. 296..... 152
- Donahue v. Kelly, 181 Pa. 93, 37 Atl. 187..... 789
- Doran v. Mullen, 78 Ill. 842..... 799
- Dormire v. Cogly, 8 Blackf. 177..... 523
- Doughty v. Doughty, 28 N. J. Eq. 581..... 547
- Douglas v. Pacific Mail S. S. Co. 4 Cal. 806..... 340
- Dovaston v. Payne, 2 Smith, Lead. Cas. 4th Am. ed. 189..... 228
- Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738..... 444, 446, 449, 450
- Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214..... 127
- Dozier v. Mitchell, 65 Ala. 511..... 747
- Drake v. Eubanks, 61 Ark. 120, 32 S. W. 492..... 268, 269
- v. Hudson River R. Co. 7 Barb. 508..... 764
- Drew v. Geneva (Ind.) 42 L. R. A. 814, note..... 488
- v. Mason, 81 Ill. 498, 25 Am. Rep. 288..... 274
- v. Peer, 93 Pa. 284..... 694
- Dreyfus v. Wolfe, 65 Ala. 496..... 612
- Driscoll v. Newark & R. Lime & Cement Co. 37 N. Y. 637, 97 Am. Dec. 761..... 720
- Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co. 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601..... 272, 332, 333
- Drucker v. Manhattan R. Co. 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568..... 775
- Dudley v. Briggs, 141 Mass. 582, 55 Am. Rep. 494, 6 N. E. 717..... 440
- Dumes v. Dumes, 76 Wis. 374, 8 L. R. A. 420, 45 N. W. 522..... 694
- Duffy v. New York & H. R. Co. 2 Hilt. 496..... 411, 412
- Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509..... 390
- Dugan Cut Stone Co. v. Gray, 114 Mo. 497, 21 S. W. 854..... 274
- Dugdale v. Queen, 1 El. & Bl. 435..... 110
- Duluth v. Marsh, 71 Minn. 248, 73 N. W. 962..... 527
- Duncan v. Harris, 17 Serg. & R. 436..... 135
- v. Hayes, 22 N. J. Eq. 25..... 771
- v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570..... 156
- Dunham v. Hyde, 30 Or. 385, 48 Pac. 422..... 553
- Dunnington v. Northwestern Turnp. Road, 6 Gratt. 160..... 579
- Durham & S. R. Co. v. Walker, 2 Q. B. 940..... 236, 241
- Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500..... 343
- Dygart v. Matthews, 11 Wend. 35..... 231
- E.
- Earle v. Norfolk & N. B. Hosiery Co. 36 N. J. Eq. 192..... 424
- Easter v. Little Miami R. Co. 14 Ohio St. 48..... 412
- Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163..... 579, 580
- East Hampton v. Kirk, 68 N. Y. 459..... 259
- Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 82 Am. Dec. 201..... 130, 488
- East Pennsylvania R. Co. v. Hilester, 40 Pa. 33..... 787
- East Tennessee, V. & G. R. Co. v. Boardman, 96 Ga. 359, 23 S. E. 403..... 764
- Eaton v. Brown, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250..... 851
- Ecke v. Fetzer, 65 Wis. 55, 26 N. W. 266..... 152
- Edger v. Randolph County Comrs. 70 Ind. 331..... 633
- Edwards, Re. 122 Mo. 426, 29 L. R. A. 681, 25 S. W. 904..... 405
- v. Dooley, 120 N. Y. 540, 24 N. E. 827..... 607
- v. Lesueur, 132 Mo. 410, 31 L. R. A. 815, 33 S. W. 1130..... 397
- 47 L. R. A.

Eggleston v. Council Bluffs Ins. Co. 65 Iowa, 308, 21 N. W. 652.....	707
Ehrman v. Kendrick, 1 Met. (Ky.) 146.....	278
Elchholts v. Martin, 53 Kan. 486, 36 Pac. 1064.....	67
Eight Hour Bill, Re, 21 Colo. 29, 39 Pac. 328.....	55, 56, 375
Elder v. Bemis, 2 Met. 599.....	319
Ellicott v. Martin, 6 Md. 517.....	121
v. Turner, 4 Md. 476.....	388
Ellis v. Albany City F. Ins. Co. 50 N. Y. 402, 10 Am. Rep. 495.....	644
v. Council Bluffs Ins. Co. 64 Iowa, 507, 20 N. W. 782.....	707
Elmore County v. Alturas County (Idaho) 37 Pac. 349.....	465
Emery v. Boston Marine Ins. Co. 138 Mass. 898.....	045
v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.....	127
Engle v. Chipman, 51 Mich. 524, 16 N. W. 886.....	97
Erdman v. Barrett, 89 Pa. 320.....	554
Erie & N. E. R. Co. v. Casey, 20 Pa. 288.....	638
Ernst v. Kunkle, 5 Ohio St. 520.....	158
Erwin v. Shaffer, 9 Ohio St. 44, 72 Am. Dec. 613.....	836
Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565.....	405, 406
Ewert v. Hurlis (N. J. Eq.) 12 Atl. 893.....	81
Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624.....	310
v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340.....	826
F.	
Fairclaim ex dem. Empson v. Shackleton, 5 Burr. 2604.....	231
Fairweather v. Owen Sound Stone Quarry Co. 26 Ont. Rep. 604.....	115, 116
Falk v. Hecht, 75 Ala. 293.....	612
Faribault v. Misener, 20 Minn. 396, Gil. 347.....	527
Farmers' Mut. F. Ins. Co. v. Barr, 94 Pa. 345.....	705
Farmers' Phosphate Co. v. Gill, 69 Md. 545, 1 L. R. A. 767, 16 Atl. 214.....	126, 127
Farnsworth v. Rockland, 83 Me. 508, 22 Atl. 894.....	754
v. Wood, 91 N. Y. 308.....	621
Farrar v. Cooper, 34 Me. 804.....	233
v. Farrar, 4 N. H. 191, 17 Am. Dec. 410.....	640
Farwell v. Great Western Teleg. Co. 161 Ill. 522, 44 N. E. 891.....	795
Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757.....	482
Faulkner v. Aurora, 85 Ind. 180, 44 Am. Rep. 1.....	801
Fears v. State, 102 Ga. 274, 29 S. E. 463.....	367
Fecheimer v. Louisville, 84 Ky. 306, 2 S. W. 65.....	505
Feely v. Pearson Cordage Co. 161 Mass. 426, 37 N. E. 368.....	177
Felner v. Wilson, 55 Ark. 77, 17 S. W. 587.....	408
Felt v. Felt, 19 Wis. 195.....	695
Feltham v. England, L. R. 2 Q. B. 33.....	114
Fenstermacher v. State, 19 Or. 508, 25 Pac. 142.....	550
Fenton v. Embiera, 8 Burr. 1278.....	388
Ferchen v. Arndt, 26 Or. 121, 29 L. R. A. 664, 37 Pac. 161.....	266
Ferguson v. Houston, E. & W. T. R. Co. 73 Tex. 844, 11 S. W. 347.....	328
v. Stamford, 60 Conn. 447, 22 Atl. 782.....	75
Fero v. Buffalo & State Line R. Co. 22 N. Y. 215, 78 Am. Dec. 178.....	84
Ferren v. Old Colony R. Co. 143 Mass. 197, 9 N. E. 608.....	180
Ferriss v. Harshes, Mart. & Y. 48, 17 Am. Dec. 782.....	276
Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.....	580, 587
Findlay v. Frey, 51 Ohio St. 390, 38 N. E. 114.....	158

Findlay v. McAllister, 113 U. S. 104, 28 L. ed. 930, 5 Sup. Ct. Rep. 401.....	441
Fink v. Ehrman Bros. 44 Ark. 310.....	408
Fireman's Fund Ins. Co. v. Buckstaff, 38 Neb. 150, 56 N. W. 697.....	707
Firmstone v. Spaeter, 150 Pa. 616, 25 Atl. 41.....	229
First Baptist Church v. Brooklyn F. Ins. Co. 19 N. Y. 305.....	648
v. Schenectady & T. R. Co. 5 Barb. 79.....	775
v. Utica & S. R. Co. 6 Barb. 313.....	775
First Nat. Bank v. Clark, 55 Kan. 219, 40 Pac. 270.....	478
v. Dana, 79 N. Y. 108.....	259
v. Davenport & St. P. R. Co. 45 Iowa, 126.....	135
v. Malheur County (Or.) 35 L. R. A. 141, and note.....	285
v. Rogers, 15 Minn. 381, Gil. 305.....	135
v. Rogers, 13 Minn. 407, Gil. 376, 97 Am. Dec. 239.....	135
Fischer v. Laack, 76 Wis. 313, 45 N. W. 104.....	235
Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 593.....	582
v. Dodge, 4 Denio, 311.....	438
Fisher v. Deering, 60 Ill. 114.....	151
v. Lewis, 1 Clark (Pa.) 422.....	152
v. Spence, 150 Ill. 253, 37 N. E. 314.....	799
v. Steele, 39 La. Ann. 347, 1 So. 882.....	522, 524
Flak v. Fitchburg R. Co. 158 Mass. 238, 33 N. E. 510.....	177
Fitch v. American Popular L. Ins. Co. 59 N. Y. 557, 17 Am. Rep. 372.....	684
Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 29 N. E. 464.....	164, 165, 180
v. Equitable Reserve Fund Life Assn. 18 N. Y. S. R. 914, 3 N. Y. Supp. 214.....	684
Fitzpatrick v. Great Western R. Co. 12 U. C. Q. B. 645.....	326
Flannigan v. Minneapolis, 36 Minn. 406, 31 N. W. 359.....	428
Flato v. Mulhall, 72 Mo. 522.....	497
Fletcher v. Chamberlin, 61 N. H. 438.....	244
v. Sharpe, 108 Ind. 276, 9 N. E. 142.....	267
v. Tuttle, 151 Ill. 41, 25 L. R. A. 143, 37 N. E. 688.....	398
Flint & P. M. R. Co. v. Lull, 28 Mich. 510.....	85
Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.....	845
Floyd v. Philadelphia & R. R. Co. 162 Pa. 29, 29 Atl. 396.....	789
Fluker v. Georgia R. & Bkg. Co. 81 Ga. 461, 2 L. R. A. 843, 8 S. E. 529.....	536
Foley v. Jersey City Electric Light Co. 54 N. J. L. 411, 24 Atl. 487.....	149
Forbes v. Marsh, 15 Conn. 384.....	604
Forbush v. Lombard, 13 Met. 109.....	230
Ford v. Kendall Borough School Dist. 121 Pa. 543, 1 L. R. A. 607, 15 Atl. 812.....	579
Fore v. State, 75 Miss. 727, 23 So. 710.....	098
Foshay v. Glen Haven, 25 Wis. 268, 3 Am. Rep. 73.....	755
Foster v. Boston Park Comrs. 133 Mass. 821.....	817
Fouche v. Swain, 80 Ala. 153.....	740
Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171.....	407, 408
Franklin County Comrs. v. State ex rel. Patton, 24 Fla. 55, 8 So. 471.....	522
Franklin Ins. Co. v. Colt, 20 Wall. 560, 22 L. ed. 428.....	645
Fraser v. Berkeley, 7 Car. & P. 621.....	30
Frecking v. Holland, 53 N. Y. 422.....	259
Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646.....	465
Freeman v. Jordan, 17 Ala. 500.....	749
v. National Ben. Soc. 42 Hun, 252.....	684
French v. Fuller, 23 Pick. 106.....	640
v. Vix, 143 N. Y. 90, 37 N. E. 612.....	720
French v. The Chancellor, 51 N. J. Eq. 624, 27 Atl. 140.....	269
Frickett's Case, 20 N. J. L. 134.....	522
Friesen v. Allemania F. Ins. Co. 30 Fed. Rep. 352.....	707
Frorer v. People use of School Fund, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.....	64, 343, 374

Frost v. Knight, L. R. 5 Exch. 322, 7 Exch. 111.....	390	Goodright ex dem. Drewry v. Barron, 11 East. 220.....	242
Frostburg Min. Co. v. Cumberland & P. R. Co. 81 Md. 28, 31 Atl. 698.....	492, 494	Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63.....	446
Fullam v. New York Union Ins. Co. 7 Gray, 61, 66 Am. Dec. 462.....	705	Gorrell v. Home L. Ins. Co. 24 U. S. App. 188, 63 Fed. Rep. 371, 11 C. C. A. 240.....	453
Fuller v. Bean, 34 N. H. 290.....	233	Gottschalk v. Chicago, B. & Q. R. Co. 14 Neb. 550, 16 N. W. 475, and 17 N. W. 120.....	779
Fulton Iron & Engine Works v. Kimball Twp. 52 Mich. 148, 17 N. W. 733.....	508	Gould v. Eastern R. Co. 142 Mass. 85, 7 N. E. 548.....	226
Furnish v. Missouri P. R. Co. 102 Mo. 669, 51 S. W. 315.....	694	v. Schermer, 101 Iowa, 582, 70 N. W. 697.....	482
G.			
Gage v. Gage (N. H.) 28 L. R. A. 829, note a.....	548	Gouverneur v. National Ice Co. 184 N. Y. 355, 18 L. R. A. 695, 31 N. E. 865.....	228
Gallagher v. Piper, 16 C. B. N. S. 669.....	114	Graham v. Chautauqua County Comrs. 31 Kan. 473, 2 Pac. 549.....	70
Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526.....	786	Grand Rapids v. Grand Rapids Hydraulic Co. 66 Mich. 606, 33 N. W. 749.....	107
v. Webster, 64 N. H. 520, 15 Atl. 144.....	231, 233	Grand Rapids Chair Co. v. Bunnels, 77 Mich. 104, 43 N. W. 1006.....	343
Garr v. Spaulding, 2 N. D. 414, 51 N. W. 867.....	835	Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.....	87
Gasquet v. City Schools Bd. of Directors, 45 La. Ann. 342, 12 So. 506.....	465, 466	v. Richardson, 91 U. S. 454, 23 L. ed. 356.....	84, 87
Gay v. Bidwell, 7 Mich. 519.....	407	Graves v. Hickman, 59 Tex. 833.....	328
v. Sanders, 101 Ga. 601, 28 S. E. 1019.....	801	Gray v. Agnew, 95 Ill. 815.....	605
Gaylor v. King, 142 Mass. 495, 8 N. E. 596.....	228	v. Lessington, 2 Bosw. 257.....	808
Gelger v. Flor, 8 Fla. 332.....	764	v. Pentland, 4 Serg. & R. 420.....	486
Gentile v. State, 29 Ind. 400.....	491	Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233.....	329
Georgetown v. Alexandria Canal Co. 12 Pet. 99, 9 L. ed. 1015.....	488	v. Kimble, 6 Blackf. 552.....	440
Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721.....	398	v. Mills, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90.....	398
Georgia Chemical, etc., Co. v. Colquitt, 72 Ga. 172.....	703	v. Milwaukee & St. P. R. Co. 38 Iowa, 100.....	223
Germania F. Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489.....	456	Greenlaw v. Williams, 2 Lea. 588.....	277
German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711.....	708	Greenleaf v. Kilton, 11 N. H. 530.....	228
Gibson v. Brockway, 8 N. H. 465, 81 Am. Dec. 200.....	230	Gregory v. Cleveland, C. & C. R. Co. 4 Ohio St. 675.....	415
v. Chouteau, 13 Wall. 92, 20 L. ed. 534.....	237	Gresham v. Ware, 79 Ala. 192.....	748, 746
Gilbert v. Greeley, St. L. & P. R. Co. 13 Colo. 501, 22 Pac. 814.....	759	Griffin v. State, 28 Ga. 493.....	109, 111, 736
v. West End Street R. Co. 160 Mass. 403, 36 N. E. 60.....	693	Grigg v. Banks, 59 Ala. 311.....	743, 745, 746, 747, 749
Gilbert-Arnold Land Co. v. Superior, 91 Wis. 353, 64 N. W. 999.....	444	Griggs v. Selden, 58 Vt. 561, 5 Atl. 504.....	607
Gilleland v. Schuyler, 9 Kan. 569, 850, 852, 853	853	Grigsby v. Clear Lake Waterworks Co. 40 Cal. 396.....	488
Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.....	260	Grills v. Jonesboro, 8 Bart. 247.....	281
Gilman v. European & N. A. R. Co. 60 Me. 255.....	412	Griswold v. Pelton, 34 Ohio St. 482.....	180
v. Lowell, 8 Wend. 573, 24 Am. Dec. 96.....	486	v. Webb, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143.....	536
Gilmore v. Cohn, 102 Iowa, 254, 71 N. W. 244.....	184	Groesch v. State, 42 Ind. 547.....	446
Glasgow Union R. Co. v. Hunter, L. R. 2 H. L. Sc. App. Cas. 78.....	759	Groff v. Ankenbrandt, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 842, note, p. 845.....	488
Glass v. Billings, 59 Kan. 776, 58 Pac. 125, 67 v. Walker, 66 Mo. 32.....	705	Guerreiro v. Pello, 3 Barn. & Ald. 616.....	605
Gleason v. Wilson, 48 Kan. 500, 20 Pac. 698.....	408	Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.....	340, 343, 373
Gleason v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859.....	582	v. Trott, 86 Tex. 412, 25 S. W. 419.....	326
Gliddon v. Andrews, 14 Ala. 733.....	747	Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49.....	522
Glover v. Wilson, 2 Barb. 264.....	151	Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61.....	828
Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 854.....	65, 342, 374	Guy v. Livesey, Cro. Jac. 501.....	694
Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66.....	95	H.	
Goldstone v. Merchants' Ice & Cold-Storage Co. 123 Cal. 625, 56 Pac. 776.....	599	Haase v. Corbin, 2 Mont. 409.....	741
Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334.....	243	Hagerstown v. Wiltmer (Md.) 39 L. R. A. 649, note.....	488
Goodbar v. Wabash R. Co. 53 Mo. App. 434.....	223	Haggard v. Wallen, 6 Neb. 271.....	836
Goodell, Re, 39 Wis. 232, 20 Am. Rep. 42.....	98	Haggin v. Saille, 23 Mont. —, 59 Pac. 154.....	405
Goodenough, Re, 19 Wis. 274.....	679	Halbert v. De Bode (Tex. Civ. App.) 28 S. W. 58.....	800
Goodes v. Boston & A. R. Co. 162 Mass. 287, 38 N. E. 500.....	177	Hall, Re, 50 Conn. 131, 47 Am. Rep. 625, 96, 101 v. Carter, 74 Iowa, 864, 37 N. W. 950.....	483
Goodrich v. Longley, 1 Gray. 615.....	230	v. Eaton, 25 Vt. 458.....	441
Goodridge v. Washington Mills Co. 100 Mass. 234, 35 N. E. 484.....	177	v. Richardson, 16 Md. 412.....	126
47 L. R. A.		v. Schoenecke, 128 Mo. 661, 31 S. W. 97.....	815
		v. Wright, El. Bl. & El. 798.....	367
		Halle v. Elstein, 34 Fla. 589, 16 So. 554.....	613
		Halsey v. Amrings, 6 Paige, 16.....	724
		Hamblet v. City Ins. Co. 86 Fed. Rep. 118.....	456
		Hammer v. Sidway, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256.....	288

- Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 18 Sup. Ct. Rep. 585.. 551
 Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90..... 219
 Hammersmith & C. R. Co. v. Brand, L. R. 4 H. L. 171..... 759
 Hammock v. Barnes, 4 Bush, 390..... 554
 Hammond v. Straus, 53 Md. 1..... 620
 Hanbury v. Woodward Lumber Co. 98 Ga. 54, 26 S. E. 477..... 764
 Hancock v. Yaden, 121 Ind. 36, 6 L. R. A. 576, 23 N. E. 253..... 344, 376
 Hancock Nat. Bank v. Ellis, 172 Mass. 89, 42 L. R. A. 396, 51 N. E. 207... 621
 Hankins v. Rockford Ins. Co. 70 Wis. 1, 35 N. W. 34..... 457
 Hanna v. People, 19 Mich. 316..... 735
 Hanson v. Donkersley, 37 Mich. 184..... 621
 Hardesty v. Campbell, 29 Md. 533..... 350
 Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808..... 228
 Harding v. Elgin, 2 Tenn. Ch. 41..... 209
 v. People, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624..... 64
 Hardwick v. State Ins. Co. 20 Or. 547, 26 Pac. 840..... 644
 Hardy v. Munroe, 127 Mass. 64..... 127
 Hartford County Comrs. v. Wise, 75 Md. 42, 23 Atl. 65..... 181
 Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556..... 423
 Harmwood's Case, 1 East, P. C. 411..... 735
 Harnett, Re, 15 N. Y. S. R. 725..... 721
 Harrell v. Hill, 19 Ark. 102, 68 Am. Dec. 212..... 208
 Harriman v. Harriman, 59 N. H. 135..... 232
 Harris v. Kennedy, 48 Wis. 500, 4 N. W. 651..... 420
 v. Miller, 71 Ala. 26..... 748, 750
 v. Musgrove, 59 Tex. 403..... 328
 v. Quincy, 171 Mass. 473, 50 N. E. 1042..... 693
 Harrison v. Brooks, 20 Ga. 537..... 653
 v. Cage, 1 Ld. Raym. 886..... 386
 v. Talbot, 2 Dana, 258..... 269
 v. Women's Homeopathic Assn. 134 Pa. 558, 10 Atl. 804..... 274
 Hart v. Citizens' Ins. Co. 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332..... 705
 v. Niagara F. Ins. Co. 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213..... 205
 v. Reed, 1 B. Mon. 166, 35 Am. Dec. 179..... 486
 v. Ten Eyck, 2 Johns. Ch. 62..... 266
 Hartford F. Ins. Co. v. Chicago & St. P. R. Co. 86 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193..... 158
 v. Kirkpatrick, 111 Ala. 456, 20 So. 651..... 428
 v. Reynolds, 36 Mich. 502..... 456
 Hartung v. Witte, 59 Wis. 285, 18 N. W. 175..... 152
 Harvey v. Briggs, 68 Miss. 60, 10 L. R. A. 62, 8 So. 274..... 329
 Haakell v. New Bedford, 108 Mass. 208, 318, 814
 Hastings v. Livermore, 7 Gray, 194..... 640
 v. Lusk, 22 Wend. 410, 34 Am. Dec. 830..... 485
 Hatcher v. Diggs, 76 Ala. 189..... 612
 Hatfield v. Lockwood, 18 Iowa, 298..... 151
 Haupt's Appeal, 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436..... 786
 Havemeyer v. San Francisco City & County Super. Ct. 84 Cal. 327, 10 L. R. A. 646, 24 Pac. 139..... 399
 Haven v. Cram, 1 N. H. 93..... 234
 Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279..... 718-720
 v. Star F. Ins. Co. 77 N. Y. 235, 33 Am. Rep. 607..... 707
 Hayden v. Bucklin, 9 Falge, 512..... 278
 v. Smithville Mfg. Co. 29 Conn. 548..... 177
 Hays v. Hays, 126 Ind. 92, 11 L. R. A. 376, 25 N. E. 600..... 269
 Hazelton Boller Co. v. Hazelton Tripod Boller Co. 142 Ill. 494, 30 N. E. 339..... 798
 Heard v. Heard (1896) P. 191..... 752
 Heath v. Stoddard, 91 Me. 499, 40 Atl. 547, 607
 Hecla Powder Co. v. Sigua Iron Co. 157 N. Y. 437, 52 N. E. 650..... 720
 Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 854..... 719
 Heffron v. Flower, 35 Ill. App. 200..... 795
 Heglinbotham v. Eastern & C. Packet Co. 8 C. B. 337..... 772
 Hellbronner v. Lloyd, 17 Mont. 299, 42 Pac. 853..... 406
 Helm v. Wright, 2 Humph. 72..... 209
 Hembling v. Grand Rapids, 99 Mich. 292, 58 N. W. 310..... 508, 507, 511
 Henry v. Plitt, 84 Mo. 237..... 274
 Hentz v. Long Island R. Co. 18 Barb. 646..... 764
 Herman v. Oconto, 100 Wis. 391, 78 N. W. 364..... 444
 Herrick v. Catley, 30 How. Pr. 208..... 795
 Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728..... 720
 Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442..... 640
 Heth v. Radford, 96 Va. 272, 31 S. E. 8, 575, 576
 Heusinkveld v. Capital Ins. Co. 95 Iowa, 504, 64 N. W. 504..... 714, 715
 Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733..... 482
 Heyward's Case, 2 Coke, 35..... 230, 231, 245
 Hickory v. United States, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327..... 454
 Hicks v. Com. 86 Va. 223, 9 S. E. 1024, 109, 111
 v. Roanoke Brick Co. 94 Va. 747, 27 S. E. 598..... 285
 v. United States, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144..... 454
 Higby v. Calaveras County, 18 Cal. 176..... 462
 Higgins v. Brown, 78 Mo. 473, 5 Atl. 269..... 423
 Higginson v. Nahant, 11 Allen, 530..... 317
 Highlands, Re, 48 N. Y. S. R. 795, 22 N. Y. Supp. 137..... 887
 Hilborn v. Bucknam, 78 Me. 485, 57 Am. Rep. 816, 7 Atl. 272..... 423
 Hill v. Anderson, 5 Smedes & M. 216..... 829
 v. Boston, 122 Mass. 344, 23 Am. Rep. 382..... 313
 v. Buckley, 17 Ves. Jr. 394..... 269
 v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451..... 301
 v. Chase, 143 Mass. 129, 9 N. E. 30..... 612
 v. Dalton, 72 Ga. 314..... 367
 v. Decatur Comrs. 22 Ga. 203..... 307
 v. Durham House Drainage Co. 79 Hun, 335, 29 N. Y. Supp. 427..... 486
 v. Grange, 1 Plowd. 164..... 229
 v. Kimball, 76 Tex. 210, 7 L. R. A. 618, 13 S. W. 59..... 826
 Hillyer v. Bennett, 8 Edw. Ch. 222..... 329
 Hines v. Hamilton County Comrs. 93 Ind. 266..... 422
 v. Leavenworth, 3 Kan. 200..... 70
 v. Moya, 125 N. C. —, 34 S. E. 108..... 42
 Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County, 6 Allen, 360..... 522
 Hintze v. Krabbeneshmidt (Tex. Civ. App.) 44 S. W. 38..... 550
 Hirsch v. United States Grand Lodge, O. of B. A. 56 Mo. App. 101..... 684
 Hirschfeld v. Bopp, 145 N. Y. 84, 39 N. E. 817..... 730
 Hitchins Bros. v. Frostburg, 68 Md. 113, 11 Atl. 826..... 129
 Hobart v. Milwaukee City R. Co. 27 Wis. 104, 9 Am. Rep. 461..... 499
 Hochster v. De La Tour, 2 El. & Bl. 678..... 390
 Hocking v. Howard Ins. Co. 130 Pa. 170, 18 Atl. 614..... 705, 715
 Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263..... 343
 Hodge v. State, 82 Ga. 643, 9 S. E. 676..... 764
 Hoege v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435..... 222
 Hoffer v. Pennsylvania Canal Co. 87 Pa. 221..... 787
 Hoffman v. New York C. & H. R. R. Co. 87 N. Y. 25, 41 Am. Rep. 337..... 253
 Holt v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119..... 230
 Holbert v. Edens, 5 Lea, 204, 40 Am. Rep. 26..... 228
 Holbrook v. Holbrook, 1 Pick. 251..... 633
 v. Tirrell, 9 Pick. 105..... 640
 Holcroft v. Dickinson, Carter, C. P. 233..... 386

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.....	60, 61, 63, 65, 66	329
v. Pike, 14 Vt. 405.....		773
Hole v. Barlow, 4 C. B. N. S. 336.....		661
Holiday v. American Mut. Acci. Asso. 103 Iowa, 178, 72 N. W. 448.....		707
Holladay v. Phoenix Ins. Co. 7 U. S. App. 325, sub nom. Steel v. Phenix Ins. Co. 51 Fed. Rep. 715, 2 C. C. A. 463.....		231
Holley v. Hawley, 89 Vt. 525.....		731
Hollister Bank, Re, 27 N. Y. 393, 84 Am. Dec. 292.....		228
Holloway v. Southmayd, 189 N. Y. 390, 34 N. E. 1047.....		308
Holmes v. Blogg, 8 Taunt. 508.....		37
v. Godwin, 71 N. C. 306.....		231
Holt v. Antrim, 64 N. H. 284, 9 Atl. 389.....		386
v. Clarenieux, 2 Strange, 937.....		521
Hommerich v. Hunter, 14 La. Ann. 225.....		708
Hong Sing v. Royal Ins. Co. 8 Utah, 135, 30 Pac. 307.....		152
Hooper v. Clark, 8 Best & S. 150.....		694
Hopkins v. Atlantic & St. L. R. Co. 86 N. H. 9, 72 Am. Dec. 287.....		587
v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.....		269
Horn v. Denton, 2 Sneed, 125.....		497
Horne v. Rouquette, L. R. 8 Q. B. Div. 514.....		423
Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.....		206
Horwitz v. Ellinger, 81 Md. 492.....		269
Hosleston v. Dickinson, 51 Iowa, 244, 1 N. W. 550.....		482
Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568.....		689
Houghton v. Burnham, 22 Wis. 301.....		232
v. Patten, 58 N. H. 326.....		754
House v. Metcalf, 27 Conn. 631.....		375
House Bill No. 203, Re, 21 Colo. 27, 39 Pac. 431.....		91
Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369.....		328
Houston, E. & W. T. R. Co. v. Ferguson, 73 Tex. 349, 18 S. W. 57.....		285
Hovey v. East Providence, 17 R. I. 80, 9 L. R. A. 156, 20 Atl. 205.....		135
Howard v. Bennett, 72 Ill. 297.....		427
v. Boorman, 17 Wis. 459.....		302
v. Brooklyn, 30 App. Div. 217, 51 N. Y. Supp. 1058.....		523
v. McDermid, 26 Ark. 100.....		550
v. Russell, 75 Tex. 171, 12 S. W. 525.....		729
Hqwarth v. Angle, 39 App. Div. 151, 57 N. Y. Supp. 187.....		116
Howells v. Landore Siemens Steel Co. L. R. 10 Q. B. 62.....		156
Hoyt v. Shelden, 1 Black, 518, sub nom. Hoyt v. Thompson, 17 L. ed. 65.....		488
Hubbard v. Russell, 24 Barb. 404.....		317
v. Taunton, 140 Mass. 467, 5 N. E. 157.....		607
v. Tenbrook, 124 Pa. 291, 2 L. R. A. 823, 16 Atl. 817.....		488
Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669.....		633
Hughes v. Done, 1 Q. B. 301.....		579
v. Monroe County, 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407.....		135
v. Monty, 24 Iowa, 490.....		633
Hunt v. Lake Shore & M. S. R. Co. 112 Ind. 60, 13 N. E. 263.....		482
v. Pownall, 9 Vt. 411.....		151
v. Thompson, 2 Allen, 341.....		693
v. Winfield, 36 Wis. 154, 17 Am. Rep. 482.....		397
Hunter v. Chandler, 45 Mo. 452.....		135
Huntington v. Bladon, 43 Iowa, 517.....		524
v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.....		232
Hurd v. Dunsmore, 63 N. H. 171.....		56
Hussey v. King, 83 Me. 568, 22 Atl. 476.....		302
Hutchinson v. Concord, 41 Vt. 271, 98 Am. Dec. 584.....		213
Huyilar v. Cragin Cattle Co. 40 N. J. Eq. 302, 2 Atl. 274.....		678
Hyde v. Jenkins, 6 La. 427.....		694
v. Scysor, Cro. Jac. 538.....		
47 L. R. A		
I.		
Idaho Forwarding Co. v. Fireman's Fund Ins. Co. 8 Utah, 41, 17 L. R. A. 586, 29 Pac. 826.....		644
Idle v. Cook, 1 P. Wms. 70.....		239
Illinois C. R. Co. v. Grabill, 50 Ill. 244.....		769
v. Minor, 60 Miss. 710, 11 So. 101.....		122
Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 16 L. R. A. 429, 31 N. E. 440.....		798
Inderlled v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 183.....		640
Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051.....		631
v. Woram, 8 Hill, 33, 40 Am. Dec. 378.....		631
Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100.....		450
Indianapolis v. Navin, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 325, 51 N. E. 80.....		62, 491
Indianapolis, P. & C. R. Co. v. Petty, 25 Ind. 413.....		412
Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937.....		535
Ingersoll v. Stockbridge & P. R. Co. 8 Allen, 438.....		84, 86
International & G. N. R. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039.....		283
Ireland v. Mobile & O. R. Co. 20 Ky. L. Rep. 1586, 49 S. W. 188.....		384
Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193.....		230
Irwin v. Patchen, 164 Pa. 51, 30 Atl. 436.....		640
Isham v. Buckingham, 49 N. Y. 216.....		257
J.		
Jackson v. Jackson, 82 Md. 32, 34 L. R. A. 773, 33 Atl. 317.....		388
v. State, 14 Ind. 327.....		736
ex dem. Hasbrouck v. Vermilyea, 6 Cow. 677.....		230, 231
People v. Ets, 5 Cow. 814.....		550
Saxton v. May, 16 Johns. 184.....		232
Van Valkenburgh v. Van Buren, 13 Johns. 525.....		231
Jacobs, Re, 98 N. Y. 98, 50 Am. Rep. 636.....		64, 66, 375
v. St. Paul P. & M. Ins. Co. 86 Iowa, 145, 53 N. W. 101.....		715
Jacobson v. Allen, 20 Blatchf. 625, 12 Fed. Rep. 454.....		621
James v. Harrodsburg, 85 Ky. 196, 5 S. W. 185.....		595
Jamesville & W. R. Co. v. Fisher (N. C.) 13 L. R. A. 721.....		96
J'Anson v. Stuart, 1 T. R. 748, 2 Smith, Lead. Cas. 986, note.....		225
Jaynes v. Omaha Street R. Co. 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67.....		779
Jeffers v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518.....		228
Jeffries v. Harrington, 11 Colo. 191, 17 Pac. 505.....		96
Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258.....		536
Jenks v. Williams, 115 Mass. 217.....		318
Jenness v. Peck, How. 612, 12 L. ed. 841.....		503
Jentsch, Ex parte, 112 Cal. 469, 82 L. & A. 664, 44 Pac. 803.....		343
Jespersion v. Phillips, 46 Minn. 147, 48 N. W. 770.....		649
John R. Davis Lumber Co. v. Hartford F. Ins. Co. 95 Wis. 226, 37 L. R. A. 131, 70 N. W. 84.....		457
Johnson v. Camovia Canvassers, 101 Mich. 187, 59 N. W. 412.....		828
v. Conant, 64 N. H. 109, 7 Atl. 116.....		232
v. Connecticut F. Ins. Co. 84 Ky. 470, 2 S. W. 151.....		646
v. Devol Snuff Co. 62 N. J. L. 417, 41 Atl. 936.....		149
v. Humboldt Ins. Co. 91 Ill. 92, 33 Am. Rep. 47.....		705
v. Lewis (Conn.) 33 Am. Dec. 407, note.....		488
v. Milwaukee, 88 Wis. 383, 60 N. W. 270.....		444, 445, 448

Johnson v. Raynor, 6 Gray, 107.....	230	Kilgore v. Jordan, 17 Tex. 856.....	328, 329
v. Smith, 2 Burr. 950.....	287	Kilgour v. Drainage Comrs. 111 Ill. 842..	803
v. State ex rel. Sefton, 128 Ind. 16,		Kilvington v. Superior, 83 Wis. 222, 18 L.	
12 L. R. A. 235, 27 N. E. 422.....	533	R. A. 45, 53 N. W. 487.....	690
v. Underhill, 52 N. Y. 203.....	237	Kimball v. Harman, 34 Md. 407, 6 Am.	
John Spry Lumber Co. v. Sault Sav. Bank,		Rep. 340.....	440
Loan & Trust Co. 77 Mich. 199,		v. Lancaster, 60 N. H. 264.....	243
6 L. R. A. 204, 43 N. W. 778..	57	v. New Hampshire Bible Soc. 65 N.	
Johnstone v. Milling, L. R. 16 Q. B. Div.		H. 139, 23 Atl. 83.....	243
460.....	390	v. Rosendale, 42 Wis. 415, 24 Am.	
Jolliffe v. Brown, 14 Wash. 155, 44 Pac.		Rep. 421.....	448
149.....	348	Kimerer v. State ex rel. Black, 129 Ind.	
Jones v. Binford, 74 Me. 439.....	522	589, 29 N. E. 178.....	553
v. Black, 48 Ala. 540.....	430	Kincaid v. Brittain, 5 Sneed, 122.....	270
v. Great Southern Fireproof Hotel		King v. Cox, 68 Ark. 204, 37 S. W. 877....	644
Co. 58 U. S. App. 397, 86 Fed.		v. Doolittle, 1 Head, 78.....	269
Rep. 370, 30 C. C. A. 108.....	57	v. Gildersleeve, 79 Cal. 504, 21 Pac.	
v. Mial, 89 N. C. 89.....	37	961.....	335
v. Pettibone, 2 Wis. 308.....	228	v. Hekia F. Ins. Co. 58 Wis. 508, 17	
v. Smith, 1 Hare, 43.....	509	N. W. 297.....	644
v. State ex rel. Atherby, 1 Kan. 273.	853	v. Merchant Tailors Co. 2 Barn. &	
v. Swepson, 84 N. C. 700.....	37	Ad. 115.....	212
v. Utica & B. R. Co. 40 Hun. 349..	694	v. Stubbs, 2 T. R. 395.....	99
Jordan v. Benwood, 42 W. Va. 312, 36 L.		v. Watertown F. Ins. Co. 47 Hun. 1.	705
R. A. 519, 26 S. E. 286.....	758	King Iron Bridge & Mfg. Co. v. Otoo	
v. Elliott, 12 W. N. C. 56.....	424	County, 124 U. S. 459, 31 L. ed.	
v. Iowa State Agri. Soc. 91 Iowa,		514, 8 Sup. Ct. Rep. 582.....	466
97, 24 L. R. A. 655, 58 N. W.		Kingman v. Brockton, 153 Mass. 255, 11 L.	
1092.....	579	R. A. 125, 26 N. E. 998.....	817
v. Robinson, 15 Me. 167.....	462	Petitioner, 153 Mass. 566, 12 L. R.	
Jordon v. Pollock, 14 Ga. 156.....	508	A. 417, 27 N. E. 778.....	817
Joy v. Jackson & M. Pl. Road Co. 11 Mich.		Kinsley v. Robinson, 21 Pick. 327.....	496
164.....	92	Kirk v. Rhoads, 46 Cal. 405.....	551
v. St. Louis, 188 U. S. 1, 24 L. ed.		Kilnec v. Colby, 46 N. Y. 427, 7 Am. Rep.	
843, 11 Sup. Ct. Rep. 243.....	636	360.....	486
Judd v. Fargo, 107 Mass. 204.....	755	Klous v. Hennessy, 13 R. I. 332.....	440
Justice v. Lang, 42 N. Y. 493, 1 Am. Rep.		Knapp v. Hyde, 60 Barb. 80.....	423
576.....	480	Knatchbull v. Hallett, L. R. 13 Ch. Div.	
Jutte v. Hughes, 67 N. Y. 267.....	719	696.....	260
K.			
Kalamazoo Hack & Bus Co. v. Sootsma, 84		Knaube v. Kerchner, 89 Ind. 217.....	274
Mich. 194, 10 L. R. A. 819, 47		Kneeland v. Furlong, 20 Wis. 438.....	683
N. W. 667.....	535	v. Milwaukee, 18 Wis. 411.....	688
Kavanagh v. Mobile & G. R. Co. 78 Ga. 271,		Knox v. Lycoming Ins. Co. 50 Wis. 671, 7	
2 S. E. 636, 78 Ga. 804, 4 S. E.		N. W. 778.....	457
113.....	764	Koch v. Milwaukee, 89 Wis. 220, 61 N. W.	
Keeler v. Wood, 30 Vt. 242.....	235	818.....	688
Keener v. Eagle Lake Land & Irrig. Co.		Koester v. Atchison County Comrs. 44	
110 Cal. 627, 43 Pac. 14.....	345	Kan. 141, 24 Pac. 65.....	67
Keller v. Gilman, 93 Wis. 9, 66 N. W. 800.	694	Kramer Case, 150 Mo. 89, 51 S. W. 716..	563
Kelley v. Davis, 49 N. H. 187.....	237	Kratzenstein v. Western Assur. Co. 116 N.	
v. Fourth of July Min. Co. 16 Mont.		Y. 54, 5 L. R. A. 799, 22 N. E.	
484, 41 Pac. 273.....	601	221.....	704
v. Milwaukee, 18 Wis. 83.....	301	Kuback, Ex parte, 55 Cal. 274, 9 L. R. A.	
v. New York, N. H. & H. R. Co. 168		462, 24 Pac. 737.....	66, 342
Mass. 308, 88 L. R. A. 631, 46		Kuckeln v. Wilson, 4 Barn. & Aid. 443...	605
N. E. 1063.....	694	Kuecken v. Volta, 110 Ill. 264.....	227
v. Tibbals, 53 Pa. 408.....	741	L.	
Kellogg v. Hickman, 12 Colo. 256, 21 Pac.		La Crosse & M. R. Co. v. Vanderpool, 78	
325.....	851	Am. Dec. 691, and notes, 11	
v. Robinson, 6 Vt. 276, 27 Am. Dec.		Wis. 119.....	274
550.....	152, 410,	Ladd v. New Bedford R. Co. 119 Mass. 412,	
Kelly v. New York, 11 N. Y. 482.....	411	20 Am. Rep. 831.....	177
v. Smith, 1 Blatchf. 290, Fed. Cas.		Lady Braughton's Case, 8 Keb. 32.....	99
No. 7,675.....	605	Lady Russell's Case, Cro. Jac. 18.....	99
Kendall v. Carland, 5 Cush. 74.....	151	Lafayette v. Timberlake, 88 Ind. 380, 301,	302
v. United States ex rel. Stokes, 12		Lake View v. Rose Hill Cemetery Co. 70 Ill.	
Pet. 608, 9 L. ed. 1214.....	520	191, 22 Am. Rep. 71.....	57
Kennard v. Kennard, 68 N. H. 303.....	243	Lamb v. Stone, 11 Pick. 527.....	440
Kennedy v. Green, 3 Myl. & K. 719.....	509	Lamotte v. Wlamer, 51 Md. 561.....	126
v. People, 122 Ill. 649, 13 N. E.		Lamprey v. Sargent, 58 N. H. 241.....	233
213.....	735	Lane v. Morris, 10 Ga. 162.....	462, 463
Kenney v. Norton, 10 Helsk. 888.....	276	v. Starr, 1 S. D. 107, 45 N. W. 212..	403
Kent v. Taylor, 64 N. H. 489, 13 Atl. 419..	223	Langhammer v. Manchester, 99 Iowa, 295,	
Kentucky Life & Acci. Ins. Co. v. Franklin,		68 N. W. 688.....	482
19 Ky. L. Rep. 1573, 43 S. W.		Lankford v. Gebhart, 130 Mo. 622, 32 S.	
709.....	651	W. 1127.....	815, 820
Kentucky Refining Co. v. Globe Refining		Laport v. Bacon, 48 Vt. 176.....	740
Co. 20 Ky. L. Rep. 778, 42 L.		Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515..	336
R. A. 358.....	127	Laughlin v. Eaton, 54 Me. 156.....	694
Kercheval v. Doty, 31 Wis. 476.....	420, 421	Lawless v. Connecticut River R. Co. 136	
Kern v. Wilson, 82 Iowa, 407, 48 N. W.		Mass. 1.....	180
919.....	714	Lawrence v. Mt. Vernon, 35 Me. 100.....	754
Keeler v. St. John, 22 Iowa. 565.....	135	v. Stonington Bank, 6 Conn. 521.....	604
Ketchum v. Freeman, 24 Wis. 296.....	695	Laytin v. Davidson, 95 N. Y. 263.....	723
Key v. Allen, 7 N. C. (3 Murph.) 523.....	37	Leach, Re, 134 Ind. 607, 21 L. R. A. 701,	
Keyser v. Covell, 62 N. H. 283.....	232	34 N. E. 641.....	98, 101
Keystone Mut. Ben. Asso. v. Norris, 115 Pa.		v. Beattie, 33 Vt. 105.....	231
446, 8 Atl. 638.....	714	Le Claire v. Wells, 7 S. D. 426, 64 N. W.	
47 L. R. A.		519.....	835

Lee v. Simmons, 65 Wis. 526, 27 N. W. 174.....	430	Lucas v. Cassaday, 2 G. Greene, 208.....	185
Leep v. St. Louis, 1 M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75.....	379	Lucy v. Chicago G. W. R. Co. 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944.....	122
Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579.....	372	Lusher v. Scites, 4 W. Va. 11.....	521
Leesburg v. Putnam, 103 Ga. 110, 29 S. E. 602.....	307	Luthe v. Farmers' Mut. F. Ins. Co. 55 Wis. 543, 13 N. W. 490.....	684
Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669, 12 So. 837.....	213	Luther v. Luther, 122 Ill. 558, 13 N. E. 166.....	801
Lehman v. Collins, 69 Ala. 127..... 743, 746, 747	747	Lycoming F. Ins. Co. v. Rubin, 79 Ill. 403.....	455
Lelplard v. Stotler, 97 Iowa, 174, 66 N. W. 150.....	483	Lyman v. Babcock, 40 Wis. 503.....	431
Lellis v. Lambert, 24 Ont. App. Rep. 653.....	312	Lynam v. Gowing, Jr. L. R. 6 C. L. 269.....	485
Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Intern. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.....	585	Lyng v. Michigan, 135 U. S. 165, 34 L. ed. 152, 3 Intern. Com. Rep. 143, 10 Sup. Ct. Rep. 725.....	585
Lemaster v. Burckhart, 2 Bibb, 30.....	288	Lyon v. American Screw Co. 16 R. I. 472, 17 Atl. 61.....	213
Leopold v. Silverman, 7 Mont. 266, 16 Pac. 580.....	406		
Lessard v. Revere, 171 Mass. 294, 50 N. E. 533.....	285		
Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.....	531		
Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332.....	607		
Levy v. New York, 1 Sandf. 465.....	301		
Lewis v. Brainerd, 53 Vt. 519.....	213		
v. Chicago & N. W. R. Co. 97 Wis. 368, 72 N. W. 976.....	695		
v. McCabe, 49 Conn. 141, 44 Am. Rep. 217.....	606		
v. State ex rel. Mayo, 12 Mo. 128, 552, 553, 556, 557.....	558		
Liberty Female College Asso. v. Watkins, 70 Mo. 3.....	621		
Lightbody v. North American Ins. Co. 23 Wend. 22.....	643		
Lincoln County v. Luning, 138 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 563.....	465		
Lindley v. Richmond & D. R. Co. 88 N. C. 347.....	37		
Linnehan v. Sampson, 126 Mass. 506, 80 Am. Rep. 692.....	180		
Littlejohn v. Egerton, 77 N. C. 379.....	42		
Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330.....	468		
Lloyd v. Sullivan, 9 Mont. 577, 24 Pac. 217.....	850		
Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631.....	607		
Locke's Appeal, 72 Pa. 491.....	446		
Lockwood v. Kelsea, 41 N. H. 195.....	740		
v. United States, 9 Ct. Cl. 346.....	95		
Loehr v. People, 132 Ill. 504, 24 N. E. 68.....	734		
London v. Cox, L. R. 2 H. L. 278.....	300		
Long v. Duluth, 49 Minn. 280, 51 N. W. 913.....	210		
v. White, 42 Ohio St. 59.....	641		
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.....	219		
Lord v. Meadville Water Co. 135 Pa. 131, 19 Atl. 1007.....	786		
v. Sydney Comrs. 12 Moore, P. C. C. 473.....	228		
Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.....	718		
Louis F. Fromer & Co. v. Stanley, 95 Wis. 56, 69 N. W. 820.....	440		
Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 52, 19 L. ed. 67.....	482		
Louisville & N. R. Co. v. East St. Louis, 134 Ill. 656, 25 N. E. 902.....	626		
v. Railroad Commission, 19 Fed. Rep. 670.....	345		
Louisville Southern R. Co. v. Hooe, 20 Ky. L. Rep. 849, 47 S. W. 621.....	779		
Love v. Pares, 13 East, 80.....	220		
Loveacres ex dem. Mudge v. Blight, 1 Cowp. 352.....	242		
Lovegrove v. London, B. & S. C. R. Co. 16 C. B. N. S. 669.....	114		
Lovejoy v. Boston & L. R. Corp. 125 Mass. 79, 28 Am. Rep. 206.....	177		
Low v. Little, 17 Johns. 346.....	237		
v. Rees Printing Co. 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.....	375		
Lowry v. Inman, 46 N. Y. 119.....	729, 730		
47 L. R. A. A.....			
		M.	
		Mabon v. Ongley Electric Co. 156 N. Y. 196, 50 N. E. 805.....	720
		McAlle v. The Iatona (Wash. Terr.) 19 Pac. 131.....	541
		McArthur v. Fry, 10 Kan. 233.....	795
		McAulich v. Mississippi & M. R. Co. 20 Iowa, 338.....	380
		McCafferty v. Spuyten Duyvil & P. M. R. Co. 61 N. Y. 178, 19 Am. Rep. 267.....	720
		McCall v. California, 138 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 851.....	586
		McCarthy v. Henderson, 138 Mass. 310.....	308
		v. Missouri R. Co. 15 Mo. App. 385.....	143
		McClain v. Garden Grove, 83 Iowa, 235, 12 L. R. A. 482, 48 N. W. 1031.....	482
		McClanahan v. Western Lunatic Asylum, 88 Va. 466, 13 S. E. 977.....	580
		McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15.....	535
		McConvill v. St. Paul, 75 Minn. 383, 43 L. R. A. 584, 77 N. W. 993.....	539
		McCormack v. Standard Oil Co. 60 N. J. L. 243, 37 Atl. 617.....	149
		McCracken v. Hayward, 2 How. 308, 11 L. ed. 397.....	478
		McCready v. Com. 27 Gratt. 985.....	584
		McCue v. Waupun, 96 Wis. 625, 71 N. W. 1054.....	444
		McDade v. People, 29 Mich. 49.....	109
		McDermott v. Claas, 104, Mo. 14, 15 S. W. 995.....	274
		v. People, 5 Park. Crim. Rep. 102.....	110
		MacDonald v. Wagner, 5 Mo. App. 56.....	795
		McDonough v. Gilman, 3 Allen, 264, 80 Am. Dec. 72, note, p. 75.....	488
		M'Dowle, Re. 8 Johns. 328.....	679
		McDuffee v. Portland & R. R. Co. 52 N. H. 430, 13 Am. Rep. 72.....	231
		McElroy v. Continental Ins. Co. 48 Kan. 200, 29 Pac. 478.....	705, 714
		McEwen v. Davis, 39 Ind. 109.....	267
		v. Montgomery County Mut. Ins. Co. 5 Hill, 105.....	648
		McFadden v. Wilson, 96 Ind. 253.....	740
		McFarlane v. Gilmour, 5 Ont. Rep. 302.....	115
		McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076.....	640
		MacGreal v. Taylor, 167 U. S. 688, 42 L. ed. 320, 17 Sup. Ct. Rep. 961.....	829
		McInnis v. McGurn, 24 Nev. —, 55 Pac. 304.....	541
		McIntyre v. Michigan State Ins. Co. 52 Mich. 138, 17 N. W. 781.....	715
		McIver v. Ballard, 96 Ind. 76.....	135
		Mack v. South Bound R. Co. 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905.....	326
		v. Story, 57 Conn. 407, 18 Atl. 707.....	605, 606
		McKeller v. Monitor Twp. 78 Mich. 485, 44 N. W. 412.....	503, 507
		McKenna v. Baessler, 86 Iowa, 197, 17 L. R. A. 310, 53 N. W. 103.....	640
		McKinney v. Western Stage Co. 4 Iowa, 420.....	694
		McKittrick v. Pardee, 8 S. D. 39, 65 N. W. 23.....	838
		McLain v. Wallace, 103 Ind. 562, 5 N. E. 911.....	267
		McMahon v. McHale, 174 Mass. —, 54 N. E. 854.....	823
		v. Williams, 79 Ala. 288.....	227, 236
		McNell v. Tenth Nat. Bank, 46 N. Y. 825, 7 Am. Rep. 341.....	607

McNeill, Re, 111 Pa. 235, 2 Atl. 341.....	623	Mellor v. Merchants' Mfg. Co. 150 Mass.	
Macomber v. Doane, 2 Allen, 541.....	740	382, 5 L. R. A. 702, 23 N. E. 100	164
Macon v. Harris, 75 Ga. 772.....	762, 764	Melody v. Reab, 4 Mass. 471.....	592
McShane v. Main, 62 N. H. 4.....	232	Memphis v. Memphis Water Co. 8 Baxt.	
McWilliams v. Myers, 10 Iowa, 325.....	135	590.....	280
Maenhaut v. New Orleans, 2 Woods, 108,		Memphis Bell Teleph. Co. v. Hunt, 16 Lea,	
Fed. Cas. No. 8,989.....	465	456, 57 Am. Rep. 237, 1 S. W.	
Magee v. Overshiner, 64 Am. P. R. 358, 150		159.....	499
Ind. 127, 40 L. R. A. 370, 49 N.		Menard v. Bay City, 114 Mich. 540, 72 N.	
E. 951, 65 Am. St. Rep. 358.....	499	W. 231.....	506, 507
Maggi v. Cutta, 123 Mass. 535.....	438	Mercein v. People ex rel. Barry, 25 Wend.	
Magoun v. Illinois Trust & Sav. Bank, 170		80, 35 Am. Dec. 653.....	678
U. S. 283, 42 L. ed. 1037, 18		Merchants' Nat. Bank v. Bangs, 102 Mass.	
Sup. Ct. Rep. 594.....	527	291.....	127
Magrath v. Magrath, 103 Mass. 577.....	752	v. Goodman, 109 Pa. 422, 58 Am.	
Magruder v. Marshall, 1 Blackf. 333.....	523	Rep. 728, 2 Atl. 687.....	272
Mahoney v. Dore, 155 Mass. 513, 80 N. E.		Meriwether v. Garrett, 102 U. S. 472, 26 L.	
366.....	164, 165, 180	ed. 197.....	448
v. Metropolitan R. Co. 104 Mass. 73	160	Merkle v. Bennington Twp. 58 Mich. 153,	
Maia v. Eastern State Hospital, 97 Va. 507,		55 Am. Rep. 666, 24 N. W. 776.....	500, 508
34 S. E. 617.....	299	Merony v. McIntyre, 82 N. C. 103.....	37
Malier, Ex parte, 103 Cal. 476, 37 Pac. 402		Merriam v. United States, 107 U. S. 437, 27	
.....	155, 634	L. ed. 531, 2 Sup. Ct. Rep. 536	432
Maine C. R. Co. v. Maine, 96 U. S. 499, 24		Merrill v. Hampden, 26 Me. 234.....	754
L. ed. 836.....	343	v. Kalamasoo, 35 Mich. 214.....	108
Mairs v. Manhattan Real Estate Asso. 89		Mersey Steel & Iron Co. v. Naylor, L. R. 9	
N. Y. 498.....	719	App. Cas. 435.....	390
Malcomson v. Wappoo Mills, 85 Fed. Rep.		Mesterman v. Home Mut. Ins. Co. 5 Wash.	
907.....	546	524, 32 Pac. 453.....	205
Manchester v. Guardian Assur. Co. 151 N.		Metropolitan Bd. of Works v. McCarthy,	
Y. 88, 45 N. E. 381.....	645	L. R. 7 H. L. 256.....	759
Mangus v. McClelland, 93 Va. 786, 22 S.		Metropolitan City R. Co. v. Chicago West	
E. 364.....	580	Div. 8, Co. 87 Ill. 317.....	804
Manistee v. Harley, 79 Mich. 238, 44 N. W.		Metropolitan Sav. Bank v. Manion, 87 Md.	
603.....	91	68, 39 Atl. 90.....	130
Mankato v. Fowler, 32 Minn. 364, 20 N. W.		Meyberg v. Jacobs, 40 Mo. App. 128.....	613
361.....	527	Meyers v. Birch, 59 N. J. L. 238, 36 Atl.	
Manly v. State, 7 Md. 135.....	220	95.....	149
Manly Mfg. Co. v. Broadbudd, 94 Va. 547, 27		Miller, Ex parte, 49 Ark. 18, 8 S. W. 883.	696
S. E. 438.....	285	v. Dunn, 72 Cal. 462, 14 Pac. 27.	229
Mann v. Roberts, 11 Lea, 57.....	277, 278	v. Hartford F. Ins. Co. 70 Iowa, 704,	
Manning v. Lowell, 130 Mass. 21.....	314	29 N. W. 411.....	707
Manning's Case, 84 Mo. 661.....	565	v. Miller, 91 N. Y. 315, 43 Am. Rep.	
Manouvrier, Re, 16 La. Ann. 257.....	677	669.....	613
Marbury v. Madison, 1 Cranch, 137, 2 L. ed.		v. Pancoast, 29 N. J. L. 250.....	408
60.....	520, 523	v. Pennoyer, 23 Or. 364, 31 Pac. 830	828
Marine Bank v. Fulton County Bank, 2		v. Texas, 158 U. S. 535, 38 L. ed.	
Wall. 252, 17 L. ed. 785.....	266	812, 14 Sup. Ct. Rep. 874.....	156
Marion & M. R. Co. v. Champlin, 37 Kan.		v. Travelers' Ins. Co. 39 Minn. 550,	
682, 16 Pac. 222.....	70	40 N. W. 839.....	651
Marr v. Barrett, 41 Me. 403.....	605	v. Zuffall, 113 Pa. 317, 6 Atl. 350.....	640
Marsh v. Clark County Supers. 42 Wia. 502		Milllet v. People, 117 Ill. 294, 57 Am. Rep.	
70.....	523	869, 7 N. E. 631.....	64, 76, 343, 375
Marshall v. Donovan, 10 Bush. 681.....	523	Milliken v. Pratt, 125 Mass. 374.....	612
v. Livingston Nat. Bank, 11 Mont.		Mills v. Rebstock, 29 Minn. 380, 13 N. W.	
351, 28 Pac. 312.....	405	162.....	684
v. Sherman, 148 N. Y. 9, 34 L. R.		Minneapolis & St. L. R. Co. v. Emmons, 149	
A. 757, 42 N. E. 419.....	730	U. S. 364, 37 L. ed. 769, 13 Sup.	
Marston v. Stickney, 58 N. H. 609.....	230	Ct. Rep. 870.....	592
Marvin v. Brewster Iron Min. Co. 55 N. Y.		Minneapolis Baseball Co. v. City Bank, 66	
538, 14 Am. Rep. 322.....	720	Minn. 441, 38 L. R. A. 415, 69	
Mason v. Ashland, 98 Wis. 540, 74 N. W.		N. W. 331.....	621
357.....	695	Minneapolis Mill Co. v. Goodnow, 40 Minn.	
Massingill v. Downs, 7 How. 760, 12 L. ed.		497, 4 L. R. A. 202, 42 N. W.	
903.....	475	356.....	430, 432
Mastin v. Halley, 61 Mo. 106.....	386	Minnesota Lumber Co. v. Whitebreast Coal	
Masury v. Southworth, 9 Ohio St. 340 410,		Co. 160 Ill. 85, 31 L. R. A. 529,	
411.....	749	43 N. E. 774.....	430, 432
Matheson v. Hearin, 29 Ala. 210.....		Minnesota Thresher Mfg. Co. v. Langdon,	
Mathews v. St. Louis & S. F. R. Co. 121 Mo.		44 Minn. 37, 46 N. W. 310.....	621
298, 25 L. R. A. 161, 24 S. W.		Missouri, K. & T. R. Co. v. Medaris, 60 Kan.	
591.....	85	151, 55 Pac. 875.....	371, 378, 380
Matt v. Iowa Mut. Aid Asso. 81 Iowa, 135,		Missouri P. R. Co. v. Behee, 2 Tex. Civ.	
46 N. W. 857.....	707	App. 107, 21 S. W. 384.....	485
Matthews v. Albert, 24 Md. 535.....	620	v. Mackey, 127 U. S. 203, 32 L. ed.	
v. Hamilton Powder Co. 14 Ont. App.		107, 8 Sup. Ct. Rep. 1161.....	340
Rep. 261.....	115	Mitchell v. Brown, 6 Coldw. 505.....	749
Mauran v. Smith, 8 R. I. 192, 5 Am. Rep.		v. Rochester R. Co. 151 N. Y. 107,	
564.....	623	84 L. R. A. 781, 45 N. E. 354.....	326
Maxwell v. Newbold, 18 How. 511, 15 L. ed.		v. Seipel, 53 Md. 262.....	80
506.....	156	Mobile v. Watson, 116 U. S. 289, 20 L. ed.	
v. People, 158 Ill. 248, 41 N. E. 995	734	620, 6 Sup. Ct. Rep. 398.....	465
May v. Hoover, 112 Ind. 455, 14 N. E. 472	633	Mobile Mut. Ins. Co. v. Cleveland, 76 Ala.	
Maynard v. Hill, 125 U. S. 190, 31 L. ed.		321.....	522
654, 8 Sup. Ct. Rep. 723.....	387	Moffatt v. Smith, 4 N. Y. 126.....	151
Meacham v. Sternes, 9 Paige, 398.....	723	Montana Union R. Co. v. Langlois, 9 Mont.	
Medbury v. Watrous, 7 Hill, 110.....	308	419, 8 L. R. A. 753, 24 Pac. 209	
Medina Twp. v. Perkins, 48 Mich. 71, 11 N.		535, 536
W. 811.....	501, 508, 509, 510,	Montgomery v. Bayless, 90 Ala. 342, 11 So.	
Meek v. Bearden, 5 Yerg. 467.....	269	108.....	613
Meese v. Fond du Lac, 48 Wis. 323, 14 N.		Moor v. Walker, 40 Iowa, 164.....	134
W. 406.....	694		
Meldrum v. Snow, 9 Pick. 441, 20 Am. Dec.			
489.....	607		
Mellen v. Hamilton F. Ins. Co. 5 Duer, 101	456		
47 L. R. A.			

Moody v. Burton, 27 Me. 427, 46 Am. Dec. 612.....	440	New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 3 So. 533.....	92
Moor v. Denn ex dem. Mellor, 2 Bos. & P. 247.....	230	New Salem v. Eagle Mill Co. 138 Mass. 8.....	488
Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 375.....	678	Newsome v. Pryor, 7 Wheat. 7, 5 L. ed. 882	232
v. Kenockee Twp. 75 Mich. 332, 4 L. R. A. 555, 42 N. W. 944.....	511	Newton v. Tolles, 66 N. H. 136, 9 L. R. A. 50, 19 Atl. 1092.....	268, 269
v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.....	156	New York v. Dry Dock, E. B. & B. R. Co. 28 Am. St. Rep. 614, note, 133 N. Y. 104, 30 N. E. 563.....	281
v. State Ins. Co. 72 Iowa, 414, 84 N. W. 183.....	714	v. Hamilton F. Ins. Co. 39 N. Y. 45, 100 Am. Dec. 400.....	707
More v. New York Bowery F. Ins. Co. 130 N. Y. 537, 29 N. E. 757.....	644	New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 280, 14 Sup. Ct. Rep. 437.....	376
Morgan v. Des Moines & St. L. R. Co. 64 Iowa, 583, 52 Am. Rep. 462, 21 N. W. 96.....	776	New York Assn. for Protection of Game v. Durham, 10 Jones & S. 306.....	155
Morris v. Niles, 12 Abb. Fr. 103.....	151	New York C. & H. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859.....	536
v. Pugh, 3 Burr. 1241.....	237	Nicholls v. Boston, 98 Mass. 43, 98 Am. Dec. 132, note, 136.....	488
Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457.....	488	Nichols v. Dunphy, 58 Cal. 605.....	468
Morrison v. Koch, 32 Wis. 254.....	440	v. Weaver, 7 Kan. 373.....	358
v. Wisconsin Odd Fellows Mut. L. Ins. Co. 59 Wis. 162, 18 N. W. 13.....	684	Nilson v. Morse, 52 Wis. 240, 9 N. W. 1.....	481
Morse v. Morse, 58 N. H. 891.....	282	Nixon v. Brown, 57 N. H. 34.....	607
v. Richmond, 41 Vt. 435, 98 Am. Dec. 600.....	755	Noble v. Richmond, 81 Gratt. 278, 31 Am. Rep. 726.....	578
v. Woodworth, 155 Mass. 238, 27 N. E. 1010, 29 N. E. 525.....	423	Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444.....	527, 528
Morton v. People, 47 Ill. 468.....	784	Norcross v. Griffiths, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606.....	228
Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114.....	415	v. Thoma, 51 Me. 503, 81 Am. Dec. 588.....	754
v. Wallace, 7 Lea. 413.....	269	Norfolk & W. R. Co. v. Com. 93 Va. 749, 84 L. R. A. 105, 24 S. E. 837.....	588
Moater v. Harmon, 29 Ohio St. 220.....	802	Norman v. Wells, 17 Wend. 136.....	152, 411
Mott v. Dawson, 46 Iowa, 538.....	225	Norris v. Hall, 18 Me. 332.....	135
Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.....	704	v. State, 25 Ohio St. 217, 18 Am. Rep. 291.....	736
Mowry v. Chaney, 43 Iowa, 609.....	694	v. Wrenschall, 34 Md. 492.....	621
Moyer v. Van de Vanter, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60.....	852, 853, 856, 857	North & West Branch R. Co. v. Swank, 105 Pa. 555.....	787
Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 297.....	75, 367	North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315.....	415
Mullery v. Hamilton, 71 Ga. 720, 51 Am. Rep. 288.....	550	North Brookfield v. Warren, 16 Gray 171.....	550
Murch v. Thomas Wilson's Sons & Co. 168 Mass. 408, 47 N. E. 111.....	177	North Milwaukee, Re, 93 Wis. 616, 33 L. R. A. 638, 67 N. W. 1033.....	444
Murdock v. Franklin Ins. Co. 38 W. Va. 407, 7 L. R. A. 572, 10 S. E. 777.....	707	Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.....	58
Murphy v. Smith, 19 C. B. N. S. 361.....	116	Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121	524
Murray v. Ballou, 1 Johns. Ch. 576.....	277	v. Volentine, 14 Vt. 259, 39 Am. Dec. 220.....	488
Myers v. Burns, 33 Barb. 401.....	152	Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708.....	91
Mygatt v. Goelchins, 20 Ga. 358.....	762, 763	Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.....	158
Myrick v. LaCrosse, 17 Wis. 442.....	688	Notley v. Buck, 8 Barn. & C. 160.....	741
		Nugent v. Mississippi Levee Comrs. 58 Miss. 197.....	579
N.			
Nash v. Craig, 134 Mo. 347, 35 S. W. 1001	822	O.	
v. Towne, 5 Wall. 689, 18 L. ed. 527	431	Oberdorfer v. Philadelphia & R. R. Co. 149 Pa. 6, 27 Atl. 804.....	789
Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. Rep. 76.....	636	O'Brien v. McGlinchy, 68 Me. 557.....	57
Nathan v. Charlotte Street R. Co. 118 N. C. 1066, 24 S. E. 511.....	37	v. Pennsylvania S. Valley R. Co. 119 Pa. 184, 13 Atl. 74.....	787
Nebraska Teleph. Co. v. State ex rel. Yelser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171.....	01	O'Connor v. Hamilton Bridge Co. 25 Ont. Rep. 12.....	115
Nehring v. McMurray, 45 S. W. 1032.....	550	Ogden v. Ogden, 1 Bland. Ch. 284.....	386
Nelms v. Kennon, 88 Ala. 329, 6 So. 744.....	746	Ogle v. Koerner, 140 Ill. 170, 29 N. E. 563	744, 749
Nelson v. Edwards, 55 Tex. 389.....	522	Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89.....	535, 536
Nevill v. Fine Arts & G. Ins. Co. [1895] 2 Q. B. 156.....	485	Oliver v. Eaton, 7 Mich. 108.....	407
New Albany & S. R. Co. v. Grooms, 9 Ind. 243.....	95	Olmstead v. Camp, 33 Conn. 551, 89 Am. Dec. 221.....	317
Newark Mach. Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L. R. A. 763, 35 N. E. 1060.....	644, 645	Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295.....	778
Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769.....	237	Omaha & N. P. R. Co. v. Janeczek, 30 Neb. 276, 46 N. W. 478.....	778
New Hampshire Bank v. Willard, 10 N. H. 210.....	230	O'Maley v. South Boston Gaslight Co. 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1110.....	177
New Jersey S. B. Co. v. Brockett, 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1039.....	122	Opinion of Justices, 1 Met. 580.....	887
Newman v. Avondale, 31 Ohio L. J. 123.....	91	197 Mass. 604, 115 Mass. 602.....	95
Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54.....	231	Opinion of Justices in House Bill No. 1,230, 163 Mass. 590, 28 L. R. A. 344, 40 N. E. 713.....	55
New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521.....	448		
47 L. R. A.			

- Oppenheimer v. Guckenheimer, 39 Fla. 617, 23 So. 9..... 613
 O'Reilly v. London Assur. Corp. 101 N. Y. 575, 5 N. E. 568..... 644
 Orme v. Richmond, 79 Va. 89..... 578
 Osborne v. London & N. W. R. Co. L. R. 21 Q. B. Div. 220..... 181
 Otis v. Gross, 96 Ill. 612..... 267
 v. McMillan, 70 Ala. 59..... 748
 Ottawa County Commr. v. Nelson, 19 Kan. 234, 27 Am. Rep. 101..... 70
 Overseers of Poor v. Bank of Virginia, 2 Gratt. 544, 44 Am. Dec. 399..... 266
 Overstreet v. Dunlap, 56 Ill. App. 486..... 424
 v. Phillips, 1 Litt. (Ky.) 123..... 288
 Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143..... 497
 v. Kilpatrick, 96 Ala. 421, 11 So. 476..... 749, 750
 Owens v. Patteson, 6 B. Mon. 489, 44 Am. Dec. 780..... 278
 Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709..... 584
- P.
- Pack v. New York, 8 N. Y. 222..... 720
 Page v. Carpenter, 10 N. H. 77..... 238
 v. East, 54 Me. 319..... 151
 v. Kuykendall, 161 Ill. 319, 32 L. R. A. 656, 43 N. E. 1114..... 828
 v. Parker, 48 N. H. 363, 80 Am. Dec. 172..... 441
 Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371..... 269
 Palmer v. Andover, 2 Cush. 600..... 482
 v. Tingle, 55 Ohio St. 423, 45 N. E. 313..... 57
 Palmer's Case, 5 Coke, 24..... 281
 Palmeter v. Wagner, 11 Alb. L. J. 149..... 287
 Papworth v. Fitzgerald, 106 Ga. 378, 32 S. E. 363..... 368
 Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632..... 236
 v. Orr, 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002..... 828
 v. Roswald, 78 Ala. 526..... 612
 v. Shackelford, 61 Mo. 68..... 640
 Parmentier v. Pater, 18 Or. 121, 9 Pac. 59..... 424
 Farmer v. Farmer, 74 Ala. 285..... 743, 746, 747
 Farmley v. Healy, 7 S. D. 401, 64 N. W. 186..... 838, 840
 Parvin v. Wimberg, 130 Ind. 561, 15 L. R. A. 775, 30 N. E. 790..... 856
 Pasadena v. Stimson, 91 Cal. 248, 27 Pac. 604..... 340, 343
 Paterson v. Tash, 2 Strange, 1178..... 605
 v. Wallace, 1 Macq. H. L. Cas. 748..... 113
 Patrick v. People, 132 Ill. 529, 24 N. E. 619 734
 Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115..... 61
 v. Pennsylvania Reform School, 92 Pa. 220..... 285
 v. People ex rel. Allen, 65 Ill. App. loc. cit. 655..... 555
 v. Wright, 64 Wis. 289, 25 N. W. 10..... 440
 Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357..... 417
 Paulk v. Sycamore, 104 Ga. 728, 31 S. E. 200..... 368
 Pause v. Atlanta, 98 Ga. 98, 26 S. E. 489..... 758-761, 779
 Peabody v. Boston School Committee, 115 Mass. 383..... 623
 v. Landon, 61 Vt. 318, 17 Atl. 781..... 408
 Pearce v. Atwood, 13 Mass. 324..... 415
 Pearl v. Hensborough, 9 Humph. 426..... 613
 Pearson v. Portland, 69 Me. 278, 31 Am. Rep. 270..... 375
 Pease v. Howard, 14 Johns. 479..... 462
 Peck v. Parchen, 52 Iowa 46, 2 N. W. 597..... 135
 Peel v. Atlanta, 85 Ga. 188, 8 L. R. A. 787, 11 S. E. 582..... 758, 759, 760, 779
 Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737..... 340, 373
 Peninsular R. Co. v. Howard, 20 Mich. 18..... 415
 Penniman v. Winner, 54 Md. 135..... 616
 Pennsylvania Co. v. Toomey, 91 Pa. 256..... 789
 Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 9 Atl. 871..... 759, 765, 776
 47 L. R. A.
- Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 13 Atl. 600..... 759, 761, 765, 776, 777
 v. Miller, 112 Pa. 34, 3 Atl. 780..... 786
 v. Stern, 119 Pa. 29, 12 Atl. 756..... 127
 Penruddock's Case, 5 Coke, 100b..... 130, 488
 Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708..... 107
 People v. Armstrong, 16 Am. St. Rep. 584, note, 73 Mich. 288, 2 L. R. A. 721, 41 N. W. 275..... 281
 v. Bristol, 35 Mich. 29..... 408
 v. Budd, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670..... 62, 65
 v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735..... 772
 v. Eaton, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145..... 107
 v. Gillson, 109 N. Y. 389, 17 N. E. 343..... 57
 v. Hastings, 29 Cal. 449..... 70
 v. Hulbert, 71 Cal. 72, 12 Pac. 43..... 464
 v. Jackson & M. Pl. Road Co. 9 Mich. 285..... 57
 v. Kirsch, 67 Mich. 539, 35 N. W. 157..... 107
 v. Machen, 73 Mich. 27, 40 N. W. 925 109
 v. Mann, 113 Cal. 76, 45 Pac. 182..... 111
 v. Murray, 14 Cal. 159..... 109, 111
 v. People's Ins. Exchange, 126 Ill. 466, 2 L. R. A. 340, 18 N. E. 774..... 456, 457
 v. Rensselaer & S. R. Co. 15 Wend. 113..... 523
 v. Stites, 75 Cal. 570, 17 Pac. 693..... 111
 v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339..... 634
 v. Truckee Lumber Co. 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374..... 634
 v. Vanderbilt, 26 N. Y. 287..... 318, 635
 v. Warren, 77 Hun. 120, 28 N. Y. Supp. 303..... 383
 People ex rel. Nickerson v. Anonymous, 19 Wend. 16..... 679
 Warren v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473..... 362
 Hunt v. Chicago & A. R. Co. 130 Ill. 175, 22 N. E. 857..... 572
 Trainer v. Cooper, 8 How. Fr. 294..... 678
 Dobbs v. Dean, 3 Wend. 438..... 95
 Eicks Water Co. v. Elk River Mill & Lumber Co. 107 Cal. 219, 40 Pac. 486..... 684
 Demarest v. Fairchild, 67 N. Y. 334..... 623
 Royce v. Goodwin, 22 Mich. 496..... 101
 Hatzel v. Hall, 80 N. Y. 117..... 623
 Grinnell v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 51 N. E. 596, 8 N. E. 788..... 446, 805
 Bardill v. Holtz, 92 Ill. 428..... 804, 805
 Graham v. Inglis, 161 Ill. 256, 43 N. E. 1103..... 805
 Hatch v. Lake Shore & M. S. R. Co. 11 Hun. 1..... 213
 Crowell v. Lawrence, 36 Barb. 177..... 521
 Hughes v. May, 3 Mich. 610..... 95
 Barry v. Mercein, 3 Hill, 390..... 679
 Dunham v. Morgan, 90 Ill. 558..... 805
 Nichols v. Onondaga County Canvasers, 129 N. Y. 448, 14 L. R. A. 624, 29 N. E. 327..... 857
 Livingston v. Pacheco, 29 Cal. 210..... 211
 Tappan v. Porter, 1 Duer, 709..... 678
 Keeler v. Robertson, 27 Mich. 118..... 554
 Atty. Gen. v. Salomon, 54 Ill. 39..... 523
 Ferguson v. San Francisco City & County Supers. 30 Cal. 595..... 211
 Sherwood v. State Bd. of Canvasers, 129 N. Y. 360, 14 L. R. A. 646, 29 N. E. 845..... 623
 Evans v. Sutherland, 41 Mich. 177, 1 N. W. 927..... 554
 Bishop v. Walker, 9 Mich. 328..... 213
 Goring v. Wappingers Falls, 144 N. Y. 616, 35 N. E. 641..... 851
 Tyroler v. Warden of City Prison, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006..... 66, 375
 Wilcox v. Wilcox, 22 Barb. 187..... 678
 Klokke v. Wright, 70 Ill. 388..... 377
 People use of Sexton v. Seelye, 146 Ill. 189, 32 N. E. 458..... 800

- People's Gas Co. v. Tyler, 181 Ind. 281, 16 L. R. A. 443, 31 N. E. 60.... 632, 633, 636
 People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679..... 406
 Peoria M. & F. Ins. Co. v. Whitehall, 25 Ill. 408..... 714
 Peppinger v. Low, 6 N. J. L. 384..... 389
 Perdue v. Ellis, 18 Ga. 586..... 367
 Perkins v. Carraway, 59 Miss. 222..... 826
 v. Eaton, 64 N. H. 559, 10 Atl. 704. 231
 v. Fayette, 68 Me. 152..... 482, 755
 v. Mathen, 40 N. H. 107..... 229
 Perkins' Case, 139 Mo. 106, 40 S. W. 650. 565
 Petersburg v. Applegarth, 28 Gratt. 843, 26 Am. Rep. 357..... 576
 Petree v. Bell, 2 Bush, 58..... 278
 Pettee v. Hawes, 13 Pick. 323..... 235
 Pettis v. Johnson, 56 Ind. 139..... 488
 Pfaff v. Golden, 126 Mass. 402..... 151
 Pfefferle v. Lyon County Comrs. 30 Kan. 432, 18 Pac. 506..... 383
 Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140..... 155, 156
 Philadelphia & R. Co. v. Smith, 28 U. S. App. 134, 64 Fed. Rep. 679, 12 C. C. A. 384, 27 L. R. A. 181..... 130
 Phillips v. Denver, 41 Am. St. Rep. 230, note, 19 Colo. 179, 34 Pac. 902. 281
 v. Goff, L. R. 17 Q. B. Div. 805..... 828
 v. Missouri P. R. Co. 86 Mo. 540..... 397
 v. Southwestern R. Co. L. R. 4 Q. B. Div. 406..... 40
 v. University of Virginia, 97 Va. 472, 34 S. E. 66..... 578
 Philpott v. Wallet, 3 Lev. 65..... 386
 Phoenix Ins. Co. v. Ryland, 69 Md. 437, 1 L. R. A. 548, 16 Atl. 109..... 645
 Pickard v. Collins, 23 Barb. 444..... 655
 Pickering v. Busk, 15 East, 38..... 606
 Pickett v. Condon, 18 Md. 412..... 130
 v. Wilmington & W. R. Co. 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264..... 37
 Pierce v. German Sav. & L. Soc. 72 Cal. 180, 13 Pac. 478..... 488
 v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418..... 496
 v. New Bedford, 129 Mass. 534, 37 Am. Rep. 387..... 301
 Pierson v. Glean, 14 N. J. L. 86, 25 Am. Dec. 497, note, p. 499..... 488
 Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91, note, p. 94..... 488
 Pilz v. Killingsworth, 20 Or. 482, 26 Pac. 305..... 274
 Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72..... 718, 719
 Place v. Minister, 65 N. Y. 89..... 441
 Plum v. Pullman Sleeping Car Co. 18 Alb. L. J. 221..... 287
 Plumb v. Fluit, 2 Anstr. 438..... 509
 Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333, note, p. 330..... 130, 458
 v. Prescott, 43 N. H. 277..... 230
 Polndexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903. 524
 Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 876..... 729
 v. Malne C. R. Co. 87 Me. 51, 32 Atl. 735..... 87
 Polydore v. Prince, 1 Ware, 402, Fed. Cas. No. 11,257..... 612
 Port v. Jackson, 17 Johns. 239..... 151
 Port of Mobile v. Louisville & N. R. Co. 84 Ala. 115, 4 So. 106..... 633
 Posey v. Pressley, 60 Ala. 249..... 746
 Post v. Aina Ins. Co. 43 Barb. 361..... 643
 v. Buffalo, P. & W. R. Co. 108 Pa. 585..... 86
 Potter v. Dennison, 10 Ill. 590..... 605
 v. Phoenix Ins. Co. 63 Fed. Rep. 384
 Potts v. Pennsylvania S. Valley R. Co. 119 Pa. 278, 13 Atl. 291..... 785
 Powell v. Brunswick County Supers. 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166..... 156
 v. Pennsylvania, 127 U. S. 678, 683, 32 L. ed. 253, 8 Sup. Ct. Rep. 902, 1257..... 61
 Powers v. Andrews, 84 Ala. 289, 4 So. 263..... 746, 748
 47 L. R. A.
- Prather v. Lexington, 13 B. Mon. 560, 56 Am. Dec. 585..... 593
 Pratt v. Bowman, 37 W. Va. 715, 17 S. E. 210..... 268, 209
 v. Chicago, R. I. & P. R. Co. 107 Iowa, 287, 77 N. W. 1064..... 482
 v. Duncan, 36 Minn. 545, 32 N. W. 709..... 274
 Prentiss v. Wood, 132 Mass. 488..... 488
 Presbrey v. Old Colony & N. R. Co. 103 Mass. 1..... 759
 Price v. Deal, 90 N. C. 290..... 37
 v. Lush, 10 Mont. 61, 9 L. R. A. 467, 24 Pac. 749..... 849
 Proprietors of Claremont v. Carlton, 2 N. H. 369..... 228
 Proprietors of Cornish Bridge v. Richardson, 8 N. H. 207..... 229
 Proprietors of Locks & Canals v. Lowell, 7 Gray, 223..... 813
 Provost v. Calder, 2 Wend. 517..... 281
 Pryor v. Petre (1894) 2 Ch. 11..... 228
 Furcell v. St. Paul City R. Co. 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034..... 826
 Purple v. Farrington, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543..... 405
 Puth v. Zimbleman, 90 Iowa, 647, 68 N. W. 855..... 483
 Pyne v. Wood, 145 Mass. 558, 14 N. E. 775 308
- Q.
- Queen v. Cookham Union, L. R. 9 Q. B. Div. 527..... 752
 v. McCann, 28 U. C. Q. B. 514.. 109, 111
 v. Train, 2 Best & S. 640..... 764
 Quincy v. Bull, 106 Ill. 337..... 92
 Quinn v. Capital Ins. Co. 71 Iowa, 615, 33 N. W. 130..... 707
- R.
- Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357..... 719
 Rafolovits v. American Tobacco Co. 73 Hun. 87, 25 N. Y. Supp. 1036.. 429
 Ragon v. Howard, 97 Tenn. 334, 37 S. W. 136..... 273
 Rahrer Case, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 885..... 476, 478
 Railroad Comrs. v. Portland & O. Cent. R. Co. 68 Me. 269, 18 Am. Rep. 208..... 572
 Railroad Tax Cases, 13 Fed. Rep. 743. 340, 344
 Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364..... 64
 Randall v. Jacksonville Street R. Co. 19 Fla. 409..... 764
 v. Randall, 59 Me. 338..... 233
 v. Southfield Twp. 116 Mich. 501, 74 N. W. 716..... 507, 512
 Ranger v. Champion Cotton-Press Co. 51 Fed. Rep. 61..... 214
 Ray v. Manchester, 46 N. H. 59, 88 Am. Dec. 192..... 302
 v. Sellers, 1 Duv. 254..... 488
 Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047..... 91, 322
 Reed v. Cosden, 1 Clarke & H. Cong. Elect. Cas. 384..... 555, 557
 v. Crosthwait, 6 Iowa, 219, 71 Am. Dec. 406..... 135
 Reg. v. Bagley (1870) Macas. (N. Z.) 836. 828
 v. Nicholls, 2 Cox, C. C. 182..... 735
 v. Roberts, 33 Eng. L. & Eq. 553..... 110
 v. Taylor, 1 Post. & F. 512..... 109
 Reggel, Ex parte, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148..... 568
 Reinhart v. Fire Asso. of Philadelphia, 93 Wis. 452, 67 N. W. 701..... 695
 Renfrow, Ex parte, 112 Mo. 591, 20 S. W. 682..... 397
 Renner v. Canfield, 36 Minn. 90, 30 N. W. 435..... 326
 Rex v. Medley, 6 Car. & P. 292..... 116
 v. Sutton, 2 Strange, 1074..... 110
 Reynolds v. Johnson, 54 Ark. 449, 16 S. W. 124..... 405

Keynolds v. New York Bldg. Loan Bkg. Co. 158 N. Y. 694, 53 N. E. 1131.....	258	Ruff v. Phillips, 50 Ga. 133.....	762
v. United States, 98 U. S. 145, 25 L. ed. 244.....	454	Ruggles v. American Cent. Ins. Co. 114 N. Y. 415, 21 N. E. 1000.....	645
Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233.....	800	Ruhe v. Buck, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412.....	612
Rice v. Boston Port & Seaman's Aid Soc. 56 N. H. 191.....	243	Runner v. Dwiggins, 147 Ind. 238, 36 L. R. A. 645, 46 N. E. 580.....	621
Richards v. Bickley, 13 Serg. & R. 395.....	462	Rutland Marble Co. v. Ripley, 10 Wall. 356, 19 L. ed. 901.....	336
Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24.....	242, 243	Rutledge v. Crawford, 91 Cal. 533, 13 L. R. A. 761, 27 Pac. 779.....	855
Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788.....	729	S.	
v. Long, 17 Gratt. 375, 94 Am. Dec. 461.....	299, 578	Saginaw v. Swift Electric Light Co. 113 Mich. 660, 72 N. W. 8.....	92
v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778.....	92	Sahlen v. Bank of Leno, 90 Tenn. 221, 16 S. W. 373.....	273
Richmond & D. R. Co. v. Childress, 82 Ga. 719, 3 L. R. A. 808, 9 S. E. 602	487	St. Andrews' Lutheran Church's Appeal, 67 Pa. 512.....	152
Ricket v. Metropolitan R. Co. L. R. 2 H. L. 175.....	759	St. Johns v. Charles, 105 Mass. 262.....	741
Rickett's Case, L. R. 2 H. L. 198.....	759	St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581.....	397, 492
Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386, 19 L. ed. 257.....	708, 714	St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883.....	343
Ridge v. Railroad Transfer Co. 56 Mo. App. 133.....	640	St. Louis, V. & T. H. R. Co. v. Washburn, 97 Ill. 253.....	411, 412
Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419	799	St. Patrick's Congregation v. Home Ins. Co. 101 Wis. 155, 76 N. W. 1125.....	695
Right v. Slidebotham, 2 Dougl. 759.....	242	St. Paul & P. B. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74.....	228
Rigney Case, 102 Ill. 64.....	759, 760, 777, 778	St. Paul Trust Co. v. Klitson, 62 Minn. 408, 65 N. W. 74.....	267
Ring v. Cohoes, 77 N. Y. 84, 33 Am. Rep. 574.....	482	St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258.....	718, 719
Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.....	55, 64, 374	Salem v. Maynes, 123 Mass. 372.....	316
Rittenhouse v. Wilmington Street R. Co. 120 N. C. 544, 26 S. E. 922.....	37	Salida v. McKinna, 16 Colo. 523, 27 Pac. 810.....	693
Rittler v. Smith, 70 Md. 265, 2 L. R. A. 844, 16 Atl. 890.....	617	Salisbury v. Great Northern R. Co. 5 C. B. N. S. 174.....	228
Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787.....	301	Salmon Falls Mfg. Co. v. Portsmouth Co. 46 N. H. 249.....	230
Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472.....	228	Saltus v. Everett, 20 Wend. 267, 32 Am. Rep. 541.....	607
Robb v. Carnegie Bros. 145 Pa. 324, 14 L. R. A. 829, 22 Atl. 649.....	772	San Antonio & A. P. R. Co. v. Wilson (Tex. App.) 19 S. W. 910.....	343
Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 In- ters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.....	586, 587	Sanborn v. Fireman's Ins. Co. 16 Gray, 448, 77 Am. Dec. 419.....	645
Roberts, Re, 3 Johns. Ch. 43.....	723, 724	v. Rice County Comrs. 9 Minn. 273, Gil. 258.....	527
v. Bonaparte, 73 Md. 191, 10 L. R. A. 689, 20 Atl. 918.....	389	v. Sanborn, 62 N. H. 631.....	243, 245
v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.....	568	Sanders v. Butler Comrs. 30 Ga. 679.....	367
v. Richmond & D. R. Co. 88 N. C. 560	37	Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220.	729
Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758.....	406	San Mateo County v. Southern Pacific R. Co. 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317.....	340
v. Franklin, 1 Humph. 156, 84 Am. Dec. 627.....	280	Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1182.....	340, 373
v. Queen, 87 Tenn. 445, 8 L. R. A. 214, 11 S. W. 38.....	612	v. Southern P. R. Co. 18 Fed. Rep. 410.....	576
Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239.....	94, 95, 98	Saul v. His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 312.....	612
Robison v. Rupert, 23 Pa. 523.....	39	Savage v. O'Neill, 44 N. Y. 298.....	407
Robson v. Mississippi River Logging Co. 43 Fed. Rep. 864, 61 Fed. Rep. 893	430, 432	Savannah & W. R. Co. v. Woodruff, 86 Ga. 98, 18 S. E. 156.....	764
Rocheleau v. Boyle, 11 Mont. 451, 28 Pac. 872.....	400	Sawyer, Re, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.....	397
Rochester v. Upman, 19 Minn. 108, Gil. 78	527	v. Colgan, 102 Cal. 283, 36 Pac. 580	466
Rochette v. Chicago, M. & St. P. R. Co. 32 Minn. 201, 20 N. W. 140.....	759, 775	v. Corse, 17 Gratt. 230, 99 Am. Dec. 445.....	290
Rock v. Denis, M. L. Rep. 4 Super. Ct. 358	328	v. Davis, 186 Mass. 239, 49 Am. Rep. 27.....	313
Roemer v. Striker, 142 N. Y. 134, 36 N. E. 808.....	720	v. Long, 86 Me. 541, 30 Atl. 111.....	408
Roof v. Stafford, 7 Cow. 182.....	329	Sayre v. Northwestern Turnp. Road, 10 Leigh, 454.....	578, 579
Rooney v. Sewall & D. Cordage Co. 161 Mass. 153, 36 N. E. 789.....	177	Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.....	156
Roosevelt, Re, 5 Redf. 601.....	723	v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.....	336
Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.....	613	Scanlon v. Suter, 158 Pa. 275, 27 Atl. 963..	789
v. Wood, 70 N. Y. 8.....	441	Seavey v. True, 53 N. H. 627.....	237
Roth v. State, 51 Ohio St. 209, 37 N. E. 259.....	155, 156	Schenectady & S. Pl. Road Co. v. Thatcher, 11 N. Y. 102.....	257
Rouse v. Harry, 55 Kan. 589, 40 Pac. 1007	378	Schomer v. Hekla Ins. Co. 50 Wis. 575, 7 N. W. 544.....	457
Rowell v. R. Co. 57 N. H. 182, 24 Am. Rep. 59.....	84, 85	Schroeder v. Keystone Ins. Co. 2 Phila. 286	705
Rude v. Nass, 79 Wis. 321, 48 N. W. 555.....	225	Schuchardt v. People ex rel. Hall, 99 Ill. 504, 39 Am. Rep. 34.....	95, 96
v. St. Louis, 93 Mo. 408, 6 S. W. 257	758, 759, 760, 777	Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342.....	807
Rudolph v. Dobson, 11 Montg. Co. L. Rep. 197.....	786		
v. Pennsylvania S. Valley R. Co. 166 Pa. 430, 31 Atl. 131.....	784		
47 L. R. A.			

Scott v. Lunt, 7 Pet. 596, 8 L. ed. 797....	151	Slinger v. Henneman, 38 Wis. 504. 444, 446, 449	
v. People, 141 Ill. 195, 30 N. E. 329	734	Sloane v. Southern California R. Co. 111	
v. Sebright, L. R. 12 Prob. Div. 21....	424	Cal. 668, 32 L. R. A. 193, 44	
v. Shepherd, 2 W. Bl. 892, 8 Wils.		Pac. 320	326
403	649	Slocum v. Bear Valley Irrig. Co. 122 Cal.	
Scranton Steel Co. v. Ward's Detroit & L.		555, 55 Pac. 408	345
S. Line, 40 Fed. Rep. 866	645	Sloggy v. Dillworth, 38 Minn. 179, 36 N. W.	
Scudder v. Union Nat. Bank, 91 U. S. 406,		451, 8 Am. St. Rep. 656, note,	
23 L. ed. 245	612	681	488
Seacord v. People, 121 Ill. 623, 13 N. E. 194	734	Smith v. Baker (1891) A. C. 325	
Searcy v. Hunter, 81 Tex. 646, 17 S. W. 372	329	115, 164, 169, 179	
Sears v. Sellow, 28 Iowa, 501	543	v. Birmingham & S. Gaslight Co. 1	
Second Nat. Bank v. Cummings, 89 Tenn.		Ad. & El. 526	597
609, 18 S. W. 115	271	v. Howard, 22 L. T. N. S. 130	114
Security F. Ins. Co. v. Kentucky Marine &		v. Janesville, 26 Wis. 291	444
F. Ins. Co. 7 Bush, 81, 3 Am.		v. Kennedy, 89 Ill. 485	274
Rep. 301	645	v. Knoxville, 3 Head, 245	281
Sedgwick v. Laffin, 10 Allen, 430	240	v. Ladd, 41 Me. 314	285
Sedgwick County Comrs. v. Bailey, 13 Kan.		v. McCarthy, 56 Pa. 359	523
600	371	v. Powers, 15 N. H. 546	283
Selbert v. Lewis, 122 U. S. 284, 30 L. ed.		v. Smith Bros. 87 Iowa, 93, 54 N. W.	
1161, 7 Sup. Ct. Rep. 1190	465	73	405
Selleck v. Janesville, 100 Wis. 157, 41 L. R.		v. Strother, 68 Cal. 194, 8 Pac. 852	321
A. 563, 75 N. W. 975	694	Smyth v. Ames, 169 U. S. 466, 42 L. ed.	
Seassums v. Botta, 34 Tex. 335	524	819, 18 Sup. Ct. Rep. 418	322
Shackelford v. Hamilton, 93 Ky. 80, 15 L.		Snyder v. Albion, 113 Mich. 280, 71 N. W.	
R. A. 531, 19 S. W. 5	582	476	506, 512
Shaffer v. Union Min. Co. 55 Md. 74	340	Some v. Barwish, Cro. Jac. 231	468
Shanahan v. Madison, 57 Wis. 276, 15 N. W.		Sone v. Williams, 130 Mo. 530, 32 S. W.	
154	694	1016	815
Shank v. Butsch, 28 Ind. 19	696	South & North Ala. R. Co. v. Morris, 65 Ala.	
v. Glens Falls Ins. Co. 4 App. Div.		193	343
516, 40 N. Y. Supp. 14	645	South Bend Toy Mfg. Co. v. Dakota F. & M.	
Sharpless v. Philadelphia, 21 Pa. 160, 59		Ins. Co. 3 S. D. 205, 52 N. W.	
Am. Dec. 759	491	866	646
Shaver v. Pennsylvania Co. 71 Fed. Rep.		South Carolina R. Co. v. Steiner, 44 Ga.	
931	372	546	760, 774
Shaw v. Carfrey, 13 Allen, 462	641	South Covington & C. Street R. Co. v.	
Sheafe v. Wall, 30 Vt. 735	234	Berry, 40 Am. St. Rep. 161, note,	
Shelby v. Hearne, 6 Yerg. 512	152	93 Ky. 43, 15 L. R. A. 604,	
Sheldon v. Davidson, 85 Wis. 141, 55 N. W.		18 S. W. 1026	281
161	440	Southern Bell Teleph. & Teleg. Co. v. Rich-	
Shepherd v. Chelsea, 4 Allen, 113	302	mond, 78 Fed. Rep. 858	107
Sherburne v. Goodwin, 44 N. H. 271	280	Southern Exp. Co. v. Com. ex rel. Walker,	
Sherman v. Maine C. R. Co. 86 Me. 422, 30		92 Va. 59, 41 L. R. A. 436, 22	
Atl. 69	84	S. E. 809	584
v. Rawson, 102 Mass. 395	389	Southern P. R. Co. v. Orton, 6 Sawy. 157,	
Shields v. Thomas, 71 Miss. 280, 14 So. 84		32 Fed. Rep. 457, Fed. Cas. No.	
Shiras v. Olinger, 50 Iowa, 571, 32 Am.		13,188a	401, 492
Rep. 185	655	Southwick v. Southwick, 97 Mass. 329, 93	
Shoemaker v. United States, 147 U. S. 282,		Am. Dec. 95	752
37 L. ed. 170, 13 Sup. Ct. Rep.		Spade v. Lynn & B. R. Co. 172 Mass. 488,	
361	317	43 L. R. A. 882, 52 N. E. 747	
Short v. Bullion B. & C. Min. Co. (Utah)		v. Lynn & B. R. Co. 168 Mass. 285, 38	
45 L. R. A. 603, 57 Pac. 720	60	L. R. A. 512, 47 N. E. 88	324, 326
Shreveport v. Robinson, 51 La. Ann. 1314,		Spare v. Home Mut. Ins. Co. 9 Sawy. 142,	
26 So. 277	656	17 Fed. Rep. 568	707
Sigerson v. Cushing, 14 Wis. 527	431	Spaulding v. Arnold, 125 N. Y. 194, 26 N. E.	
Silsbee v. Webber, 171 Mass. 378, 50 N. E.		295	466
555	324	v. White, 173 Ill. 127, 50 N. E. 224	
Silsby v. Trotter, 29 N. J. Bq. 233	545	v. Winslow, 74 Me. 528	755
Silts v. Hawkeye Ins. Co. 71 Iowa, 710, 29		Speer v. Com. 23 Gratt. 935	594
N. W. 605	483	Spencer's Case, 5 Coke, 16	411
Silver Valley Min. Co. v. North Carolina		Spensley v. Valentine, 34 Wis. 154	227
Smelting Co. 122 N. C. 542, 29		Sperry v. Etheridge, 63 Iowa, 543, 19 N. W.	
S. E. 940	37	657	407
Simmons Creek Coal Co. v. Doran, 142 U.		Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80,	
S. 417, 35 L. ed. 1062, 12 Sup.		8 Sup. Ct. Rep. 21	156
Ct. Rep. 239	509	Spinks v. Davis, 32 Miss. 152	795
Simpson v. Blaisdell, 85 Me. 199, 27 Atl.		Spits's Case, 127 Mo. 248, 29 S. W. 1011 ..	565
101	283	Spoor v. Phillips, 27 Ala. 193	744
Sims v. Frankfort, 79 Ind. 448	488	Sprague v. Norway, 31 Cal. 173	229
Sinking Fund Cases, 99 U. S. 700, 25 L. ed.		Spring Valley Waterworks Co. v. Schottler,	
496	343	110 U. S. 347, 28 L. ed. 173, 4	
Sinks v. Reese, 10 Ohio St. 306, 2 Am. Rep.		Sup. Ct. Rep. 48	321
397	387	Spurgin v. Thompson, 37 Neb. 39, 55 N. W.	
Sinnet v. Bowman, 151 Ill. 146, 37 N. E.		297	853, 857
835	802	Stabler v. Com. 95 Pa. 318, 40 Am. Rep.	
Skinner v. Garnett Gold-Min. Co. 96 Fed.		653	109
Rep. 735	344	Stackpole v. Hallahan, 16 Mont. 40, 28 L. R.	
v. Walker, 98 Ky. 729, 34 S. W. 233		A. 502, 40 Pac. 80	850
268	269	Stadler Bros. v. Parmlee, 14 Iowa, 175 ..	134
Slack v. Lyon, 9 Pick. 62	836	Stair v. York Nat. Bank, 55 Pa. 364, 93	
v. Tucker, 23 Wall. 321, 23 L. ed.		Am. Dec. 759	266
143	605	Standard Life & Acci. Ins. Co. v. Davis, 59	
Slaughter v. Louisville, 89 Ky. 112, 8 S. W.		Kan. 523, 53 Pac. 856	651
917	70	Standard Oil Co. v. Triumph Ins. Co. 64 N.	
Slaughter-House Cases, 16 Wall. 26, 21 L.		Y. 85	456
ed. 394	61, 102	Stanley v. Epperson, 45 Tex. 645	640
Sleeper v. Laconia, 60 N. H. 201, 49 Am.		v. Safe Deposit & T. Co. 87 Md. 450,	
Rep. 311	228	40 Atl. 53	800
Slight v. Gutzlaff, 35 Wis. 675, 17 Am.		Staples v. Dickson, 88 Me. 362, 34 Atl. 168	754
Rep. 476	488		
47 L. R. A.			

Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770	281	State v. Wilson, 58 Pac. 981	879
Starr v. Jackson, 11 Mass. 519	640	v. York, 22 Mo. 462	897
v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919	454	ex rel. Ensworth v. Albin, 44 Mo. 346	623
State v. Abrisch, 41 Minn. 41, 42 N. W. 543	147	Bennett v. Barber, 5 Wyo. 56, 32 Pac. 28	849
v. Adams, 2 Stew. (Ala.) 231	554	Moody v. Barnes, 25 Fla. 298, 5 So. 722	522
v. Adams Express Co. 144 Ind. 549, 42 N. E. 483	631	Turner v. Bell, 91 Wis. 271, 64 N. W. 845	448
v. Amery, 12 R. I. 64	379	Martin v. Blenville Oil Works Co. 28 La. Ann. 204	213
v. Baker County, 24 Or. 141, 33 Pac. 530	462	Hope v. Board of Liquidation, 42 La. Ann. 647, 7 So. 760, 8 So. 577	520
v. Bannock, 53 Minn. 419, 55 N. W. 558	143	Brown v. Boden, 51 N. J. L. 114, 16 Atl. 58	553
v. Barrett, 27 Kan. 213	371	Ecuyer v. Burke, 33 La. Ann. 969	520
v. Berdatta, 73 Ind. 185, 38 Am. Rep. 117, note, 127	488	Circuit Attorney v. Cape Girardeau & S. L. R. Co. 48 Mo. 468	397
v. Byrd, 93 N. C. 624	696	Dakota Hall Asso. v. Carey, 2 N. D. 38, 49 N. W. 164	211
v. Canterbury, 28 N. H. 195	228	Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262	219
v. Cassidy, 22 Minn. 812, 21 Am. Rep. 765	527	Macaulay v. Clinton, 27 La. Ann. 429	522
v. Chicago & E. I. R. Co. 145 Ind. 229, 43 N. E. 226	631	Mentz v. Clinton, 28 La. Ann. 47	520
v. Conable, 81 Iowa, 60, 46 N. W. 739	225	New Orleans Republican Print Co. v. Clinton, 28 La. Ann. 72	520
v. Dulaney, 43 La. Ann. 500, 9 So. 481	656	Barry v. Connor, 86 Tex. 133, 23 S. W. 1103	853
v. Farrell, 23 Mo. App. 176	155, 156	Childs v. Copeland, 66 Minn. 315, 34 L. R. A. 777, 69 N. W. 27	446
v. Fifth Judicial Dist. Judge, 5 La. Ann. 756	522	Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182	634
v. Fluch (Minn.) 46 L. R. A. 437, 80 N. W. 856	527	Peters v. Davidson, 92 Tenn. 531, 20 L. R. A. 311, 22 S. W. 203	96, 99
v. Fire Creek Coal & C. Co. 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288	342	Lytile v. Douglas County Comrs. 18 Neb. 506, 26 N. W. 315	523
v. Garibaldi, 44 La. Ann. 814, 11 So. 36	656	McCausland v. Elk County Comrs. 61 Kan. —, 58 Pac. 959	383
v. Gilmanton, 9 N. H. 461	228	Atty. Gen. v. Fidelity & C. Ins. Co. 49 Ohio St. 440, 16 L. R. A. 611, 31 N. E. 658	798
v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285	373	Bell Teleph. Co. v. Flad, 28 Mo. App. 185	107
v. Hamilton, 47 Ohio St. 52, 23 N. E. 935	219	Braley v. Gay, 59 Minn. 6, 60 N. W. 676	848
v. Hartford & N. H. R. Co. 29 Conn. 538	572	Bloxham v. Gibbs, 13 Fla. 53	522
v. Holden, 14 Utah, 71, 87 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105	60, 61, 62	Davidson v. Gorman, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948	527
v. Hopkins (Iowa) 47 L. R. A. 223, 80 N. W. 1063	485	Hahn v. Gorton, 33 Minn. 845, 23 N. W. 529	108
v. House, 55 Iowa, 466, 8 N. W. 307	736	Richards v. Hammer, 42 N. J. L. 439	343
v. Howard, 66 Minn. 309, 34 L. R. A. 178, 68 N. W. 1096	147	Townsend v. Hill, 10 Neb. 58, 4 N. W. 514	523
v. Jarvis, 21 Iowa, 44	735	Warner v. Hoagland, 51 N. J. L. 62, 16 Atl. 166	446
v. Judy, 7 Mo. App. 524	156	Crow v. Hostetter, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270	96, 102
v. Julow, 128 Mo. 163, 20 L. R. A. 257, 31 S. W. 781	66, 375	Atchison, T. & S. F. R. Co. v. Jefferson County Comrs. 11 Kan. 66	211
v. Kuntz, 47 La. Ann. 107, 16 So. 651	656	Collins v. Jumel, 30 La. Ann. 863	520
v. Loomis, 115 Mo. 307, 21 L. R. A. 780, 22 S. W. 350	65, 343, 374	School Directors v. Jumel, 32 La. Ann. 60	522
v. Louisville, N. A. & C. R. Co. 86 Ind. 114	488	Atty. Gen. v. Kennon, 7 Ohio St. 546	805
v. Mahner, 43 La. Ann. 496, 9 So. 480	656	Adamson v. Lafayette County Ct. 41 Mo. 221	522
v. McGulre, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666	155	Doyle v. Laughlin, 53 Mo. App. 542	213
v. Marshall, 105 Iowa, 38, 74 N. W. 765	488	Harris v. Laughlin, 75 Mo. 147	397
v. Peel Splint Coal Co. 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000	60, 63, 65, 344, 380	Atty. Gen. v. Leavenworth County Comrs. 2 Kan. 61	70
v. Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379	631	Epler v. Lewis, 10 Ohio St. 128	522
v. Randolph, 1 Mo. App. 15	155, 156	Davis v. Lincoln County Comrs. 28 Nev. 262, 45 Pac. 982	466
v. Rich, 20 Mo. 393	897, 523	Tredway v. Lusk, 18 Mo. 333	564
v. Rodman, 58 Minn. 393, 59 N. W. 1098	632	Circuit Atty. v. McCann, 81 Mo. 479	564
v. Sarradat, 46 La. Ann. 703, 24 L. R. A. 548, 15 So. 87	656	Harris v. McCann, 88 Mo. loc. cit. 390	564
v. Scott, 98 Tenn. 254, 36 L. E. A. 401, 39 S. W. 1	417	Curtis v. McCullough, 3 Nev. 202	212
v. Searcy, 46 Mo. App. 421	897	Atty. Gen. v. McGovney, 92 Mo. loc. cit. 430, 3 S. W. 867	564
v. Shaeffer, 89 Mo. 271, 1 S. W. 293	736	Mahoney v. McKinnon, 8 Or. 493	553
v. Shawnee County Comrs. 28 Kan. 431	67, 383	Clifford v. McMullen, 46 Ind. 307	553
v. Shepard, 7 Conn. 54	735	Harvey v. Manning, 84 Mo. loc. cit. 663	564
v. Sholl, 58 Kan. 507, 49 Pac. 668	371	Morris v. Mason, 43 La. Ann. 647, 9 So. 776	521
v. Tamler, 19 Or. 528, 9 L. R. A. 553, 25 Pac. 71	155	Cannon v. May, 106 Mo. 488, 17 S. W. 660	397
v. Union Nat. Bank, 145 Ind. 537, 44 N. E. 585	631	Harrison v. Menaugh, 151 Ind. 260, 43 L. R. A. 408, 51 N. E. 117	491
v. Wiley, 109 Mo. 439, 10 S. W. 197	397		

Texarkana & Ft. S. R. Co. v. Bulgier (Tex. Civ. App.) 47 S. W. 1047.....	779	Tulare v. Hevren (Cal.) 58 Pac. 580.....	348
Texas & P. R. Co. v. Bigham , 90 Tex. 223, 38 S. W. 162.....	326	Tunno v. Robert , 16 Fla. 738.....	613
v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10	156	Turner v. Burnell , 48 Wis. 221, 4 N. W. 30	420
Thatcher v. Maine C. R. Co. 85 Me. 502, 27 Atl. 519.....	83	Tuson v. Evans , 12 Ad. & El. 733.....	862, 864
Thayer v. Boston , 19 Pick. 513, 31 Am. Dec. 157.....	596	Tuttle v. Detroit, G. H. & M. B. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.....	177
v. Burchard , 99 Mass. 508.....	429	v. Dewey , 44 Iowa, 306.....	744
Thellusson v. Woodford , 13 Ves. Jr. 209.....	243	Twyne's Case , 3 Coke, 80b.....	408
Thomas, He , 16 Colo. 441, 13 L. R. A. 538, 27 Pac. 707.....	108	Tyler v. Tyler , 2 Root, 519.....	95
v. Grand Junction , 13 Colo. App. 90, 56 Pac. 665.....	218	U.	
v. Hannibal & St. J. R. Co. 82 Mo. 538.....	412	Uhl v. Com. 6 Gratt. 706.....	110
v. Illinois Industrial University , 71 Ill. 312.....	285	Ullman v. Meyer , 10 Fed. Rep. 241.....	388
v. People use of Joiner , 107 Ill. 517, 47 Am. Rep. 458.....	801	Underhill v. Sonora Trustees , 17 Cal. 172	465
v. Quartermaine , L. R. 18 Q. B. Div. 685.....	164, 169, 181	Union Mut. Accl. Assn. v. Frohard , 134 Ill. 228, 10 L. R. A. 383, 25 N. E. 642.....	651
v. Von Kapfz , 6 Gill & J. 372.....	152	Union Mut. F. Ins. Co. v. Keyser , 32 N. H. 813, 84 Am. Dec. 375.....	684
v. Western U. Teleg. Co. 100 Mass. 156.....	180	Union Nat. Bank v. German Ins. Co. 34 U. S. App. 397, 71 Fed. Rep. 473, 18 C. C. A. 203.....	454
Thomas Case , 102 Mo. 85, 14 S. W. 108.....	565	Union P. R. Co. v. Jarvi , 10 U. S. App. 439, 53 Fed. Rep. 65, 8 C. C. A. 433.....	600, 601
Thomason v. Scales , 12 Ala. 309.....	749	Union Stock Yards & Transit Co. v. Western Land & Cattle Co. 18 U. S. App. 438, 59 Fed. Rep. 49, 7 C. C. A. 680.....	453
Thompson v. Baxter , 92 Tenn. 305, 21 S. W. 668.....	274	United States v. Bixby , 9 Fed. Rep. 78.....	96, 99
v. Gregory , 4 Johns. 81, 4 Am. Dec. 255.....	281	v. Huckabee , 16 Wall. 414, 21 L. ed. 457.....	422, 423
v. Ketchum , 8 Johns. 190, 5 Am. Dec. 332.....	618	v. Knox , 102 U. S. 422, 26 L. ed. 218	781
v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765.....	453, 454	v. Laecki , 29 Fed. Rep. 699.....	319
v. People , 96 Ill. 158.....	735	v. Martin , 94 U. S. 400, 24 L. ed. 128	382
v. Phenix Ins. Co. 136 U. S. 287, 34 ed. 408, 10 Sup. Ct. Rep. 1023	810	v. Morris , 10 Wheat. 236, 6 L. ed. 314.....	836
v. Riggs , 5 Wall. 603, 18 L. ed. 704	266	v. North Bloomfield Gravel Min. Co. 81 Fed. Rep. 243.....	635
v. Woolf , 8 Or. 454.....	550	v. Peck , 102 U. S. 64, 26 L. ed. 46.....	482
Thompson-Houston Electric Co. v. Newton , 42 Fed. Rep. 723.....	219	v. Quincy , 6 Pet. 464, 8 L. ed. 465	734, 735
Thomson v. Kyle , 39 Fla. 582, 23 So. 12.....	612	v. Western U. Teleg. Co. 50 Fed. Rep. 23.....	91
Thornton v. Smith , 11 Minn. 15, Gil. 1.....	488	United States ex rel. Von Hoffman v. Quincy , 18 L. ed. 403, sub nom. Hoffman v. Quincy, 4 Wall. 535	465
Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625.....	57	Universal Mut. F. Ins. Co. v. Weiss , 106 Pa. 20.....	705
Throckmerton v. Tracy , 1 Plowd. 145.....	234	Uplington v. Oviatt , 24 Ohio St. 232.....	158
Thron v. Pinkham , 84 Me. 101, 24 Atl. 718	428	Utica & S. R. Co. v. Brinckerhoff , 21 Wend. 139, 34 Am. Dec. 220.....	430
Thrusell v. Hlandyside , L. R. 20 Q. B. Div. 359.....	164, 179	Utica, C. & S. Valley R. Co. Re , 56 Barb. 456.....	574
Tiernan v. Rinker , 102 U. S. 123, 26 L. ed. 103.....	379	V.	
Tillett v. Lynchburg & D. R. Co. 115 N. C. 682, 20 S. E. 480.....	87	Valentine v. St. Paul , 34 Minn. 446, 26 N. W. 457.....	538, 539
Timm v. Harrison , 109 Ill. 593.....	377	Vallier v. Brakke , 7 S. D. 343, 64 N. W. 180	838, 839
Tipping v. St. Helens Smelting Co. 4 Beat & S. 608.....	772	Van Alen v. American Nat. Bank , 52 N. Y. 1.....	266
Tissot v. Great Southern Teleg. & Teleph. Co. 30 La. Ann. 996, 3 So. 261	499	Vandenburgh v. Van Bergen , 13 Johns. 212	231
Todd v. Kalamazoo Election Comrs. 104 Mich. 480, 29 L. R. A. 330, 62 N. W. 564, 64 N. W. 496.....	858	Vanderpoel v. Van Valkenburgh , 6 N. Y. 190	800
Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L. R. A. 395, 54 Fed. Rep. 751.....	636	Van Hook v. Whitlock , 3 Paige. 409.....	463, 463
Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co. 6 Ohio C. C. 362.....	91	Van Horn v. State ex rel. Abbott , 46 Neb. 62, 64 N. W. 365.....	523
Tomson v. Ward , 1 N. H. 9.....	640	Van Loan v. Farmers' Mut. F. Ins. Assn. 90 N. Y. 280.....	644
Topeka v. Gillett , 32 Kan. 431, 4 Pac. 804	76	Van Trott v. Wiese , 30 Wis. 439.....	420
Townsend v. Little , 109 U. S. 512, 27 L. ed. 1015, 3 Sup. Ct. Rep. 361.....	509	Vason v. South Carolina R. Co. 42 Ga. 637	762
v. State , 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19.....	631, 632	Vaughan v. Taff Vale R. Co. 3 Hurlst. & N. 750.....	85
Trapnall v. Richardson , 13 Ark. 543, 58 Am. Dec. 338.....	135	Vaughn v. California C. R. Co. 83 Cal. 18, 23 Pac. 215.....	599
Travelers' Ins. Co. v. California Ins. Co. 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703.....	705, 706	Veazie Bank v. Fenno , 8 Wall. 553, 19 L. ed. 489.....	521
Tremain v. Cohoes Co. 2 N. Y. 163, 51 Am. Dec. 284.....	718, 719	Vegnan v. Morse , 160 Mass. 143, 35 N. E. 451.....	323
Tremblay, Ex parte (1887) 13 Quebec L. Rep. 64.....	858	Vette v. Clinton F. Ins. Co. 30 Fed. Rep. 668	707
Tripp v. Brownell , 12 Cush. 876.....	740	Victorian R. Comrs. v. Coultas , L. R. 13 App. Cas. 222.....	326
Trull v. Skinner , 17 Pick. 213.....	640	Violet v. Alexandria , 92 Va. 561, 81 L. R. A. 382, 23 S. E. 909.....	575, 576
Tucker v. Gillman , 121 N. Y. 189, 24 N. E. 302.....	257	Virginia F. & M. Ins. Co. v. Wells , 83 Va. 736, 3 S. E. 349.....	703
v. State ex rel. Johnson , 89 Md. 471, 46 L. R. A. 181, 43 Atl. 778, 44 Atl. 1004.....	124	Vogelsang v. Null , 67 Tex. 465, 3 S. W. 451	328
Tugman v. Chicago , 78 Ill. 409.....	656		
47 L. R. A.			

Von Dorn v. Mengedocht, 41 Neb. 535, 59 N. W. 800.....	108	West v. Chicago & N. W. R. Co. 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512.....	85
Von Hoffman v. Quincy, 4 Wall. 535, sub nom. United States ex rel. Von Hoffman v. Quincy, 18 L. ed. 403	465	v. People, 137 Ill. 189, 27 N. E. 84, 34 N. E. 254.....	784
Vore v. Hawkeye Ins. Co. 76 Iowa, 548, 41 N. W. 309.....	714	Westborne v. Mordant, Cro. Elis. 191.....	468
		West Chicago Street R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112.....	628
W.		Westerfield, Ex parte, 55 Cal. 551, 36 Am. Rep. 47.....	343
Wabash R. Co. v. Williamson, 104 Ind. 154, 3 N. E. 814.....	412	Westerly Waterworks Co. v. Westerly, 80 Fed. Rep. 611.....	221
Wade v. Love, 69 Tex. 522, 7 S. W. 225.....	328	Western & A. H. Co. v. Cox, 93 Ga. 561, 20 S. E. 63.....	762, 768
Wadsworth v. Marshall, 85 Me. 263, 32 L. R. A. 588, 84 Atl. 80.....	86	Western Nat. Bank v. Lawrence, 117 Mich. 669, 76 N. W. 105.....	621
v. Union P. R. Co. 13 Colo. 600, 28 L. R. A. 812, 33 Pac. 515.....	63	Western U. Teleg. Co. v. State, 146 Ind. 54, 44 N. E. 793.....	681
Waggoner v. Jermaine, 3 Denio, 309, 45 Am. Dec. 474, note, 479.....	488	v. Union P. R. Co. 1 McCrary, 581, 3 Fed. Rep. 721.....	91
Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131.....	335	West Memphis Packet Co. v. White, 90 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583.....	123
v. St. Clair Twp. 91 Mich. 19, 51 N. W. 606.....	506	Wetherell v. O'Brien, 140 Ill. 146, 29 N. E. 904.....	267
Walker v. Ball, 39 Ala. 298.....	743	Weyl v. Sonoma Valley R. Co. 69 Cal. 202, 10 Pac. 510.....	541
v. Walker, 63 N. H. 321, 56 Am. Rep. 514.....	232	Wharton v. Lewis, 1 Car. & P. 529.....	389
Wallace v. Loomia, 97 U. S. 146, 24 L. ed. 895.....	492	Wheeler v. Boyd, 69 Tex. 293, 6 S. W. 614.....	269
Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.....	220, 221	v. Wheeler, 184 Ill. 522, 10 L. R. A. 613, 25 N. E. 588.....	801
Wallis v. Auer, 10 Phila. 356.....	772	Wheelwright v. Rhoades, 28 Hun. 57.....	721
Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511.....	340	Whitbred v. Boulinois, 1 Younge & C. Exch. 303.....	502
Walsh v. Whiteley, L. R. 21 Q. B. Div. 371.....	169	Whitcomb v. Joselyn, 51 Vt. 79, 31 Am. Rep. 678.....	329
Walter v. Selfe, 4 Eng. L. & Eq. 15.....	773	White v. Ledyard, 48 Mich. 264, 12 N. W. 216.....	358
Wanek v. Winona (Minn.) 46 L. R. A. 448, 80 N. W. 551.....	144	v. Meadville, 177 Pa. 648, 34 L. R. A. 567, 35 Atl. 695.....	220
Ward v. Chamberlain, 2 Black, 430, 17 L. ed. 819.....	475	v. Multnomah County Comrs. 13 Or. 317, 57 Am. Rep. 20, 10 Pac. 454.....	851
v. Greeneville, 8 Baxt. 228.....	280, 281	v. New York & N. E. R. Co. 156 Mass. 181, 30 N. E. 612.....	241
Warner v. Benjamin, 89 Wis. 296, 62 N. W. 179.....	440	v. Nicholas, 3 Iowa. 286, 11 L. ed. 600.....	485
v. Lockerby, 28 Minn. 28, 8 N. W. 879.....	836	v. Sander, 168 Mass. 296, 47 N. E. 90.....	324
v. Martin, 11 How. 209, 13 L. ed. 667.....	606	White Lake Lumber Co. v. Russell, 22 Neb. 126, 84 N. W. 104.....	274
Warren v. Crane, 50 Mich. 301, 15 N. W. 465.....	454	Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245.....	212
v. Keokuk & D. M. R. Co. 41 Iowa, 484.....	412	Whitman v. Haywood, 77 Tex. 557, 14 S. W. 166.....	800
v. Merrifield, 8 Met. 93.....	230	Whitney v. Bartholomew, 21 Conn. 218.....	771
Warwick v. State, 25 Ohio St. 21.....	96	Whitson v. Griffin, 39 Kan. 211, 17 Pac. 801.....	407
Washington F. Ins. Co. v. Davison, 30 Md. 91.....	458	v. Leonminster, 136 Mass. 25.....	483
Washington Ins. Co. v. Price, Hopk. Ch. 1.....	415	Whittemore v. Ware, 101 Mass. 352.....	836
Wason v. Sanborn, 45 N. H. 169.....	488	Whittier v. Winkley, 62 N. H. 338.....	232
Waters v. Hutton, 85 Tenn. 114, 1 S. W. 787.....	269	Wigmore v. Jay, 5 Exch. 354.....	114
Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.....	152	Wilder v. Chicago & W. M. R. Co. 70 Mich. 352, 38 N. W. 289.....	343
v. Mayo, 109 Mass. 315, 12 Am. Rep. 694.....	816	Willey v. Yale, 1 Met. 553.....	810
Watson v. Bartlett, 62 N. H. 447.....	235	Wilhelm v. Des Moines Ins. Co. (Iowa) 68 N. W. 782.....	715
v. Pittsburgh & C. R. Co. 37 Pa. 469.....	787	Williams v. Dayley, L. R. 1 H. L. 200.....	424
v. Walsh, 1 Esp. N. P. *285.....	152	v. Burg, 9 Lea, 453.....	277
Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041.....	621	v. Churchill, 137 Mass. 243, 50 Am. Rep. 304.....	174
Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253.....	474	v. City Nat. Bank (Tex. Civ. App.) 27 S. W. 147.....	415
Webb v. Davis, 37 Ark. 551.....	836	v. Earle, 9 Rest. & S. 740.....	132
Welster v. Foley, 21 Can. S. C. 580.....	115, 116	v. Mitchell (Kan. App.) 58 Pac. 1025.....	407
v. Gilmore, 91 Ill. 324.....	554	v. Williams, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98.....	752
v. Upton, 91 U. S. 65, 23 L. ed. 884.....	257	Williams, Ex parte, 11 Rich. L. 459.....	679
Weeden v. Richmond, 9 E. I. 128, 98 Am. Dec. 373.....	628	Williamson v. Brown, 15 N. Y. 359.....	508
Weems v. Mathieson, 4 Macq. H. L. Cas. 215.....	115	v. Carlton, 51 Me. 449.....	523
Weill v. Kenfield, 54 Cal. 111.....	229	v. Williams, 11 Lea, 355.....	277
Weiler v. Burlington, 60 Vt. 28, 12 Atl. 215.....	302	Willis v. Miller, 23 Or. 352, 31 Pac. 827.....	744
Wellington v. Small, 3 Cush. 145, 50 Am. Dec. 719.....	440	Willits v. Waite, 25 N. Y. 577.....	780
Petitioner, 16 Pick. 96, 26 Am. Dec. 631.....	523	Willoughby v. Moulton, 47 N. H. 205.....	696
Wells v. Alexandre, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142.....	432	Wills v. State ex rel. Hughes, 128 Ind. 859, 27 N. E. 423.....	558
v. Burnham, 20 Wis. 112.....	688, 690	v. Walters, 5 Bush, 351.....	592
v. Milwaukee & St. P. Railway Co. 30 Wis. 605.....	429, 430, 431, 432	Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 25 L. R. A. 538, 29 Atl. 1047.....	802
v. Munroe, 86 Md. 449, 38 Atl. 988.....	628	Wilmington & R. R. Co. v. Stauffer, 60 Pa. 374.....	787
Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.....	585	Willson v. Aetna Ins. Co. 27 Vt. 99.....	715
47 L. R. A.		v. Book, 13 Wash. 676, 43 Pac. 930.....	621

- § 3512. Redemption... 745
 3514. Persons deemed creditors... 745
 3515. Right of child to redeem... 749
Clay's Digest.
 PP. 502, 503. Redemption statute... 744
- California.**
Constitution, 1841.
 Art. 4, § 31. Corporations to be formed under general laws. 492
Constitution.
 Art. 1, § 11. General laws shall have uniform operation... 339
 13. Rights of accused persons... 339
 21. Special privileges and immunities... 339
 4, § 25. Prohibiting legislature from passing local or special laws... 340
Statutes.
 1863, April 25. Action on bonds... 465
 1883, § 870. Municipal corporation act... 343
 1891, March 31, p. 195. Mechanics' liens... 345
 1897, March 29, p. 231. Liens for wages... 339
Civil Code.
 § 286. Formation of private corporation. 340
 822. Liability of stockholders for debts of corporation... 463
 1494. Conditional offer of performance. 337
Code of Civil Procedure.
 § 377. Damages for wrongful death... 467
- Colorado.**
Constitution.
 Art. 2, § 1. Political power vested in the people... 53
 3. Certain inalienable rights of people... 53
 11. Irrevocable franchise privilege or immunity forbidden... 218
 28. Enumeration of constitutional rights not exhaustive... 53
 5, § 21. Bills which shall contain more than one subject... 56
 25. Passage of local or special laws... 53
 16, § 2. Ventilation of mines, etc... 55
Statutes.
 1899, chap. 103. Eight-hour law... 53
General Statutes.
 § 3812, subd. 67. Construction of water-works by city... 218
- Florida.**
Constitution, 1885.
 Art. 11, § 2. Married woman's property may be sold for debts... 618
Revised Statutes.
 § 1956. Conveyance by married woman... 614
 1958. Acknowledgments by married woman... 614
 2072. Sale and conveyance of wife's property... 613
- Georgia.**
Statutes.
 1872, p. 181. Power to pass ordinances... 367
 1894, pp. 95 *et seq.* Condemnation of private property... 780
Civil Code.
 § 3859. Right of action for nuisance... 769
 3861. "Nuisance" defined... 769
 3874. Right of action for injury to property... 769
 4047. Power of court to control its officers... 487
 4658. Condemnation law... 761, 780
 47 L. R. A.
- § 4674, 4675. Condemnation of private property... 780
 § 5729. Compensation for property taken. 757
- Idaho.**
Statutes.
 1883, Feb. 8, p. 119. Erection of courthouse and jail at Halley... 459
 1895, March 5, p. 31. Creation of Blaine county... 459
 18, p. 170. Creation of Lincoln county... 459
Revised Statutes.
 § 4052. Five-year limitation... 459
 P. 437, § 4054. Three-year limitation... 464
- Illinois.**
Constitution, 1870.
 Art. 2, § 9. Rights of accused in criminal prosecutions... 736
 4, § 13. No act shall embrace more than one subject... 877
 22. Prohibiting special legislation... 804
 5, § 10. Nominations by governor... 805
 24. Definition of office... 805
 6, § 20. Probate courts... 800
 1877, April 27. Establishment of probate courts... 800
Statutes.
 1879, May 31, § 1. Compliance with general insurance law... 797
 June 4, § 2. Better regulation of the business of insurance... 797
 1883, June 15. Dram-shop act... 377
 1895, April 11. Limitation; probate... 801
 1897, June 14. Local improvements... 328
 1899, Apr. 24. Licensing commission merchants... 803
Revised Statutes, 1874.
 Chap. 24, p. 254, § 58. Election contests; tie... 555
 43. Dram-shop act... 377
 77, §§ 18-20. Redemption statute... 749
 148, § 2. Attestation of will by witnesses... 798
Hurd's Revised Statutes.
 P. 264. Election contests... 555
Starr & Curtis's Annotated Statutes.
 Vol. 1 (1st ed.) p. 1311, chap. 73, § 4. Power of auditor of public accounts... 797
 p. 1322, chap. 73. Agent of insurance company... 453
 (1st ed.) p. 1330. Compliance with general insurance law... 797
 1331, chap. 73. Foreign insurance companies 797
Criminal Code.
 Div. 1, § 98. Confidence game... 734
 99. Confidence game indictment 733
 10, § 8. Jurisdiction in larceny... 736
 11, § 6. Form of indictment... 733
- Indiana.**
Constitution.
 Art. 1, § 23. Exclusive privileges not allowed... 491
 2, § 13. Elections shall be by ballot... 553
 4, § 22. Prohibiting passage of local or special laws... 491
 23. Laws shall be general and uniform... 491
 11, § 13. Corporations formed under general laws... 491
Statutes.
 1886, Feb. 8, p. 191. Indianapolis Insurance Company... 490
 1865 (Sp. Sess.) p. 110. Amendatory act... 490

1881, Apr. 2. Recognition of change of name of corporation.....	490
1883, March 6. Provisions respecting private corporations.....	490
1891, p. 55. Prohibiting escape of gas....	631
1893, p. 300, § 1. Escape of gas.....	631
1897, March 6, p. 201. Fares to be charged by street-railway companies.....	491

Revised Statutes, 1881.

Chap. 41. Street-railway companies.....	491
§ 289. Nuisance.....	634
291. Remedy for nuisance.....	634
339. Cause for demurrer.....	631
4736. Election, tie vote.....	553
5864. Duty of attorney to resist applications for change of name.....	491

Revised Statutes, 1894.

Chap. 44. Street-railway companies.....	491
§ 290. Nuisance.....	634
292. Remedy for nuisance.....	634
342. Cause for demurrer.....	631
§ 2316-18. Prohibiting escape of gas....	631
7510-12. Escape of gas.....	631
§ 7812. Duty of attorney to resist applications for change of name.....	491

Horner's Revised Statutes, 1897.

Chap. 41. Street-railway companies.....	491
§ 289. Nuisance.....	634
291. Remedy for nuisance.....	634
339. Causes for demurrer.....	631
5864. Duty of attorney to resist applications for change of name.....	491

Iowa.*Constitution.*

Art. 1, § 6. Uniform laws.....	380
7. Freedom of speech and press..	225
8, § 30. Local and special laws.....	380

Statutes.

1878, 17th Gen. Assem. chap. 129. Liens of judgments.....	478
18th Gen. Assem. chap. 211, § 8. Notice and affidavit of assured.....	714
22d Gen. Assem. chap. 11. Power of cities to maintain electric-light plants.....	219

Code, 1873.

Title 17, chap. 2, § 2537. Limitation; failure of action.....	714
§ 2844. Dismissal of action.....	715
2851. Plea in abatement.....	714
2882. Liens of judgments.....	469

Revised Code, 1877.

§ 2056. Fires; effect of contributory negligence.....	85
-------------------------------------------------------	----

McClain's Code.

§ 4091. Attachment of liens.....	474
----------------------------------	-----

Kansas.*Bill of Rights.*

§ 2. Origin of political power; forbidding special privileges.....	102, 876
20. Enumeration of rights not exhaustive.....	102

Constitution.

Art. 2, § 4. Qualifications of members of legislature.....	103
16. Bills to contain but one subject.....	371
§ 4. Appointment of officers of court.....	103
5. District judges.....	103
11. Election of judicial officers.....	103
§ 5. Disqualification for holding office.....	103
6. Bribery at elections.....	103
6, § 2. Schools of high grade.....	67

47 L. R. A.

Art. 9, § 3. County officers, term of office	67
11, § 1. Uniform taxation.....	60
12, § 1. Formation of corporations..	376
15, § 2. Tenure of office fixed by law.	68
4. Election of state printer.....	103

Statutes.

1886, chap. 147. County high schools.....	68
1887, chap. 171. Payment of wages to employees.....	371
1889, chap. 249. Taxation of insurance contracts.....	69
1891, chap. 114. Eight-hour law.....	381
1893, chap. 183, § 1. Weighing of coal at mines.....	71
1895, chap. 263. Levy of fire tax.....	78
1897, March 2, chap. 145. Wages of employees.....	369
1899, chap. 189. Establishment of school at Howard, Elk county.....	67

General statutes, 1889.

§§ 2441-2443. Payment of wages to laborers in coal mines...	369
-------------------------------------------------------------	-----

General statutes, 1897.

Chap. 73. Labor and protection of laborers.....	371
pp. 781, 782. Eight-hour law.....	381
145, § 14. Defining "trust".....	371
170. Levy of fire tax.....	78

Kentucky.*Constitution.*

§ 242. Compensation for property taken..	779
------------------------------------------	-----

Louisiana.*Constitution, 1852.*

Art. 69. Jurisdiction of supreme court to issue habeas corpus	677
---------------------------------------------------------------	-----

Constitution.

Art. 115. Power of district judges to issue habeas corpus.....	677
238. Agricultural and mechanical college fund.....	516

Constitution, 1898.

Art. 85. Appellate jurisdiction of supreme court.....	678
-------------------------------------------------------	-----

Statutes.

1828, March 17. Emancipation of minors.	675
1830, March 11. Persons and estates of minors.....	675
1858, No. 143. Payment of warrants.....	521
1882, No. 49. Manner of effecting incorporation.....	654
1888, No. 48. Revenue act.....	515
1894, No. 182. Concurrent resolution....	514
1898, No. 136. Creation and powers of corporations.....	654

Civil Code, 1808.

Art. 39, § 1, p. 52. Child cannot quit paternal house.....	675
------------------------------------------------------------	-----

Revised Civil Code, 1825.

Art. 236. Child cannot quit paternal house	675
263. Emancipation of minors.....	675

Revised Civil Code.

Art. 26. Subjection of children to parents	675
34. Period of capability determined by law.....	675
35. Emancipation of children.....	675
36. Age at which minors become adults.....	675
37. Defining "minors".....	675
39. Domicil of minor.....	675
166. Expiration of time of engagement of minors.....	675
170. Duty of bound servants and apprentices.....	675
215. Child owes respect to parents.....	674
216. Child under authority of parents	674
217. Obedience of child.....	674
218. Child cannot quit paternal house	660
219. Right of parents to appoint tutors.....	675

Art 220.	Delegation of authority of parents	675
246.	Minor under authority of tutor	675
250.	Tutorship by nature	675
385.	Petition to judge for emancipation of minor	675
387.	Consent of parents necessary to authorize judge to act	675
1782.	Capacity of minors to contract	676
1798.	Parties to contract	676

Code of Practice.

Art. 787.	Habeas corpus	677
791.	Habeas corpus	677
794.	Mode of obtaining writ	677
795.	Statement of petition	680
798.	Illegal imprisonment	677
799.	Habeas corpus	677
806.	Manner of obeying habeas corpus	677
807.	Answer of respondent	677
808.	Recitals of answer	677
818.	Hearing of imprisoned party	677
819.	Summary hearing	677
824.	When judge shall liberate prisoner	677
825.	Delivery of prisoner to whom	677

Maine.

Revised Statutes.

Chap. 17, § 28.	Blasting	86
51, § 64.	Liability of railroad corporation for damages from fire	82

Maryland.

Declaration of Rights.

Art. 5.	Common law of England	383
---------	-----------------------------	-----

Constitution, 1867.

Art. 3, § 8.	Term of senator	623
18.	Election of senators	623
19.	Power of senate	623
48.	Corporations may be formed under general laws	494

Statutes.

1864, chap. 362, § 3.	Grant of annuities by insurance company	616
1888, chap. 294.	Liability of stockholder	619
1896, chap. 349.	Distribution to creditors	619

Code Supplement, 1868.

Art. 26, § 190.	Receivers	619
-----------------	-----------------	-----

Code of Public General Laws.

Art. 5, § 9.	Questions open in court of appeals	389
11, § 27.	Liability of stockholder of bank	610
28, § 260.	Receivers	619

Massachusetts.

Statutes.

1887, chap. 270.	Employer's liability act	163
1894, chap. 257.	Right of city of Boston to enforce its building laws	319
1895, chap. 488.	Metropolitan water supply act	321
1896, chap. 313.	Building line and height of buildings on parkways	316
1897, chap. 336, § 1.	Establishment of maximum water rates	321
chap. 378.	Permitting roofs to be built above line	318
chap. 379.	Height of buildings	316
1898, chap. 452.	Limiting height of buildings in Boston	316

Public Statutes.

Chap. 50, § 1.	Right to maintain sewers	513
188.	Railroads	525
47 L. R. A.		

Michigan.

Constitution.

Art. 4, § 5.	Senators and representatives must be electors	100
45.	Bills appropriating money	119
5, § 2.	Eligibility for governor	100
7, § 1.	Qualifications of electors	94
8, § 4.	Board of state auditors	119
10, § 3.	Election of county officers	93, 554
11, § 1.	Township officers	100
15, § 1.	How corporations may be formed	493
8.	Amending acts of corporation	493
10.	Term of corporation	493
19, § 9.	Charters of mining companies may be modified	493

Resolutions.

1899, May 10.	Provision for relief of Thomas Allen	118
---------------	--------------------------------------------	-----

Statutes.

1872, p. 72, § 86.	Liability of railroad for failure to erect fences	85
1883, No. 129.	Incorporation of telephone company	88
p. 131, § 4.	Telephone companies	106
1887, p. 183.	Women as notaries public	96
No. 264.	Damages for injuries on defective highway	501
p. 845, §§ 1, 2.	Liability of city for defective bridge	500
1895, No. 215, chap. 22, § 14.	Authority of common council over streets	107

Revised Statutes, 1838.

P. 411, § 13.	Attorneys at law	96
---------------	------------------------	----

Revised Statutes, 1846.

P. 95, § 108.	Eligibility to elective office	100
423, § 27.	Attorneys at law	96

Compiled Laws, 1871.

§ 136.	Elections, tie votes	554
1317.	Cutting and removal of trees and shrubs	499

Compiled Laws, 1897.

§ 1121.	Attorneys at law	96
1127.	Authority to practice law	103
2620.	Women as notaries public	96
chap. 91, § 3442.	Liability for injuries through defects after notice	501
§ 4159.	Trees and shrubs in highway	499
11,784.	Punishment for attempt to commit crimes	109

Howell's Statutes.

Vol. 1, § 1379.	Duty of overseer of bridges	503
§ 1445.	Highway commissioners of townships	503
3115.	Water companies	107
3527.	Tramways	107
3548.	Street railways	107
4191.	Electric-light companies	107
2, §§ 5925-5931.	Order of distribution	325
3, chap. 102a, § 3718a.	Incorporation of telephone company	88
3718d.	Telephone lines in streets	107
3718f.	Service by telephone company	107
4904e.	Alienation of property by corporations	92

Minnesota.

Constitution, 1857.

Art. 9, § 1.	Equal taxation	527
10, § 2.	Corporations not to be formed under special acts	493

Statutes.

- 1885, chap. 103. Annual salaries as compensation to probate judges 527
 1897, chap. 293. Inheritance tax law..... 528
 1899, March 6, chap. 43, § 1. Bicycle paths 146

General Statutes, 1894.

- § 380, subd. b. Warehouse and commission law 530

*Missouri.**Constitution, 1820.*

- Art. 4, § 25. Elections of sheriff and coroner..... 557

Amendments of 1834.

- Art. 2, § 3. Clerks of courts 556

Constitution, 1875.

- Art. 2, § 21. Compensation for property taken 758
 4, § 2. Apportionment of representatives 559
 5, § 3. Determination of the vote..... 559
 6, § 30. Ties for judges of courts of records 558
 § 37. Justices of the peace..... 552
 40. Election of clerks; ties and contests 559
 8, § 12. Aliens prohibited from holding office 96
 9, § 10. Election of sheriffs and coroners 559
 14, § 5. Tenure of office 564

Statutes.

- 1863, March 28. Ballot partly fraudulent. 817
 1897, April 4. Ballot law 816
 p. 134. Printing of ballots..... 828
 135. Elections; duties of judges. 820
 175. Election of justices of the peace 558
 176, § 7. Appointment to fill vacancy 563
 1893, April 18, p. 156. Ballot law 816
 p. 164. Elections; duties of judges 820
 1895, April 11, p. 171. Mode of voting on amendments 827
 May 31. Election commissioners 396
 1899, June 19. Registration and elections. 396

Revised Statutes, 1845.

- P. 201, chap. 25, § 8. Election for clerks.. 556

Revised Statutes, 1855.

- P. 336, § 10. Qualifications of clerks..... 96

Revised Statutes, 1879.

- § 879. Telegraph and telephone companies 107
 2807. Election of justices of the peace.. 564

Revised Statutes, 1889.

- § 2615. Liability for setting out fire..... 85
 4506. Alimony and maintenance of wife 392
 4678. Ballot partly fraudulent 817
 4726. Clerk's certificate evidence of facts 829
 4753. Mode of voting on amendments.. 827
 4765. Candidates limited to one office... 827
 4773. Printing of ballots 826
 4781. Ballot law 816
 4784. When judges shall prepare ballot. 820
 6092. Number of justices; duty of mayor 552
 6099. Power of county court to decide election contest 552

*Montana.**Statutes.*

- 1883, Feb. 26, p. 119. Commissioners' act. 464
Compiled Laws, 1887.

- Div. 5, § 1540. Filing of chattel mortgage. 405

Civil Code.

- § 3860. Mortgage of personal property.... 405
 3864. Filing of chattel mortgage..... 405
 47 L. R. A.

*Nevada.**Statutes.*

- 1877, p. 46. Municipal bonds 465

*New Hampshire.**Public Statutes.*

- Chap. 186, § 6. Devise of real estate..... 244

General Statutes.

- Chap. 148, § 8. Liability of railroad company for damages... 84

*New Jersey.**Revision.*

- P. 1201, § 45. Tie votes 533

*New York.**Statutes.*

- 1817, Apr. 15. Allowance to executors, administrators, and guardians 724
 1848, chap. 40. Corporation law 256
 1866, chap. 115. Accounts of trustees..... 723
 1890, chap. 564. Stock corporation law... 258
 chap. 564, § 58. Liability of stockholders 730
 1892, chap. 688. Stock corporation law... 258
 1892, chap. 689, § 52. Liability of stockholders 730
 1897, chap. 441, § 1. Amendment of banking law 730

Revised Statutes, 1828.

- Vol. 2, p. 93, § 58. Commissioners to be allowed executors, etc. 724
 " 94, § 66. Trustees to account to court of equity..... 723

Code of Civil Procedure.

- § 394. Action against stockholder of bank 730
 1902. Damages for death by wrongful act 717
 2730. Commissions of executors and administrators 722

*North Dakota.**Revised Code.*

- § 3366. Remedy for recovery of rent..... 151
 3367. Remedy for breach of agreement in lease 151
 3519. Title not divested by destruction of deed 640
 3543. Grants of rent or reversions..... 151
 §§ 3784-3787. Covenants in grants of real property 151
 § 4608. Standard policy of insurance... 645
 5444. Special verdict defined 639
 5445. Directing special verdict 639

*Ohio.**Revised Statutes.*

- § 2264. Special assessments 158
 2269. Rules of assessment 160

*Oregon.**Constitution.*

- Art. 2, § 16. Elections 554

Statutes.

- 1893, p. 28. Notice by stock owner of injury to stock..... 412
 1899, Feb. 20, p. 199. Protection of trout and other food fishes 155

Hill's Annotated Laws.

- § 776, subd. 20. Presumption that ordinary course of business has been followed .. 260
 3005. Conveyance of fee simple 411
 §§ 3136, *et seq.* Escheats 549
 § 8140. Attorney's fee for escheat proceeding 551
 3141. Proceedings in case of escheated property 549
 3144. Employment of additional counsel 551

Pennsylvania.*Statutes.*

- 1849, Feb. 10 (P. L. 79) § 11. Appoint-
ment of viewers.... 787
1856, Apr. 9, § 2. Condemnation of stream
for railroad right of
way..... 787
1881, June 29. Store-order act..... 342

South Carolina.*Statutes.*

- 1891, Dec. 16. Time for commencing ac-
tions on insurance
policies..... 709

South Dakota.*Constitution.*

- Art. 5, §§ 24, 25. Qualifications for office
of state's attorney... 835
§ 31. Judges not to act as attor-
neys at law..... 415
7. Soldier not resident of state
where stationed... 837
26, § 18, subdiv. 5. Jurisdiction over
Ft. Meade military
reservation..... 837

Statutes.

- 1897, chap. 110, § 2. Order by railroad
commissioners to
build depot..... 569

Compiled Laws.

- §§ 1489, 1491. Election contest proceeding 835
§ 3401. Interest of husband in wife's prop-
erty..... 415
5013. Defining "judgment roll"..... 414
7843. Habeas corpus act..... 567

Tennessee.*Statutes.*

- 1885, chap. 24. Taxes barred by limitation 277
1899, chap. 432, § 4. Taxing agents for
laundries..... 416

Shannon's Code.

- § 3531. Mechanics' liens..... 273
§ 3533, 3534. Liens..... 275
§ 3540. Liens..... 275
3542. Liens..... 275

Texas.*Revised Statutes, 1879.*

- P. 2, § 17. Compensation for property
taken..... 770

Utah.*Constitution.*

- Art. 16, § 1. Rights of labor..... 60
6. Eight hours shall constitute
a day's work..... 60
7. Enforcement of provisions of
article sixteen..... 60

Virginia.*Constitution.*

- Art. 5, § 15. Mode of re-enacting law..... 591

Statutes.

- 1882-84, p. 88, § 25. Charter of Norfolk;
assessments..... 575
1889-90, p. 226, chap. 244, § 64. Defining
"commercial broker" 585
945. Defining "lawful fence" 590
1893-94, p. 397. State institution for in-
sane..... 578
945. Defining "lawful fence" 590
948. Fence law..... 590
1895-96, p. 466. Boundary lines declared
lawful fence..... 591
1896, Jan. 23. Authority of rectors of uni-
versity to secure
loan by deed of trust 285

47 L. R. A.

- 1897-98, p. 524. Damages for trespasses
by animals..... 591
651. Fence law of Accomac
county..... 591

Henning's Statutes.

- 1631 (1 Hen. Stat. p. 178). Inclosures and
trespass..... 591
1632 (1 Hen. Stat. p. 190). Inclosures. . . 591
1657 (1 Hen. Stat. p. 458). Inclosures and
trespass..... 591
1769 (8 Hen. Stat. p. 378). Hospital for
insane persons..... 578
1785 (12 Hen. Stat. p. 198). Insane per-
sons..... 578

Code, 1819.

- Chap. 109. Restraint and support of idiots
and lunatics..... 578

Code 1849.

- Chap. 85. Insane persons..... 578

Code 1887.

- § 1068. General powers of corporation... 580
Chap. 68. University of Virginia..... 285
§ 1554. Annual appropriation for Univer-
sity of Virginia... 285
Chap. 75. Insane persons and inebriates... 578
§ 1661. Location and corporate name of
asylum..... 579
Chap. 93, §§ 2038-2061. Fence law..... 590

Revised Code.

- Vol. 1, p. 89, chap. 33, § 20. University of
Virginia..... 285
90, chap. 34. Annual appropria-
tion for University
of Virginia..... 285

Revised Code, Supplement.

- P. 44, chaps. 29, 30. University of Virginia 285
46, chaps. 32, 33. University of Virginia 285
47, chap. 34. University of Virginia... 285

Washington.*Constitution.*

- Art. 1, § 8. Grant of privilege or fran-
chise forbidden.... 217
10. Administration of justice.... 218
12. Privileges or immunities of
citizens..... 217
7, §§ 1, 2, 9. Uniformity in taxation.. 209

Statutes.

- 1886, Feb. 4, § 48, subdiv. 5. Tacoma char-
ter; power of city
government.... 216
1890, March 24. Government of cities... 216
Ballinger's Annotated Codes and Statutes.
Vol. 1, § 739, subd. 33. License for lawful
purposes..... 207
§ 938, subdiv. 10. Power of cities to li-
cense business.... 208
1011, subdiv. 10. Power of cities to li-
cense business.... 208
4753, subdivs. 1, 2. Powers and duties of
attorney general... 211
4824. In whose name action shall be
prosecuted..... 211
5738. Designation of party..... 211
5775. Rules of practice..... 211

Wisconsin.*Constitution, 1848.*

- Art. 4, § 31. Prohibiting special legislation 442
32. General laws to be uniform... 443
11, § 1. Formation of corporations... 494

Amendments of 1871.

- Art. 4, § 31, subsec. 7. Granting corporate
powers except to
cities, forbidden.... 494

Statutes.

- 1864, March 1. Incorporation of Black
River Improvement
Company..... 494
1866, May 25. Amendment of charter... 491
1874, chap. 184. Duty of board of public
works..... 688

1882, chap. 263. Act extending life of corporation.....	404	§§ 925-173. Record of grade of streets...	446
1889, chap. 326. General city charter law	443	925-175. Opening, regrading, and paving streets.....	446
1893, chap. 312, § 72. General city charter law.....	444	925-177. Express of keeping streets in repair.....	446
<i>Revised Statutes, 1878.</i>		Chap. 40b, § 926. Adoption of general charter.....	444
1895, chap. 320, § 1. General city charter law.....	444	§ 1977. Defining "agent".....	457
§ 1339. Damages from insufficient highway.....	693	Wyoming.	
2382. Defining "judgment".....	695	<i>Constitution.</i>	
2925. Costs on appeal from justices' court.....	695	Art. 6, §§ 1, 2. Requirements of voters....	850
4192. Proof of signing of instrument...	696	§ 11. Elections to be by ballot.....	845
4971, subdiv. 19. Signature by mark....	696	13. Purity of elections.....	845
<i>Revised Statutes, 1898.</i>		<i>Statutes.</i>	
Chap. 40a. General city charter law.....	443	1890, March 14, chap. 80. Election law...	854
47 L. R. A.		1891, p 157. Statutory law re-enacted...	854



LAWYERS' REPORTS

ANNOTATED.

NORTH CAROLINA SUPREME COURT.

W. A. BENTON

v.

Ruffin V. COLLINS, Appt.

(.....N. C.....)

1. A grant of a new trial on one or more of several issues is in the sound discretion of the court, where the matter involved is entirely distinct and separable from the matters involved in the other issues.
2. A new trial on the single issue of the amount of damages may be allowed, although this cuts off some evidence which, if introduced on other issues, might mitigate damages, where all such evidence is admissible on the issue as to damages.
3. Inadequacy of damages may be the ground of setting aside a verdict and ordering a new trial.

4. The discretion of the court in setting aside a verdict for inadequacy of damages is not reviewable on appeal.
5. An allotment of a homestead, and a sale of the excess of the owner's lands by a commissioner, may be ordered by a court of equity when it has control of the lands and all the parties interested are before the court.
6. The appointment of commissioners to set off a homestead may be made by the clerk when instructed by the court, as the clerk is but the hand of the court in the matter.
7. The fact that lands are situated in two counties does not prevent the court from making an order for setting off a homestead and selling the lands which are in excess of the homestead to satisfy a judgment against the owner.

(October 24, 1899.)

NOTE.—*Inadequacy of damages as a ground for setting aside a verdict.*

- I. Power and duty of the court as to.
- II. Rule in contract actions.
- III. Rule in actions with relation to property and property rights.
- IV. Rule in actions for personal injuries.
 - a. Generally.
 - b. Actions for libel and slander.
 - c. Actions for malicious prosecution and false imprisonment.
 - d. Actions for assault and battery and other torts.
 - e. Actions for personal injuries caused by negligence.
 1. General rules as to.
 2. What sufficient to show bias or omission of duty—instances.
 - f. Statutory provisions as to smallness of damages for personal injury.
- V. Effect of uncertainty as to cause of injury.
- VI. Who entitled to relief.
- VII. Matters of procedure.
- VIII. Increase of verdict by court.

I. Power and duty of the court as to.

The power and duty of the court with reference to setting aside verdicts for inadequacy would seem to depend to a large extent upon the measurability of the injury suffered according to some legal standard. If the injury can be thus measured, and the verdict is inadequate, it is not only within the power, but the imperative duty, of the court to set it aside. The rule is different, however, where there is no legal standard of measurement of the injury. But even in such case it will be seen that while usually a

47 L. R. A.

verdict will not be disturbed for inadequacy, circumstances may exist under which the court would be called upon to act.

The court has power to set aside a verdict and grant a new trial on the ground of inadequacy where the ends of justice seem to require it, as well as and upon the same principle as on the ground of excessiveness. *Platts v. Cohoes*, 8 Abb. N. C. 392; *Mariana v. Dougherty*, 46 Cal. 26; *Hackett v. Pratt*, 52 Ill. App. 346.

A verdict for a grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law, than a verdict for an excessive or extravagant amount, and a new trial may be granted upon the one ground as well as upon the other. *McDonald v. Walter*, 40 N. Y. 551. And see *BENTON v. COLLINS*.

And when value is a material question the rule with reference to setting a verdict aside is the same where the verdict for a party is for too small a sum, as it is where the verdict is against a party for too large a sum. *Hall v. The Emily Banning*, 33 Cal. 522.

And the court may grant a new trial where the damages are inadequate, as well as where they are excessive, if the case is such as clearly to indicate that the jury had acted under the influence of partiality, bias, or a perverted judgment. *Richards v. Sandford*, 2 E. D. Smith, 349.

So, it is within the province of an appellate court to revise and set aside a verdict for insufficiency as well as for excessiveness of damages. *Paul v. Leyenberger*, 17 Ill. App. 167. But see *BENTON v. COLLINS*, and *Jung v. Keuffel*, 144 N. Y. 381, 39 N. E. 340, *infra*, VII.

And while the estimation of damages is peculiarly within the province of the jury where there is no legal measure and the damages are

APPEAL by defendant from a judgment of the Superior Court for Franklin County in favor of plaintiff in an action brought to recover damages for an assault and battery. *Affirmed.*

The facts are stated in the opinion.

Mr. F. S. Spruill, for appellant:

The statute sets out the grounds upon which a judge may, "in his discretion," entertain a motion to set aside a verdict.

Clark's Code, § 412, subsec. 4.

The language of our statute not only does not confer upon the trial judge a right to set aside a verdict because of inadequacy of damages assessed, but expressly deprives him of that right, if, indeed, he ever had it. The principle *Expressio unius exclusio alterius*, if it has any place in the construction of statutes, must apply here.

Young v. Hairston, 14 N. C. (3 Dev. L.)

55; *Brown v. Morris*, 20 N. C. (4 Dev. & B. L.) 429; *Quincey v. Perkins*, 76 N. C. 295.

Granting that the trial judge, in the exercise of a sound discretion, could have set aside the verdict as to damages, yet when he refuses to exercise a discretion, and attempts to assign a reason, and gives a wrong or illegal one, such ruling is reviewable error.

Clark's Code, § 274, cases cited under caption *Want of Power*, ¶ 230; *Beck v. Bellamy*, 93 N. C. 129; *Gilchrist v. Kitchen*, 86 N. C. 20; *Hudgins v. White*, 65 N. C. 393.

A new trial will not be granted on the ground that the damages found are inadequate.

16 Am. & Eng. Enc. Law, p. 589; *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265, 4 S. W. 437; 4 Minor, Inst. 758; *Gray v. Second Ave. R. Co.* 65 N. Y. 561; *Taylor v. Davis* (Tex.) 13 S. W. 642; *Price v. Bailey*,

unliquidated or where vindictive or exemplary damages are authorized, where actual damages are shown with such definiteness as to furnish a reasonably certain measure, the court may look into the circumstances proved, and grant a new trial if the amount awarded by the verdict is manifestly inadequate. *Hackett v. Pratt*, 52 Ill. App. 346.

And where the law itself prescribes the rule of damages to which alone a party is entitled if he recovers at all, an award of a sum not warranted by the rule is such evidence of passion, prejudice, mistake, or misapprehension that the verdict ought not to be permitted to stand. *McDonald v. Walter*, 40 N. Y. 551.

So, where the amount to which a party to an action was entitled is susceptible of adjustment and ascertainment by fair and not very difficult computation, and the figures to form the basis of the calculation are presented in an intelligent and tangible form, and a verdict is rendered lower than the lowest estimate, it should be set aside as clearly contrary to the evidence. *Fawcett v. Woods*, 5 Iowa, 400.

And a verdict for nominal damages when the plaintiff is entitled to more will be set aside and a new trial awarded, though given under the recommendation of the court. *Duff v. Hutson*, 2 Ball. L. 215.

And a judgment will be reversed on appeal where a prima facie case was made entitling the plaintiff to recover a much larger sum than that allowed, and no contradictory evidence was offered to disprove the prima facie case. *State ex rel. Scott County Comrs. v. Wilson*, 90 Ind. 114.

So, in *Tutton v. Andrews*, Barnes' Notes, 488, it was held that notwithstanding the notion which had prevailed that where damages are excessive a new trial may be granted, but not where they are less than they ought to be, an inquisition will be set aside and plaintiff given leave to execute a new writ of inquiry, where the sheriff permitted improper evidence to be given by the defendant whereby the damages were lessened.

And in *Collins v. Albany & S. R. Co.* 12 Barb. 492, and *Clapp v. Hudson River R. Co.* 19 Barb. 461, the rule was laid down that when the damages found by the jury are either so large or so small as to force upon the mind of every man familiar with the circumstances of the case the conviction that by some means the jury have acted under the influence of a perverted judgment, it is the duty of the court, in the exercise of a sound judicial discretion, to grant a new trial; but both were cases of excessive damages.

And in *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 47 L. R. A.

15, it was said that it is the province of the jury to see that justice is done, but when the assessment is manifestly unjust, whether too small or too excessive, a new trial should be granted; but this was also a case of excessive, and not inadequate, damages.

And in *Meyer v. Fiegel*, 38 How. Pr. 424, the court named as a ground upon which a new trial will be granted damages which are palpably insufficient; but the motion was for a new trial on newly discovered evidence.

And in *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L. R. A. 329, 22 Atl. 649, it was said that where the amount of a verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages or a mistake in computation, the trial judge should not hesitate to set it aside; but the case was not one of inadequate damages.

So, in *Peterborough v. Sadler*, 12 Mod. 347, a new trial was granted where a former verdict had been rendered and set aside as excessive because of the great difference between the two verdicts.

But where there is no standard for measuring damages, and no certain rule can be prescribed for the guidance of the jury, the court will not ordinarily grant a new trial though the damages awarded him be manifestly small, unless the inadequacy was plainly produced by prejudice or passion or other improper motives. *Moseley v. Jamison*, 68 Miss. 336, 8 So. 744.

The court is justified in interfering with and setting aside a verdict of a jury for inadequacy only in those cases where it appears that the jury in fixing the amount were actuated by prejudice, passion, and partiality or corruption, or failed to understand and apply the rule of damages appertaining to the case, or where it can be clearly seen from the record that under all the circumstances of the case the amount awarded was unreasonable and unfair. *Reger v. Rochester R. Co.* 2 App. Div. 5, 87 N. Y. Supp. 520.

The power to set aside a verdict for inadequacy is only rarely exercised, especially in actions for personal wrongs, such as slanders, batteries, and the like; but where the foundation of the action is a breach of contract, and the damages are capable of estimation, if there is a glaring deficiency justice requires that the case shall be revised. *Taunton Mfg. Co. v. Smith*, 9 Pick. 11.

And in the consideration of the question of setting aside a verdict for inadequacy the court on appeal will assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proof. *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809.

66 Ill. 48; *Young v. Rossi*, 30 Fed. Rep. 231; *Henderson v. McReynolds*, 38 N. Y. S. R. 734, 14 N. Y. Supp. 351; 1 *Graham & Waterman's New Trials*, p. 447; *Gregory v. Chambers*, 78 Mo. 297; *Hayward v. Newton*, 2 Strange, 940; *Barker v. Davis*, 2 Strange, 1051; *Benjamin v. Stewart*, 61 Cal. 608; *Merony v. McIntyre*, 82 N. C. 103.

Mr. C. M. Cooke for appellee.

Montgomery, J., delivered the opinion of the court:

In the first trial of this action,—an action for damages growing out of an assault and battery committed by defendant, Ruffin Collins, upon the plaintiff,—all of the issues were found for the plaintiff. In response to the issue as to the amount of damages which the plaintiff was entitled to recover, the jury answered \$350, and his honor set aside that

part of the verdict on the ground that the damages assessed were inadequate, and let the others stand. On appeal from that ruling, this court declared the appeal premature; and upon a second trial the defendant, Ruffin Collins, renewed his exception to the order on the first trial setting aside that part of the verdict as to damages, and the granting of a new trial on that issue alone. The two issues which were eliminated from the second trial, and which were found by the jury for the plaintiff on the first trial, to wit, the first and third issues, were in these words: (1) "Did the defendant, R. V. Collins, wrongfully damage the plaintiff, as alleged in the complaint?" (3) "Was the deed of trust executed by R. V. Collins and wife to S. E. Eure with the fraudulent intent to hinder and delay and defraud said R. V. Collins's creditors?" Upon the second trial, the

So, in *Fogg v. Stinson* (Me.) 4 New Eng. Rep. 146, 8 Atl. 453, it was held that a new trial will not be granted when it does not appear that the verdict is unreasonable in amount, but there was nothing in the case to show whether the verdict was complained of as inadequate or excessive.

Nor will a new trial be granted for inadequacy of damages where the only dispute was as to the allowance of a certain offset, and the evidence was conflicting, and the difference between the verdict and the amount which should have been found, if anything, is so trifling as to bring the case within the maxim *De minimis non curat lex*. *Engel v. Fischer*, 44 Ill. App. 362, and see also *Nichol v. Bestwick*, 28 L. J. Eq. N. S. 4, *infra*, 11.

But the difference between a verdict for \$37.90 and \$75.51, which was the amount due, is not too small to justify a new trial, and the fact that it would cost the county for another trial more than the difference amounted to is of no effect. *Galloway v. Weber*, 55 Ill. App. 366.

II. Rule in contract actions.

It is within the power of the court in an action for breach of contract to set aside a verdict upon the ground that the damages are too small. *Taunton Mfg. Co. v. Smith*, 9 Pick. 11.

The rule that verdicts will not be set aside on account of their smallness does not apply to actions on contract. *Woodford v. Eades*, 1 Strange, 425; *Colyer v. Huff*, 3 Bibb, 34.

As a general rule in cases of breach of contract, there are fixed standards of value with reference to the injury done, capable of estimation by direct proof, and if a glaring deficiency appears in the amount of the verdict, justice demands a revision. *Watson v. Harmon*, 85 Mo. 443.

And a verdict for a much less sum in an action on contract in which the plaintiff was entitled to recover his whole claim or nothing will be deemed to show that the jury in determining the case either wholly disregarded the evidence or misapprehended its effect, or overlooked some important fact, or necessarily found some fact in favor of the defendant which was wholly inconsistent with a verdict for any amount in favor of the plaintiff, and may therefore be set aside. *Powers v. Gouraud*, 19 Misc. 268, 44 N. Y. Supp. 249.

So, setting aside a verdict and granting a new trial in an action for breach of contract is not an abuse of discretion where the finding in favor of the plaintiff entitles him to substantial damages, but only nominal damages are awarded. 47 L. R. A.

Conrad v. Dohmeyer, 57 Minn. 147, 58 N. W. 870.

And such a verdict may be set aside as against evidence. *Gartner v. Saxon*, 19 E. I. 461, 36 Atl. 1132.

And a motion for a new trial in an action of assumpsit should be granted where the verdict was for a less sum than the party was entitled to. *Hallberg v. Brosseau*, 64 Ill. App. 520.

And a verdict in an action upon an account stated will not be sustained where it is for a sum greatly less than the damages suffered as shown by the evidence in writing, which was practically undisputed. *Porter v. Sherman County Bkg. Co.* 36 Neb. 271, 54 N. W. 424.

Thus, a verdict for \$25 in an action for services rendered will be set aside and a new trial granted where by the uncontradicted evidence they were worth \$150 or \$200. *Hood v. Ware*, 34 Ga. 328.

And a judgment in an action for services for \$16 is erroneous where the only evidence on the issue was that it took thirteen days' labor to do the work which was worth \$2 a day. *Fagan v. Whitcomb* (Tex. App.) 14 S. W. 1018.

And a verdict for the plaintiff for \$125 in an action brought by him for his services as an attorney will be set aside as contrary to the evidence, and a new trial granted, where the proof of the value of the services rendered justified fixing the amount at not less than \$250, and there was no evidence warranting the finding of the less amount. *Shropshire v. Doxey*, 23 Tex. 127.

So, a verdict will be set aside and a new trial ordered in an action for wages *quantum meruit* where the amount found was less than that fixed by any witness in the case as the value of the services rendered. *Howe v. Lincoln*, 23 Kan. 468.

And a finding upon an inquest of one penny damages for the plaintiff in an action on a debt of £333 for an apothecary's bill will be set aside for smallness, and a new writ of inquiry issued. *Markham v. Middleton*, 2 Strange, 1259.

And a verdict for \$100 for the plaintiff in an action for the contract price of drilling a well and furnishing casings, etc., in which the amount earned was established without dispute at \$249.80, and there was an undisputed offset of \$25, in which the court charged the jury that if the contract was found to be as alleged the plaintiff was entitled to \$224.84, is properly set aside as inadequate, and as in direct contravention of the instructions of the court. *Bigelow v. Garwitz*, 40 N. Y. S. R. 580, 15 N. Y. Supp. 940.

jury, in response to the single issue as to damages, answered \$600. His honor gave judgment for the plaintiff, and against the defendant, R. V. Collins, for that amount, and after reciting that the conveyance by the defendant, R. V. Collins, and his wife, of his lands lying in Nash and Franklin counties, had been conveyed in fraud of his creditors, ordered that, subject to the homestead exemption of defendant, R. V. Collins, the lands so fraudulently conveyed be sold to satisfy the plaintiff's judgment, and the clerk was instructed to appoint three commissioners to appraise and allot to the defendant, R. V. Collins, his homestead therein, who should report their proceedings to the next term of Franklin superior court; and it was further ordered that the excess over the homestead should be sold by a commissioner then named by the court, and that his re-

port should be returned to the next term of that court.

The case is before us on two exceptions,—one to the ruling of his honor in the first trial setting aside the verdict for inadequacy of damages, and the ordering of a new trial on that one issue alone; and the other to the judgment, as to its form and substance, as to the allotment of the homestead, and the sale of the excess. Both points raised on the appeal are important as matters of court practice and procedure, and as matters affecting the substantial property rights of the defendant.

On the question as to the power of the superior courts to grant new trials on one or more of several issues, and to let the others stand, and the practice of this court to order new trials on particular or restricted issues, the authorities are numerous, and cover a

So, the presiding judge in an action for damages for breach of contract in neglecting to receive and pay for property sold, may, upon a motion made upon his minutes, set aside a verdict for a sum far less than the amount of the damages, and award a new trial on the ground of inadequacy of the verdict, though upon the evidence a verdict for the defendant would not have been disturbed. *McDonald v. Walter*, 40 N. Y. 551.

And the fact that stock purchased upon false representations as to its value afterwards became worthless will not prevent setting aside a verdict for 6 cents rendered in an action brought by the purchaser for such false representations, as it does not necessarily follow that the purchaser would have retained the stock until its value was gone. *Cowles v. Watson*, 14 Hun, 41.

And in *Woodford v. Eades*, 1 Strange, 425, a verdict of one cent damages for the plaintiff in an action on contract for stock between the plaintiff and another, each of whom deposited \$200 in the hands of the defendant for the recovery of the money on the failure of the other to perform his agreement, was set aside, and a new trial granted.

So, a verdict for the plaintiff in an action upon a bond for only one fourth of the principal and interest due thereon will be set aside as against evidence and in violation of law, and a new trial ordered, where no evidence was given by the defendant. *Carwile v. Harvey*, 15 Rich. L. 314.

And see *State ex rel. Scott County Comrs. v. Wilson*, 90 Ind. 114, *supra*, L. for a similar holding with reference to a verdict on a county clerk's bond.

And a verdict for \$50 for the plaintiff, in an action on a note for \$100 in which it was alleged that the note was passed for a loan of \$50 under a verbal stipulation that if the bearer would repay the \$50 the note should be given up, otherwise it should be forfeited, will be set aside and a new trial granted, as the note would be usurious if such agreement was found to exist, and therefore void, and the plaintiff would be entitled to recover the whole amount if the agreement did not exist. *Fowler v. Word*, Harp. L. 372.

And a verdict in an action upon a promissory note given for the purchase price of lands, the title to part of which failed, allowing the defendant about one half of the lowest estimate placed upon such part by the witnesses, will be set aside as against evidence, and a new trial granted. *Fawcett v. Woods*, 5 Iowa, 400. 47 L. R. A.

And in *Russel v. Ball*, Barnes' Notes, 455, it was held that where a demand is certain, as by promissory note, the court will set aside a verdict for too small damages, but not where the damages are uncertain, as in a case for damages for curing a wound.

So, a verdict in an action upon a fire-insurance policy under which the plaintiff made affidavit of damage to the extent of \$1,085 rendered in his favor for \$500, will be set aside and a new trial granted, where the policy contained a condition that the plaintiff should forfeit all benefit under the policy if there was any fraud or false swearing in the claim he made. *Levy v. Baillie*, 7 Bing. 849, 5 Moore & P. 208, 9 L. J. C. P. 108.

But proof that a verdict in an action upon an insurance policy was for a less sum than the estimation of the loss by the plaintiff does not establish fraud and false swearing, or authorize the court to say that the jury was under such improper influence that their verdict should be disturbed. *Moore v. Protection Ina. Co.* 29 Me. 97, 48 Am. Dec. 514.

So, a finding of the jury in executing a writ of inquiry in an action on a covenant for non-payment of rent reserved on a lease, for less than the rent in arrear, will be quashed, and a new writ of inquiry granted on payment of the costs. *Parr v. Purbeck*, 8 Mod. 196, and see also *Wolf v. Goodhue F. Ina. Co.* 48 Barb. 400, *infra*, VII.

Nor will the court refuse a new trial in an action of covenant by a lessor against a lessee upon a lease reserving an increased rent for every acre of certain lands converted into tillage, where the jury gave damages for the actual injury sustained instead of the increased rent, on the ground that the verdict was consistent with justice. *Farrant v. Oimius*, 3 Barn. & Ald. 692.

And a verdict for \$100 in an action for use and occupation, in which the uncontradicted evidence as to value fixed it at \$475, will be set aside as against the weight of evidence. *Hoe v. Hoey*, 39 N. Y. S. R. 221, 15 N. Y. Supp. 105.

And asking a question of a witness in an action for rent, which suggested the plaintiff's wealth and the defendant's poverty, to which an objection was overruled, will be deemed to have occasioned passion or prejudice, and to warrant a new trial, where, by the verdict, the rent of an agreed amount of \$275 was practically reduced to \$60. *Fonda v. Lape*, 29 N. Y. S. R. 327, 8 N. Y. Supp. 792.

And where a tenant under a lease containing

long series of years. The following are some of them: *Strother v. Aberdeen & A. R. Co.* 123 N. C. 197, 31 S. E. 386; *Silver Valley Min. Co. v. North Carolina Smelting Co.* 122 N. C. 542, 29 S. E. 940; *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 544, 26 S. E. 922; *Nathan v. Charlotte Street R. Co.* 118 N. C. 1066, 24 S. E. 511; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264; *Blackburn v. St. Paul F. & M. Ins. Co.* 116 N. C. 821, 21 S. E. 922; *Tillett v. Lynchburg & D. R. Co.* 115 N. C. 662, 20 S. E. 480; *Jones v. Swenson*, 94 N. C. 700; *Boing v. Raleigh & G. R. Co.* 91 N. C. 199; *Price v. Deal*, 90 N. C. 290; *Jones v. Mial*, 89 N. C. 89; *Lindley v. Richmond & D. R. Co.* 88 N. C. 547; *Crawford v. Geiser Mfg. Co.* 88 N. C. 554; *Roberts v. Richmond & D. R. Co.* 88 N. C. 560; *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Burton v. Wil-*

mington & W. R. Co. 84 N. C. 192; *Merony v. McIntyre*, 82 N. C. 103; *Holmes v. Godwin*, 71 N. C. 306; *Key v. Allen*, 7 N. C. (3 Murph.) 523; *Barnes v. Brown*, 69 N. C. 439.

Before such partial new trials, however, are granted, it should clearly appear that the matter involved is entirely distinct and separable from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters. Such partial trials are not of strict legal right, but of sound legal discretion. There was no violation of the limitation in such matters in the case before us. The issues were clearly separable, and each one could have been answered without dependence or complication upon the others.

The contention of the defendant is that on the second trial various matters favorable

a covenant to repair underlets the premises to one who enters into a similar covenant, and the lessor brings action on the covenant in the first lease against his tenant and recovers, the damages and costs recovered in that action, and also the costs of defending it, may be recovered as special damages in an action by the tenant against the under-tenant for breach of his covenant to repair, and if the jury assess the damages at the sum recovered in the former action for breach of covenant to repair only, the inquiry will be set aside and a new writ of inquiry issued. *Neale v. Wyllie*, 3 Barn. & C. 533, 5 Dowl. & R. 442, 27 Revised Rep. 418.

As to what degree of inadequacy will warrant the court in acting in rent cases, see *Galloway v. Weber*, 55 Ill. App. 366, *supra*, I.

So, a verdict for the plaintiff for nominal damages only in an action on an implied warranty of the soundness of a negro will be set aside as against evidence, and a new trial ordered, where the unsoundness of the slave at the time of the sale was conclusively established, and it appears that a full price was paid. *Verdier v. Trowell*, 6 Rich. L. 186.

Or where the testimony as to the diseased condition of the slave was uncontradicted, and it appears that he was injured from 25 to 30 per cent upon the purchase price. *Wallace v. Frazier*, 2 Nott & M'C. 516.

And a verdict for one cent in an action for damages for deceit and breach of warranty of soundness of a horse sold, will be set aside as inadequate where the evidence shows that the horse was of no value, and that in the condition he was represented to be in he would have been worth at least \$200. *Traylor v. Evertson* (Tex. Civ. App.) 26 S. W. 637.

A party deceived by fraudulent misrepresentations has the right, in an action for damages because of the fraud, to be placed in the pecuniary position which the representations entitled him to believe he was securing by means of the transaction, and a verdict adopting his theory of the case, but limiting his recovery to 6 cents, where the damages were many thousand dollars, will be set aside as inadequate, as the jury had no discretion on the subject, but were under a legal duty to recompense him for the entire amount of his loss. *Cowles v. Watson*, 14 Hun, 41.

And where, in an action for the contract price and extra work of supplying and placing a heating apparatus, the defendant alleges breach of warranty, and claims that \$500 apparently paid thereon was really a loan made by him to the plaintiff, and the court charges 47 L. R. A.

the jury to find for the plaintiff unless the breach of warranty was established, in which case they would have to find a verdict for the defendant for the \$500, and a verdict for the defendant is found without allowing him the \$500, it is a proper exercise of discretion for the trial justice to set aside the verdict and grant a new trial. *H. B. Smith Co. v. Chapin*, 88 N. Y. S. R. 463, 13 N. Y. Supp. 799.

So, a judgment upon a verdict in an action upon contract not allowing interest to the plaintiff to which he was entitled is erroneous, and should be reversed. *Winn v. Young*, 1 J. J. Marsh. 51, 19 Am. Dec. 52.

And a judgment and verdict in an action in which the answer admits an indebtedness to the plaintiff of a larger amount will be reversed on appeal, and the cause remanded with directions to the court below to render judgment for the admitted sum. *Coffman v. Brown*, 7 Colo. 147, 2 Pac. 905.

But the fact that the jury found a verdict for a less sum than that fixed by any of the witnesses as the amount of damages in an action for breach of contract to erect and complete a bridge, is not a ground for a new trial where the amount of damages was merely a matter of opinion. *Brewer v. Tyrringham*, 12 Pick. 547. But see *Howe v. Lincoln*, 23 Kan. 468, *supra*.

And in actions on contract in which the damages may be more or less a matter of calculation, although the plaintiff may be prima facie entitled to a full measure of damages, where the actual amount of damages has been in any degree affected by the conduct of the plaintiff or his agent, that is a legitimate element of consideration, and the jury are at liberty to diminish the damages on that account, but if they do so unreasonably and arbitrarily the court can grant a new trial as for a verdict against evidence. *Wilson v. Hicks*, 26 L. J. Exch. N. S. 242.

And a verdict for the plaintiff for merely nominal damages in an action for breach of contract will not be set aside for inadequacy when the damages were not a mere matter of computation, and there were views upon which the jury might not unreasonably consider that there was no substantial damage, especially when the matter in dispute amounted to but a small sum. *Nichol v. Bestwick*, 28 L. J. Exch. N. S. 4.

So, while a verdict would not be sustained if it were established that the jury had lessened the damages with a view to reducing them below \$20 in order to affect the amount of costs to which the plaintiff would be entitled, it will not be disturbed where there was no proof that

to the defendant on the issue as to the amount of damages might have been cut off, which would have been relevant and competent on the first trial under the first issue, and that, therefore, the defendant might have suffered by the manner in which the case was tried on the second trial. The argument of the defendant's counsel is that upon the first issue as submitted in the first trial, "Did the defendant, R. V. Collins, wrongfully damage the plaintiff, as alleged in the complaint?" all the circumstances attending the assault are drawn out. If there be anything to repel malice, to mitigate the damages,—any conduct on the part of the plaintiff provoking the assault, as foul language or insulting words,—it comes out in the investigation of the evidence on the first issue, and the same jury hears the evidence as to the extent of the wound, the loss

of time, pain, and permanence and effect of injury; and the jury which hears the whole could judge more impartially all of the issues than another jury could, hearing only the testimony on the issue as to damages. The answer to that argument is that whatever evidence could have been introduced on the first trial upon the first issue, in mitigation of damages,—such matters as the defendant's counsel urged in his argument,—could be, as a matter of law, gone into on the second trial upon the issue as to damages. If no attempt was made by the plaintiff in the second trial to show malice in the defendant in making the battery upon the plaintiff, then the damages could have been only actual damages. If malice or aggravation was attempted to be proved to recover punitive damages, then it was permissible for the defendant to show the conduct of the plaintiff

they so reduced it other than the verdict itself. *Brewer v. Tyringham*, 12 Pick. 547.

See also *Scott v. Baldwicks*, 2 Mill, Const. 410; *Anonymous*, 2 Salk. 647; *Wilson v. Hicks*, 26 L. J. Exch. N. S. 242,—*infra*, V.; and *Whitwell v. Atkinson*, 6 Mass. 272, *infra*, VII.

III. Rule in actions with relation to property and property rights.

Actions to recover for injuries to property, or to recover property, or secure property rights, like actions upon contract, usually have fixed standards of value which are capable of estimation by direct proof, and in such cases when a glaring deficiency in the amount of the verdict appears, justice demands a revision. *Watson v. Harmon*, 85 Mo. 443.

Thus, a verdict for \$1 in an action for conversion must be set aside and a new trial granted where the minimum valuation of the property converted, fixed by the witnesses, was \$3,300. *Ibid*.

And a refusal to set aside a verdict and grant a new trial in an action in trover is error where the jury found the defendant guilty of a conversion of the goods, but assessed the damages at a sum much less than their real value. *Bernstein v. Walker*, 25 Ill. App. 224.

So, a bailor of property which is lost by the bailee, if he is entitled to recover at all against the bailee is entitled to have the value of the property lost, and a verdict in an action therefor assessing the value of the property at much less than its true value will be set aside and a new trial granted. *Wise v. Freshley*, 3 McCord, L. 547.

And setting aside a verdict and granting a new trial are not an abuse of discretion in an action for the value of the contents of a lost trunk, where the verdict does not accord in any reasonable manner with the evidence, though the testimony as to damages was conflicting. *Hall v. The Emily Banning*, 33 Cal. 522.

So, a verdict for \$5 in an action against a city for the value of property destroyed by order of the city authorities, will be set aside as inadequate, and a new trial awarded, where it appears by the uncontradicted evidence that the property was worth \$1,378.14. *Bishop v. Macon*, 7 Ga. 200, 50 Am. Dec. 400.

And the jury in an action for injury to or destruction of property are not at liberty, directly contrary to the evidence, to award an arbitrary sum below its real value, and a nominal verdict in an action for shooting and killing the plaintiff's slave will be set aside and a new trial granted, though it appears that he was of 47 L. R. A.

bad character and was stealing potatoes at the time, the character and act of the slave going only in mitigation of damages. *Richardson v. Dukes*, 4 McCord, L. 166.

Nor is setting aside a verdict in a statutory proceeding to assess damages claimed by a landowner against a railroad company for appropriating his land and constructing a railroad over it for the value of the land actually taken and used an abuse of discretion, where there was evidence of other and additional damages to his land besides the value of the land so taken and used. *Georgia Southern & F. R. Co. v. Jones*, 90 Ga. 292, 15 S. E. 824.

And the supreme court on appeal may correct a judgment in an action for damages for the appropriation of land under the right of eminent domain, where it appears that interest had not been allowed in the court below where it should have been, without reversing and remanding the case. *Alloway v. Nashville*, 38 Tenn. 510, 8 L. R. A. 123, 13 S. W. 123.

But a verdict in a proceeding by a railroad company to condemn lands in which a turnpike company had an easement required by the railroad to cross the turnpike, for \$25 for land taken and \$275 for consequential damages, will not be set aside as too small. *Shelbyville & E. Turnp. Co. v. Louisville & N. R. Co.* 21 Ky. L. Rep. 548, 51 S. W. 805.

So, a judgment for \$2.12½ in an action against a common carrier for negligence in carrying horses, causing their injury, will be reversed as against evidence, and the cause remanded, where it appears by the evidence that some of the injuries were of a permanent character, and the damages were assessed by the witnesses at from \$10 to \$75 each on six horses, and but one witness testified that the horses were not injured, and his testimony was of an inconclusive character. *Eggleston v. Gulf, C. & S. F. R. Co.* (Tex. App.) 13 S. W. 187.

And a verdict for the plaintiff for nominal damages only, in an action brought by the owner of property against a lessee for cutting down a grove of large trees surrounding the buildings, will be set aside, and a new trial granted, where the evidence shows that the injury was serious. *English v. Clerry*, 3 Hill, L. 279.

And a verdict in an action for damages to the rental value of plaintiff's house because of the building and operating of a railroad along its side, finding that he had suffered six cents damage in four years, is totally inadequate, and will be set aside and a new trial granted, where there was uncontradicted testimony as to the

as to provocation, in mitigation of damages. "The general rule is that anything which is a complete answer to the action must be pleaded either in bar or in justification; but it is also well settled in many cases that matters which go to the *quantum* of damages, merely to palliate the character of the offense, or to mitigate the amount which the jury may award, may be given in evidence under the general issue." Sedgw. Damages, 546. In *Fraser v. Berkeley*, 7 Car. & P. 621, Lord Abinger said: "In actions for personal wrongs and injuries [at nisi prius], a defendant who does not deny that the verdict must pass against him may give evidence to show that the plaintiff in some degree brought the thing upon himself." That is the rule applicable to the case before us. If this were not the rule, the plaintiff, in actions like the one before us, might get full com-

pensation for damages which he might have partly caused by his own conduct. "Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure." *Robison v. Rupert*, 23 Pa. 523.

As to the matter of the setting aside of the verdict by his honor because of inadequacy of damages, this is, so far as we can find, the first case in the history of judicial proceedings in the state; and it may be further said that it has been generally thought that our courts could not set aside a verdict for inadequacy of damages. Nevertheless it may be said to be true that it is generally considered that there is no reason which can be advanced in favor of setting aside verdicts because of excessive damages which does not apply to setting them aside for inadequacy

loss of rentals. *Jones v. Metropolitan Elev. R. Co.* 27 Jones & S. 437, 14 N. Y. Supp. 632.

And a new trial may be granted for inadequacy of damages, in an action to abate a nuisance and to recover damages occasioned thereby. *Lefrois v. Monroe County*, 88 Hun, 109, 34 N. Y. Supp. 612.

So, a verdict of a jury in an action of ejectment, finding for the plaintiff but allowing him no damages, will be set aside and a new trial awarded, where there was no question as to his being entitled to mesne profits, and their value was fixed by the testimony. *Duncan v. Jackson*, 16 Fla. 338.

And a verdict for the plaintiff for nominal damages in trespass to try title will be set aside and a new trial granted where the right of the plaintiff to recover the land was in question, and the defendant had been in possession for three years, and the land was proved to be worth from \$40 to \$50 per annum. *Duff v. Hutson*, 2 Ball. L. 215.

So, a verdict for one cent in favor of the plaintiff in an action for trespass for taking property from plaintiff's premises will be set aside and a new trial granted, as the jury were bound to find damages, at least to the value of the property taken. *Porteous v. Hazel*, Harp. L. 332.

The general rule that a verdict in actions sounding in damages will not be set aside on account of excess or deficiency of the damages does not apply when a pecuniary injury has been sustained, the extent of which can be ascertained as in cases of trespass for destroying a building the cost of which is clearly proved, in which case the jury would have no power to find a less sum than the injury actually amounted to, though there might be an exception, even in such a case, where a trespass was committed under circumstances of mitigation or provocation on the part of the plaintiff which bordered on a justification. *Hopkins v. Myers*, 1 Harp. L. 56.

But the rule has been held to be different with reference to a mere naked trespass.

Thus, the court will not grant a new trial in an action sounding in damages, as trespass, etc., because the jury assessed only half a farthing for damages, as it is in their power to assess such damages as they please in such a case. *Marshall v. Buller*, 2 Rolfe, Rep. 21.

Nor will a verdict for the plaintiff for six cents, in an action for trespass by a tenant against his landlord, be set aside as inadequate where the plaintiff had abandoned the use of the premises and the landlord merely entered

to put them in good order and condition. *Bloomingsdale v. Steubing*, 10 Misc. 229, 30 N. Y. Supp. 1056.

But while a new trial could not be granted for smallness of damages in trespass at common law it may be under 1 Va. Rev. Code 1819, chap. 128, § 96, p. 510. *Jackson v. Boast*, 2 Va. Cas. 49.

The judgment of witnesses as to value, however, is not as a matter of law to be accepted by the jury in place of their own, and a party against whom damages are assessed by a jury cannot complain that such damages have been placed at a lower sum than fixed by the witnesses. *Powell v. Missouri P. R. Co.* 59 Mo. App. 335.

And a verdict in an action of trespass to try title will not be set aside for inadequacy, though the damages given are less than those fixed by the witnesses, and though the court agrees with the witnesses, where the amount of the damages was a mere matter of opinion with the witnesses growing out of circumstances upon which the jury were as competent to express an opinion as the witnesses themselves. *Hopkins v. Myers*, Harp. L. 56.

But in *Weeding v. Mason*, 2 C. B. N. S. 382, in which upon an execution of a writ of inquiry in an action for dilapidations, surveyors called upon one side estimated the damages at a low figure, and those called upon the other side at a much higher figure, and the jury returned a verdict for a much lower figure than that made by any of the surveyors, the inquiry was ordered to be set aside without costs unless the defendant would consent to the entry of a verdict equal to the smallest amount testified to by the surveyors.

See also *Benson v. Burlington & M. River R. Co.* 18 Neb. 659, 26 N. W. 467; *Phillips v. Phillips*, 34 N. J. L. 208; *Blanchard v. Loges*, 11 Neb. 460, 9 N. W. 568; *Chicago, R. I. & T. R. Co. v. Yarbrough* (Tex. Civ. App.) 35 S. W. 423; *Moystyn v. Coles*, 7 Hurlst. & N. 872, 31 L. J. Exch. N. S. 151, 10 Week. Rep. 355; *Hawkins v. Alder*, 18 C. B. 640; *Learned v. Castle*, 78 Cal. 454, 21 Pac. 11, 18 Pac. 872; *Richards v. Ross*, 24 Eng. L. & Eq. 406, 9 Exch. 218, 23 L. J. Exch. N. S. 3, 17 Jur. 1036, 2 C. L. Rep. 311, *infra*, V.; and *Engel v. Fischer*, 44 Ill. App. 362, *supra*, I.

IV. Rule in actions for personal injuries.

a. Generally.

The earlier English cases, and some American cases, have made the broad statement of the

of damages. It seems to be settled, upon examination of numerous authorities, that at common law the courts claimed and had the power to set aside verdicts for inadequacy of damages; but it further appears, from the earlier cases, that it was most seldom done. And, too, in the cases where such verdicts were set aside, they were extreme cases,—cases where the jury had been palpably influenced by caprice, or gross partiality, or some other unworthy motive, and where the damages did not amount, in point of fact, to damages at all, but were mere attempts to evade substantial damages. The English judges, however, as we have said, did not doubt their power to set aside such verdicts, but declared in many cases that they would not do it because they had no rule to go by. This was especially the case in actions of tort for damages for personal

injuries. In a recent English case (*Phillips v. Southwestern R. Co.* [1879] L. R. 4 Q. B. Div. 406), the common-law rule was relaxed. The action was for damages for personal injuries sustained through the defendant's negligence, and there was a motion for a new trial on the ground of inadequacy of damages. It appeared upon the facts proved that the jury must have omitted to take into consideration some of the matters involved in the plaintiff's claim for damages. The counsel for the defendant in that action contended that a new trial could not be granted on account of the damages being too small, because the action was for unliquidated damages, unless there had been some misdirection on the part of the judge or some misconduct on the part of the jury. The court said: "We think the rule contended for has no application in a case of personal injury, and

doctrine that as a general rule courts will not set aside verdicts and grant new trials in actions for tort on account of the smallness of the damages. *Maurice v. Brecknock*, 2 Dougl. 509; *Queen v. Justices of West Riding of Yorkshire*, 1 Q. B. 624; *Kennedy v. Wray*, 7 West. L. J. (Ohio) 414; *Hackett v. Pratt*, 52 Ill. App. 346; *Colyer v. Huff*, 3 Bibb, 84.

At common law new trials were not allowed upon the ground that the damages awarded by the jury in actions for tort were insufficient, at least in trespass *vi et armis*, and there is much authority that the rule applied in all actions for tort. *Hackett v. Pratt*, 52 Ill. App. 346.

So, in *Burges v. Nightingale*, Barnes' Notes, 230, it was held that an inquisition upon a writ of inquiry will not be quashed by reason of the smallness of damages where the jury find any damages, but that the rule might be different had they found no damages.

And in *Lord Stafford's Case*, Bull. N. P. 27, cited in *Duberley v. Gunning*, 4 T. R. 655, the court, though they thought that the verdict of one shilling was much too small, did not feel warranted in granting a new trial because they had no rule to go by.

And in *Bourke v. Bulow*, 1 Bay, 49, it was said that though the jury in an action sounding in damages might have given the plaintiff larger damages, the court did not think it proper to set aside a verdict because the damages were small in order that the plaintiff might have another chance of getting more, and would not do it unless very peculiar circumstances appeared to justify it.

We have seen, however, from the cases in *supra*, III., that this rule does not apply to torts against property when there is a standard of measurement of the damages, and it seems to have been considerably modified, even with reference to torts purely personal.

The rule laid down in *Coffin v. Varila*, 8 Tex. Civ. App. 417, 27 S. W. 956, which was a case of excessive damages, that courts will not set aside verdicts in actions for personal injuries, either on the ground that the damages are excessive, or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or improper influence, or made some mistake of fact or law, appears to be more accurate, at least from the more modern standpoint.

Thus, the general rule now is that where the verdict is either so great or so small as to indicate that in rendering it the jury either disregarded the testimony or acted from passion or prejudice, it is the duty of the court to set 47 L. R. A.

it aside. *Welch v. McAllister*, 13 Mo. App. 89; *Chouquette v. Southern Electric R. Co.* (Mo.) 53 S. W. 897.

And while in actions for personal torts and actions sounding purely in damages courts will usually refuse to grant new trials for smallness of damages, it being the peculiar province of the jury in such cases to estimate the injury, relief will be granted where the finding is grossly inadequate and the compensation given entirely disproportionate to the injury proved to have been sustained. *Bishop v. Macon*, 7 Ga. 200, 50 Am. Dec. 400; *Lefrois v. Monroe County*, 88 Hun, 109, 34 N. Y. Supp. 612.

And a new trial may be granted in an action for damages where, the verdict of the jury upon the fact of responsibility being accepted as correct, the damages allowed are either in excess of or less than any amount which an impartial and just enforcement of the responsibility requires. *Dobson v. Philadelphia*, 7 Pa. Dist. R. 321.

And a verdict for \$125 in an action for damages for personal injuries will be set aside and a new trial ordered on the ground that the verdict was against the evidence, where the evidence in the case makes it manifest that if plaintiff was entitled to a verdict at all he was actually damaged in a much greater sum. *Lough v. Romaine*, 4 Jones & S. 332.

The rule that a verdict in an action for damages for personal injuries will be set aside when no reasonable proportion exists between it and the circumstances of the case is applicable to cases of inadequacy of damages, as well as where the damages are excessive. *Beattie v. Moore*, Ir. L. R. 2 Eq. 28.

And a new trial will be granted in an action for tort if the verdict is for an unreasonably small amount of damages, and the damages are capable of being definitely ascertained. *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752.

A verdict for the plaintiff in an action for tort may be set aside for inadequacy where the nature of the injury received and the means by which it was produced are such that the damages may in a good measure be computed by estimating the loss of time, the expenditure incurred, etc. *Bailey v. Cincinnati*, 1 Handy (Ohio) 488.

And a verdict in an action for injury to the person awarding damages, so small as to be inconsistent with the undisputed evidence, will be set aside at the instance of the plaintiff. *Miller v. Delaware, L. & W. R. Co.* 58 N. J. L. 428, 33 Atl. 950.

And a verdict in an action for a collision,

that it is perfectly competent to us, if we think the damages unreasonably small, to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case. The rule must therefore be made absolute for a new trial."

There are conflicting decisions on this question in the courts of several of the states, but we believe that the conclusion arrived at by the English court in the case quoted from is the correct conclusion, and we will adopt it as the conclusion of this court. Holding, then, as we do, that the superior courts of this state have the power to set aside verdicts for inadequacy of damages,

for less than half the amount of the expense account for repairs to the carriage and continuing the journey and for medicines and medical attendance, to say nothing of personal injuries received, will be set aside on motion of the plaintiff as inadequate. *May v. Hahn* (Tex. Civ. App.) 54 S. W. 416.

So, a new trial must be granted, even in actions *ex delicto*, where the jury has responded only to a part of the demand made upon it by the law and evidence. *Moseley v. Jamison*, 68 Miss. 386, 8 So. 744.

There is no inexorable rule of practice precluding the granting of a new trial on the ground of the smallness of the damages; and where the smallness of the damages shows that the jury may have made a compromise, and instead of deciding the issue submitted to them have agreed to find for the plaintiff for nominal damages only, a new trial will be granted, such a case being the same in effect as if the jury had been discharged without a verdict. *Beattie v. Moore*, Ir. L. R. 2 Eq. 28; *Kelly v. Sherlock*, L. R. 1 Q. B. 697, 6 Best & S. 480, 35 L. J. Q. B. N. S. 209, 12 Jur. N. S. 937; *Faivey v. Stanford*, L. R. 10 Q. B. 54, 44 L. J. Q. B. N. S. 7, 23 Week. Rep. 162, 81 L. T. N. S. 677.

In *Beattie v. Moore*, Ir. L. R. 2 Eq. 28, *supra*, *Gibbs v. Tunaley*, 1 C. B. 640, *infra*, IV. e. 1, was distinguished and explained on the ground that it appeared in that case that the judge told the jury that if they thought the defendant had been guilty of any degree of negligence the plaintiff would be entitled to nominal damages, but that if they were of the opinion that the injury was attributable to the defendant's carelessness and want of skill they ought to give serious damages, and that the jury in finding a farthing were merely following the direction of the judge.

So, the rule that a new trial will not be granted for the smallness of the damages, in an action founded upon tort sounding merely in damages, does not apply to cases in which the verdict has been the result of contrivance by the defendant, or surprise on the plaintiff, or the partiality or misconduct of the jury. *Colyer v. Huff*, 3 Bibb, 34, *dictum*.

But where there is no measure of damages in a case of tort, the court will be slow to interfere with a verdict on the ground of inadequacy if it can see any reasonable ground to support it. *Beattie v. Moore*, Ir. L. R. 2 Eq. 28.

In actions sounding in tort a wide latitude is given to juries, and courts will interfere with a verdict because it may be less than should 47 L. R. A.

we logically conclude that such power is discretionary with them, and that it is not reviewable by us. The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and, in our judgment, it is best that such power be confided to the judges who preside over the trials. They are presumed to be learned in the law, impartial in their judgments, and upright in their conduct, and, with most rare exceptions, they have measured up to the standard of that presumption.

As to the order contained in the judgment in reference to the allotment of the homestead to the defendant, R. V. Collins, and the sale of the excess by a commissioner, we see no error. The deed of conveyance from the defendant, R. V. Collins, and wife, to Eure was found to be fraudulent, and all the parties thereto, including the beneficiaries, were

have been given only in the most extreme cases. *Fawcett v. Woods*, 5 Iowa, 400.

There is no certain rule by which damages can be measured in actions of tort sounding entirely in damage, and the court will not interfere, either on account of excessive or insufficient damages, unless the verdict is palpably wrong. *Duncan v. Finnyhorn*, Sneed (Ky.) 262.

The general rule is that the court will not interfere in actions sounding altogether in damages on account either of excess or deficiency of the damages, except in cases where they are so inconsiderable or so great as to excite a belief that the jury have acted under an improper influence. *Hopkins v. Myers*, Harp. L. 56.

And a verdict in an action for damages for personal injuries should not be disturbed, though the court may regard it as inadequate, unless something is shown which indicates that the jury were actuated by passion, prejudice, or corrupt motives, or that they made an important and manifest mistake. *Lancaster v. Providence & S. S. S. Co.* 26 Fed. Rep. 283. And see *Reger v. Rochester R. Co.* 2 App. Div. 5, 87 N. Y. Supp. 520, *supra*, I.

To justify the interference of the court with a verdict in an action for damages for personal injuries it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment. *McDermott v. Chicago & N. W. R. Co.* 85 Wis. 102, 55 N. W. 179; *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809; *Bogges v. Metropolitan Street R. Co.* 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437; *Berry v. Lake Erie & W. R. Co.* 72 Fed. Rep. 488.

Or that there must have been mistake or oversight in failing to take into consideration the proper elements of damage in assessing the amount of recovery. *Berry v. Lake Erie & W. R. Co.* 72 Fed. Rep. 488.

Where substantial damages are awarded in an action for tort in which there is no fixed rule of measurement of the damages, the verdict will not be set aside and a new trial awarded merely because the amount is less than the court thinks ought to have been given. *Ibid.*; *Walker v. Smith*, 1 Wash. C. C. 202, Fed. Cas. No. 17,087; *Fawcett v. Woods*, 5 Iowa, 400; *Reger v. Rochester R. Co.* 2 App. Div. 5, 87 N. Y. Supp. 520; *Brooks v. Ludin*, 1 N. Y. Supp. 338, affirmed in 25 Jones & S. 145, 6 N. Y. Supp. 510.

And a new trial will not be granted merely

before the court. The court, as a court of equity, got control of the lands conveyed in the deed, and it had the power to order their sale after the defendant's homestead had been allotted him, and the disposition of the proceeds to satisfy the claim of the plaintiff under his judgment. The objection raised by defendant's counsel to the manner in which the court ordered the allotment of the homestead to be made is without force. It is true that the law has declared two ways of allotting a homestead,—one by petition, and the other under execution. But there are other methods besides those. In *Littlejohn v. Egerton*, 77 N. C. 379, the superior court of Franklin county was instructed by this court to appoint three commissioners to lay off the homestead of the plaintiff, with instructions to give notice at the time to the defendants, and "in all particulars to observe, as near as may be, the requirements of the Constitution, and of the homestead

act." That the clerk was instructed by his honor to appoint the three commissioners is not objectionable, for the clerk is but the hand of the court in this matter. Neither is it objectionable that the lands are situated in two counties. The court has the power to make the order, and a report is to be made to the next term of the superior court of Franklin county, after the allotment of the homestead and the sale of the excess by the commissioners, in each matter. *Hines v. Moye*, 125 N. C. —, 34 S. E. 103. The last clause of the judgment to which exception is made by the defendant, if erroneous, is harmless, for the reason that none but parties to the action are bound by the judgment in the cause, unless notice of its *pendens* has been properly filed, and of that we are not informed.

There was no error in the proceedings below.

Affirmed.

to enable the party to the action to recover vindictive damages. *McKee v. Ingalls*, 5 Ill. 80; *Johnson v. Weedman*, 5 Ill. 495.

To set aside a verdict for inadequacy, in an action for a personal wrong, is within the discretion of the court, to be exercised very cautiously, and perhaps never, for this cause alone, where the action is of a vindictive nature and the damages are arbitrary, though there might be a flagrant case, even of that nature, in which the court might interpose. *Taunton Mfg. Co. v. Smith*, 9 Pick. 11.

So, in *Brown v. Union R. Co.* 51 Mo. App. 192, it was held that courts have no authority to annul the verdict of a jury in an action for personal injuries solely on account of the smallness or insignificance of the sum allowed. They have the authority only when gross injustice clearly appears *affande* the verdict.

Texas Rev. Stat. art. 1448, providing that new trials may be granted as well when the damages are manifestly too small as when they are too large, applies to actions *ex delicto*, as well as to actions *ex contractu*. *Allison v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 29 S. W. 425.

See also, on this subject, *infra*, IV. e, 1. And see *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 609; *Davis v. Central R. Co.* 60 Ga. 329; *Flanders v. Meath*, 27 Ga. 358,—*infra*, V.

b. Actions for libel and slander.

As a general rule the injury inflicted by a libel or a slander is purely personal, and not susceptible of measurement by any standard. Libel and slander cases therefore fall within that class of cases in which a verdict will not be set aside for inadequacy unless it is such as to shock the understanding and show bias, passion, or prejudice, and some of the cases, notably the early English ones decided contemporaneously with those mentioned in *supra*, IV. a, seem to have adopted the more stringent rule that a verdict cannot be set aside for inadequacy unless there has been some mistake of law by the court, or in calculation by the jury.

The last-named rule was adopted in *Rendall v. Hayward*, 5 Bing. N. C. 424, 7 Scott, 407, 2 Arn. 14, 8 Jur. 363, 8 L. J. C. P. N. S. 243; *Forsdike v. Stone*, L. R. 3 C. P. 607, 37 L. J. C. P. N. S. 301.

So, in *Hayward v. Newton*, 2 Strange, 940, the court refused to set aside a verdict in an action for slander because of its smallness, though it said it did not see why it was not 47 L. R. A.

within the reason for setting aside a verdict for excessive damages.

And in *Lord G—r v. Heath*, Barnes' Notes, 445, it was said that in point of reason there is the same cause for setting aside a verdict for inadequacy as for excessiveness, but as the difference had always been taken and the practice long settled, and as no instance of a verdict being set aside for inadequacy had been found, the court refused to set aside a verdict of 12d. in an action for slander.

So, in *Wavle v. Wavle*, 9 Hun, 125, it was held that the amount of damages to which the plaintiff in an action for slander in which the defense was a justification is entitled, is not fixed, definite, or certain, or capable of being made so by computation, and is wholly within the discretion of the jury, and an order setting aside a verdict for 6 cents, and granting a new trial, was reversed on appeal.

In the above case, *McDonald v. Walter*, 40 N. Y. 551, *supra*, II., was distinguished upon the ground that in that case the damages sought to be recovered were capable of being rendered certain by computation.

So, a verdict for the plaintiff for 1s. in an action for slander will not be set aside as a result of a misapprehension by the jury of the judge's charge, where the judge told them that the case was not one that called for large damages, but merely such as would set the plaintiff's character right with the world. *Mears v. Griffin*, 2 Scott N. R. 15, 1 Mann. & G. 790.

The amount of damages to which the plaintiff in an action for libel is entitled is a question for the jury, and the court will not interfere with the verdict on the ground of inadequacy, though the libel was reiterated, and the court would have been better satisfied if the jury had assessed the damages at a higher figure. *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 6 Best & S. 480, 12 Jur. N. S. 987, 35 L. J. Q. B. N. S. 209.

And a new trial will not be granted in such actions for inadequacy except in very extreme cases. *Bailey v. Cincinnati*, 1 Handy (Ohio) 438.

And a new trial will not be awarded in an action for libel in which merely nominal damages were awarded, though it was a case which would have justified the jury in imposing heavy vindictive damages, where no evidence was given as to the actual damage done. *Palmer v. Leader* Pub. Co. 6 Pa. Dist. R. 182.

And, in ascertaining the propriety of a ver-

dict in an action for slander with the view of setting it aside for inadequacy, its effect upon the costs must be entirely laid out of consideration. *Mears v. Griffin*, 2 Scott N. R. 15, 1 Mann. & G. 796.

So, in *Manton v. Bales*, 1 C. B. 444, in an action for injury to the plaintiff's reputation by the sale of goods of an inferior quality with the plaintiff's name stamped upon them, the plaintiff being a manufacturer of the same kind of goods, the court refused to set aside a verdict in which the damages were estimated at £5 on the ground of inadequacy under the well-known rule precluding the interference with a verdict for a small amount as against evidence.

But a new trial in an action for slander may be granted under 1 Va. Rev. Code, 510, § 96, where the damages found by the jury are manifestly too small. *Rixey v. Ward*, 3 Rand. (Va.) 52.

And a finding of the jury in an action for libel, that the libel was published with malicious intent to injure, justifying the giving of a verdict for exemplary damages, but awarding to the plaintiff 6 cents only, warrants the conclusion that they acted under some bias or mistake of law, and requires the setting aside of the verdict as inconsistent, and the direction of a new trial. *Cottrill v. Cramer*, 59 Wis. 231, 18 N. W. 12.

And a verdict for one farthing, in an action for slander in which, though there was no proof of any actual damage, there was no evidence that the plaintiff had done anything to provoke the slander or to show that he had disintitied himself to claim such a verdict as would be practically sufficient to vindicate his character, is so inconsistent with the facts as to warrant the court in setting it aside as inadequate and granting a new trial. *Falvey v. Stanford*, L. R. 10 Q. B. 54, 44 L. J. Q. B. N. S. 7, 28 Week. Rep. 162, 31 L. T. N. S. 677.

In the above case the court said with reference to *Rendall v. Hayward*, 5 Bing. N. C. 424, 7 Scott, 407, *supra*, that, if the circumstances were such as to leave no doubt that the jury had fairly exercised a judgment upon the issue before them and upon the amount of compensation due in the shape of damages, the practice in that case would, in the absence of other considerations restricting its application, be generally followed in the exercise of the discretion of the court.

c. Actions for malicious prosecution and false imprisonment.

The injury caused by malicious prosecution and false imprisonment, like libel and slander, seems to have been formerly regarded, at least in England, as not susceptible of legal measurement, so that a verdict in an action therefor would be conclusive, however small it may have been.

Thus, a new trial was refused in an action of trespass and false imprisonment for taking plaintiff before a magistrate upon an unfounded charge of felony, because a question of character was involved, though the jury had given only one farthing damages, as the court had no means of knowing that their estimate was an improper one. *Appo v. Day*, 14 C. B. 112.

And it is in the discretion of the jury in an action for false imprisonment to give the plaintiff such damages as they may consider sufficient compensation for the wrong he has sustained irrespective of any expense he may have incurred in his defense, and an award of only a farthing by way of compensation for his detention for several hours at the police station will not be set aside, though the expense actu-

ally incurred by him in defending himself and obtaining his release from the unfounded charge was £17, 14s, where there was no intentional violation of right or duty upon the part of the jury. *Bradlaugh v. Edwards*, 11 C. B. N. S. 377.

So, in *Baker v. Dixie*, 2 Strange, 1051, the court refused to set aside a verdict for 5s. damages in an action for malicious prosecution, on account of its smallness, upon the ground that it was not a false verdict, as finding for the defendant would have been.

And in *Mauricet v. Brecknock*, 2 Dougl. 509, which was an action for maliciously suing out a commission of bankruptcy against the plaintiff and maliciously holding him to bail, the court refused to set aside a verdict of £5, though it appeared that the bill of costs of the plaintiff for superseding the commission of bankruptcy amounted to upwards of £30.

But the expense of defending against such prosecution, or of procuring relief from such imprisonment, is a tangible element of damages, and the more modern rule would seem to permit, though it does not require, the consideration of this element, and with reference to this subject, as well as with reference to all others, a verdict may be set aside where it is so small as to shock the understanding and show bias or prejudice.

Thus, a verdict finding the defendant guilty of malicious prosecution, but giving the plaintiff only nominal damages, should be set aside and a new trial granted, where the actual damage was shown with such definiteness as to be capable of being classified under a particular head, and determined by a legal measure. *Paul v. Leyenberger*, 17 Ill. App. 167.

And a verdict in favor of the plaintiff for \$5, in an action for malicious prosecution will be set aside as inadequate and as against instructions, where the undisputed evidence proves that the plaintiff paid or became liable to pay about \$150 for counsel fees, and to procure the attendance of his witnesses in making the defense to the prosecution instituted against him by the defendant, and the court charged the jury that if they found for the plaintiff they should allow him his reasonable expenses in that behalf. *Wauke v. McLeellan*, 51 Wis. 484, 8 N. W. 300.

So, while an arrest without a warrant is justifiable, where such an arrest is made and the prisoner is detained longer than a reasonable time for suing out a warrant, and he is handcuffed and carried out of the county and there incarcerated for days under no warrant whatever, it is false imprisonment for which a finding by the jury of \$25 is no compensation for the injury, and will be set aside and a new trial granted. *Potter v. Swindle*, 77 Ga. 419, 3 S. E. 94.

But in such actions a new trial will not be granted for inadequacy except in very extreme cases. *Bailey v. Cincinnati*, 1 Handy (Ohio) 438.

And a verdict for the plaintiff for 6 cents in an action for false imprisonment will not be interfered with by the court where the detention was only technical, and he was detained only long enough to walk across the street. *Henderson v. McReynolds*, 88 N. Y. S. R. 784, 14 N. Y. Supp. 351.

And a verdict for the plaintiff for \$50, in an action for damages for wrongful imprisonment, will not be set aside as inadequate, though heavier damages might have been awarded, upon a showing that he had employment at \$35 and board per month, which would have continued for five months, and that such employment was worth to him \$250, and that he felt degraded

and humiliated by being put in jail, where it does not appear that he could have got other equally profitable employment after he was discharged, or that he had not lost his employment when first arrested. *Taylor v. Davis* (Tex.) 13 S. W. 642.

So, a judgment for a nominal sum in an action for malicious prosecution will not be reversed because the jury did not allow the plaintiff the counsel fees paid by him in defending himself against such prosecution, though the jury would have been at liberty to allow such fees. The rule that in an action for malicious prosecution the jury may award the plaintiff the damages directly sustained by him in the defense of the original suit or prosecution against him, including reasonable counsel fees, is not imperative, and a verdict for the plaintiff for \$1 in such a case will not be set aside as in disregard of an instruction to assess such damages as the jury believed he suffered, where the evidence showed that he had expended \$101 as attorneys' fees in securing his release, as the jury may have disregarded the evidence. *Gregory v. Chambers*, 78 Mo. 294.

d. Actions for assault and battery and other torts.

Actions for assault and battery, etc., seem to be governed by the same rule as those for malicious prosecution and false imprisonment, and the verdict was formerly deemed conclusive without reference to its smallness.

Thus, in *Donelly v. Baker*, *Barnes' Notes*, 154, the court refused to set aside a verdict for \$8 on the ground of smallness of damages in an action for assault and battery, though the plaintiff's cure by a surgeon was proved to be worth 18 guineas, and no witness was produced by the defendant to controvert the fact.

So, in *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 487, a verdict for the plaintiff for \$1 in an action for damages for maliciously assaulting and shooting and wounding the plaintiff was upheld on motion to set it aside as inadequate, on the ground that no standard was furnished in the evidence by which the damage could be measured with any reasonable degree of certainty.

And even under the more modern doctrine recognizing the period of disability and the cost of medical attendance as an element of damages which could be measured, and permitting verdicts to be set aside where the inadequacy was such as to shock the understanding and show bias or prejudice, a new trial will not be granted except in very extreme cases. *Bailey v. Cincinnati*, 1 Handy (Ohio) 438.

But a verdict for nominal damages in favor of the plaintiff in an action for damages for personal injuries by wounding by pistol shots fired without justification is inconsistent and unreasonable, and will be set aside where the injuries were gross, and he was wholly disabled from business, and considerable sums were expended by him for medical attention and supplies. *Moseley v. Jamison*, 68 Miss. 336, 8 So. 744.

And a verdict of \$500 for an assault from which the plaintiff received a scalp wound an inch and a half long, cut through to the bone, and which rendered it necessary to amputate his arm above the elbow, and from which he suffered great pain both before and after the amputation, is grossly inadequate, and should be set aside on that ground. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108.

And a verdict for the plaintiff for \$1 in an action for a cruel and unprovoked assault will be set aside and a new trial granted. *Bacot v. Keith*, 2 Bay, 466.
47 L. R. A.

So, a verdict in favor of a married woman for \$1, in an action brought by her against a saloon keeper for damages resulting from loss of support by the intoxication of her husband, for the sum of \$1,000 for the benefit of her individual estate, cannot be sustained. *Greenlee v. Schoenhelt*, 23 Neb. 660, 37 N. W. 600.

And in *Page v. Carter*, referred to in *Apps v. Day*, 14 C. B. 112, a rule was made absolute for a new trial in an action of crim. con. on the ground that the verdict was against the evidence though the damages were under £20, because it involved a question of character.

See also *Shoff v. Wells*, 1 Neb. 168, *infra*, IV. f.

e. Actions for personal injuries caused by negligence.

1. General rules as to.

The court has power to set aside a verdict in an action for damages for personal injury resulting from negligence, upon the ground that it is grossly inadequate and disproportionate to the injury suffered. *Henderson v. St. Paul & D. R. Co.* 52 Minn. 479, 55 N. W. 58.

But a verdict in an action for substantial damages for personal injuries caused by negligence will not be set aside for inadequacy unless it is such as to shock the conscience and clearly show that the jury must have been influenced by passion or prejudice, or that they proceeded upon some erroneous basis in arriving at their conclusion. *McGowan v. Interstate Consol. Street R. Co.* 20 R. I. 264, 38 Atl. 497.

A trial judge would not be justified in setting aside the verdict of a jury and granting a new trial in an action for damages for negligence on account of insufficiency of damages, unless he was assured, on careful examination of the testimony, that the conclusion of the jury could not be supported on any reasonable theory, and was wholly inconsistent with any fair deduction from the evidence. *Brooks v. Ludin*, 1 N. Y. Supp. 338, *Affirmed* in 25 Jones & S. 145, 6 N. Y. Supp. 610.

And a new trial in an action for damages for negligence ought not to be granted on the ground that the damages are smaller than the court may think reasonable, especially where the judge who tried the cause is not displeased with the smallness of the damages. *Gibbs v. Tunaley*, 1 C. B. 640.

But while a verdict in an action for damages for personal injuries will not as a general rule be disturbed merely on account of the smallness of the damages the court should interfere where the damages under the circumstances are such as to shock the understanding and induce the conviction that the verdict was the result of either passion, prejudice, or partiality. *Fairgrieve v. Moberly*, 29 Mo. App. 152; *Lee v. Knapp*, 137 Mo. 385, 38 S. W. 1107; *Dowd v. Westinghouse Air Brake Co.* 132 Mo. 579, 34 S. W. 493; *Boggess v. Metropolitan Street R. Co.* 118 Mo. 328, 23 S. W. 159, 24 S. W. 210.

Or where the damages are such as to induce the conviction that the jury have shrunk from deciding the issue submitted to them. *Lee v. George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107.

Or that there were some objectionable compromises. *O'Shea v. M'Leary*, 15 N. Y. Civ. Proc. Rep. 69, 1 N. Y. Supp. 407.

And a new trial will be granted in an action for personal injuries sustained through defendant's negligence, on the ground of the inadequacy of the damages found by the jury, where it appears from the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly in-

involved in the plaintiff's claim. *Phillips v. South Western R. Co.* L. R. 4 Q. B. Div. 406, 40 L. T. N. S. 813, 27 Week. Rep. 797, 48 L. J. Q. B. N. S. 693, L. R. 5 Q. B. Div. 78, 41 L. T. N. S. 121, 28 Week. Rep. 10, 49 L. J. Q. B. N. S. 233.

And the jury, in an action for personal injuries, cannot be said to have taken a reasonable view of the case, and considered all the heads of damages involved in the plaintiff's claim, so as to prevent a new trial on the ground of inadequacy, unless they have taken into account the bodily injury sustained, the pain undergone, the effect on the health of the person injured according to its degree and probable duration, the expense incidental to attempts to effect a cure or lessen the injury, and the pecuniary loss sustained through inability to attend to a profession or business, and the duration of such inability. *Phillips v. South Western R. Co.* L. R. 4 Q. B. Div. 406, 40 L. T. N. S. 813, 27 Week. Rep. 797, 48 L. J. Q. B. N. S. 693.

See also, on this subject, *supra*, IV. a. And see *Gaither v. Kansas City, etc. R. Co.* 27 Fed. Rep. 545; *Gann v. Worman*, 69 Ind. 458,—*infra*, VII.

2. What sufficient to show bias or omission of duty—instances.

The question as to what is sufficient to show bias or prejudice or that the jury omitted to consider some of the elements of damage depends upon the character and extent of the injury and the surrounding circumstances, and must be determined, therefore, in every instance with reference to the facts of the particular case.

Thus, a verdict that the defendant is guilty of such neglect or default as results in the death of a human being, but allowing only nominal damages to the beneficial plaintiff, who appears from the evidence to have suffered substantial pecuniary loss by reason of such death, falls upon the court to subject the cause to an investigation to ascertain if the verdict upon the whole case administers justice between the parties. *Hackett v. Pratt*, 52 Ill. App. 346.

And evidence in an action for negligently causing death that the person killed earned \$18 per week, and provided a home for and supported his two daughters, and was educating and contributing to the support of a nephew, furnishes a reasonably certain measure of damages therefor, so as to authorize setting aside a verdict which was wholly inadequate to compensate the beneficial plaintiffs for the wrong. *Ibid.*

So, a verdict for the plaintiff for \$150, in an action by a husband for the negligent killing of his wife, is inadequate, and will be set aside and a new trial ordered, where it appears that the husband spent \$120 for her funeral expenses and about \$25 for help to fill her place, and that she was sixty years of age and a strong and healthy woman who did a man's work in his milk business, and acted as his housekeeper besides. *Meyer v. Hart*, 23 App. Div. 131, 48 N. Y. Supp. 904.

And a verdict for \$1 in favor of a wife in an action for damages for negligently causing the death of her husband is grossly inadequate, and will be set aside where it appears that he supported his wife comfortably by his labor, and earned about \$100 per month, and that she was deprived of that support. *Wolford v. Lyon Gravel Gold Min. Co.* 63 Cal. 483.

And setting aside a verdict and judgment for \$200 and granting a new trial are not an abuse of discretion in an action for damages for negligently causing death, where it appears that the person killed found employment about three

fourths of the time, and made, when at work, from \$4 to \$7 per day, and that he had several children, one of whom was living with and dependent upon him for support. *Mariani v. Dougherty*, 46 Cal. 20.

And the act of the trial judge in setting aside as inadequate a verdict for the plaintiff for \$1,000, in an action for damages for injuries causing death, is not error where it appears that the deceased left a widow and four children, the oldest eleven years of age, and that he was a laboring man earning \$2 per day and charged with the support of his wife and children, and that he was in good health prior to the accident. *Connor v. New York*, 28 App. Div. 186, 50 N. Y. Supp. 972.

But a verdict for \$500 in favor of a widow for the negligent killing of her husband does not evidence passion, prejudice, or corruption on the part of the jury, which would authorize the court to set it aside, where the facts do not make a strong case for the plaintiff, and the accident was such as would be frequently liable to happen. *Chesapeake, O. & S. W. R. Co. v. Higgins*, 85 Tenn. 620.

So, a verdict of one cent in an action by a parent for the killing of his child by the falling of an elevator is inadequate, and cannot be sustained, where the evidence shows a net profit of \$12 per month to the plaintiff from the child's wages, and an outlay by him of \$150 for the child's funeral. *Lee v. George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107.

But a verdict for \$375 in an action for damages for the death of a child will not be set aside for inadequacy, where the child was but three and one half years of age, and never had any earning capacity. *Reger v. Rochester R. Co.* 2 App. Div. 5, 37 N. Y. Supp. 520.

So, a verdict for \$175 in an action for the negligent killing of a boy sixteen years and ten months old, brought by his parents, will not be set aside as inadequate, where no evidence was given as to the boy's health or characteristics or adaptation to business or habits of industry or economy, or whether he contributed to the support of the family or lived with his parents, all that appeared being his age, and the fact that for two or three months he had earned \$7.50 per week. *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941.

And a verdict for \$1,000 each in an action for the negligent killing of two sisters, will not be set aside as inadequate, the same sum having been found by both juries, both of which seemed to be intelligent and impartial. *Linas v. Chesapeake & O. R. Co.* 91 Fed. Rep. 964.

Under the provisions of the Missouri damage act, § 2121, the plaintiffs in an action by parents for damages for the death of a minor child by negligence are entitled to recover the sum of \$5,000 or nothing, and a verdict assessing the damages at \$2,500 will be arrested on motion of the defendant. *Rafferty v. Missouri P. R. Co.* 15 Mo. App. 559.

So, in actions for personal injuries not causing death a verdict of \$1 or less for mere nominal damages has been held inadequate, and been set aside and a new trial granted.

Where it appeared that the injuries were very severe, and caused much suffering, in *Chouquette v. Southern Electric R. Co. (Mo.)* 53 S. W. 897.

And where it appeared that the plaintiff was rendered unconscious by his injury, and had to remain about five weeks in the county hospital, two weeks of which time he was confined to his bed, in *Carter v. Wells, F. & Co.* 64 Fed. Rep. 1005.

And where the injuries were serious, if not

permanent, and confined the plaintiff to her bed for several months, and caused great suffering, and compelled her to lose a winter from school, in *Fairgrieve v. Moberly*, 29 Mo. App. 152.

And where, by the uncontradicted evidence, the plaintiff remained insensible through the day from the injuries received, and could not use his feet for ten or twelve days, and was laid up nearly five months, and confined most of the time to his house, in *Robbins v. Hudson River R. Co.* 7 Bosw. 1.

And when the plaintiff's head was cut in two places which had to be sewed up, one of the cuts being about 3 inches long, and she had to be taken to the city dispensary and her wounds dressed, after which she was taken home and lay in bed for over a week, after which she was sent to another infirmary and remained two or three weeks, and her health was not as good after as before the injury, in *Welch v. McAllister*, 13 Mo. App. 89.

And where the plaintiff was ejected by force from one of the defendant's trains, and had to undergo a three hours walk by night, and he testified to the aggravation of a disease by which he had been affected, and the court charged the jury that if they found for him they should find such a verdict as would fully compensate him for the injury he had suffered, and justly mark their appreciation of the character of the wrong, in *Le Vann v. Pennsylvania R. Co.* 5 W. N. C. 293.

And where it appeared that the plaintiff had paid \$4, 10c. for medical attendance upon his wife, who was injured, in *Tedd v. Douglas*, 5 C. B. N. S. 895.

And a verdict for the plaintiff for one shilling in an action for damages for personal injuries is inadequate, and will be set aside as bearing no reasonable proportion to the nature of the injuries, where it appears that the plaintiff was knocked down and run over by a cart, and the back of his head and forehead cut, and his loin hurt, and he was rendered senseless for some time, and confined to his bed for three days, and laid up for six weeks, and had to employ others to do his work. *Beattie v. Moore*, Ir. L. R. 2 Eq. 28.

So, a verdict of 6¼ cents in an action for damages caused by negligence, in which there was uncontradicted evidence as to the serious nature of the plaintiff's injuries, and an actual outlay for surgical attendance and loss of earning power, is inadequate, and is not condoned by a provisional order made by the trial court for a new trial which the plaintiff refused to accept, and such order should be reversed on appeal and a *verdict de novo* awarded. *Bradwell v. Pittsburgh & W. E. Pass. R. Co.* 139 Pa. 404, 20 Atl. 1046.

And a verdict for the plaintiff for \$10 in an action for damages for injuries received by him from falling at night over a pile of stones on a sidewalk, will be set aside as grossly inadequate, and a new trial granted on payment of costs, unless an increase of the amount is assented to, where it appears that he sustained severe bruises upon his mouth and face, and one of his teeth was knocked out. *Richards v. Sandford*, 2 E. D. Smith, 349.

And a verdict for \$15, in an action for damages for injuries resulting to the plaintiff from a fall on a sidewalk rendered unsafe by ice, is grossly inadequate and will be set aside, where it appears that as a result of his fall the plaintiff sustained a fracture of two ribs, suffered great pain in his side for some months, was wholly disabled from labor for several months, and there was evidence tending to show that a weakness of the knees resulted from the same 47 L. R. A.

cause. *Kelly v. Rochester*, 38 N. Y. S. R. 797, 15 N. Y. Supp. 29.

And a verdict for \$24.27 in favor of the plaintiff in an action for damages for personal injuries caused by a defective crosswalk, being such as entitled the defendant to recover costs amounting to more than the verdict, will be set aside as perverse, and a new trial ordered, where it appears that his shoulder was very much injured, and that he suffered much pain for a considerable time, and was compelled to carry his arm in a sling for two months, and was unable to use it as before in his business. *Whitney v. Milwaukee*, 65 Wis. 400, 27 N. W. 39.

And a verdict for \$30 in favor of the plaintiff in an action for an injury caused by the neglect of a city to keep a public street in repair will be set aside as inadequate where it appears that the plaintiff was thrown from his horse by reason of the defect, and suffered for several months from the fracture of his collar bone, and that he was rendered unable to work, and had been employed at from \$3 to \$5 per day, and that his physical strength was impaired and one of his arms stiffened, and that his surgeon's bill was about \$40. *Bailey v. Cincinnati*, 1 Handy (Ohio) 438.

So, a verdict for \$55 in an action for injuries to person and property is insufficient, and will be set aside and a new trial granted, where it appears from the evidence that one of the shafts of the plaintiff's wagon was broken, and that it was otherwise injured, and that he was in bed six weeks and lost time in his business, and paid \$88 doctor's bills. *Saperstone v. Rochester R. Co.* 25 App. Div. 286, 49 N. Y. Supp. 436.

And a verdict for \$100 in an action for damages for personal injuries against a railroad company will be set aside as inadequate where it appears that the plaintiff was considerably bruised, and his ankle was broken, and he was confined to his bed for three months and not able to work for nine months, and had to use crutches for several months after he left his bed, and suffered great pain, and was made a cripple for life, and incurred expenses for medicine and medical service amounting to \$100, and that his time was worth \$200 per month. *Michalke v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 27 S. W. 164.

And a verdict for \$108 in an action by a trained nurse for a personal injury will be set aside as omitting some of the heads of damages which should have been considered, where it appears that she was earning from \$20 to \$25 a week, and that her leg was broken and she was rendered unable to work for many weeks, and that she incurred a doctor's bill of \$108. *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502.

So, a verdict for \$125 in an action for a personal injury is inadequate, and will be set aside and a new trial granted where it appears that previous to the injury the plaintiff had been earning \$4.50 per day, and was pretty constantly at work, and that by reason of the injury he was confined to his bed and couch for eight weeks and to the house about three months, and that since the injury he had been unable to work as well as usual, and that his doctor's bill was \$500. *Lough v. Romaine*, 4 Jones & S. 332.

And where the plaintiff's toes were crushed in a railway accident and the great toe had to be amputated, and two others were badly lacerated, and one of them permanently injured, and lameness caused which was likely to be permanent, and he was under surgical treatment for four or five weeks and experienced considerable pain and suffering, a verdict for \$250 should be set aside as inadequate and disproportionate to

the nature of the injury, and a new trial granted. *Henderson v. St. Paul & D. R. Co.* 52 Minn. 479, 55 N. W. 53.

And a verdict for \$400 in an action for damages resulting from negligence is inadequate and will not be permitted to stand, where it appears that the plaintiff received injuries most serious in their character, from which she suffered greatly for three years and until the time of the trial, and which were probably permanent and might shorten her life, and which rendered her unable to discharge her domestic duties, which inability would probably be permanent. *Platz v. Cohoes*, 8 Abb. N. C. 392.

So, a verdict for \$500 in an action for damages for personal injury due to alleged negligence will be set aside as totally inadequate and a new trial granted, where the injuries resulted in shortening one of the legs of the plaintiff and making it impossible for him to endure heavy work requiring him to remain on his feet, and he had been getting \$2 a day, and was kept out of employment up to the time of the trial, and had undergone expenditures aggregating nearly \$400. *Morrissey v. Westchester Electric R. Co.* 30 App. Div. 424, 52 N. Y. Supp. 945.

And a verdict for \$700 in an action for damages for a personal injury will be set aside on the ground that the jury must have overlooked some of the elements of the plaintiff's claims entitling him to damages, where it appears that he was a physician having a large practice, and it was anticipated that the injury would be permanent, and there was evidence tending to show a falling off of his professional earnings during the half year following the injury of upwards of \$3,000. *Church v. Ottawa*, 25 Ont. Rep. 298.

And a verdict for \$1,000 for the plaintiff in an action for personal injuries due to negligence is totally inadequate, where, previous to the injury, she was a healthy young woman depending upon her own labor for her livelihood, and she suffered greatly from the injury, and was rendered unable to walk, sit erect, or rise in bed, even upon her elbow, and was permanently and totally deprived of her ability to earn a livelihood, and her expenses on account of her injury amounted to \$3,000 besides her loss of earnings of \$4 per week for three years. *Smith v. Dittman*, 16 Daly, 427, 11 N. Y. Supp. 769.

And the jury in an action for personal injuries will not be deemed to have taken into consideration all of the elements of damages which ought to have been taken into account in finding a verdict for \$7,000, where it appears that the plaintiff was a man of middle age and of robust health, and his health was irreparably injured to such a degree as to render life a burden and a source of misery, and that he had undergone great pain and would probably never recover, and that the expenses incurred had already amounted to \$1,000, and that medical attendance was still necessary and likely to be for a long time, and that he was making an income of \$5,000 a year, the amount of which had been entirely lost for sixteen months since the accident. *Phillips v. South Western R. Co.* L. R. 4 Q. B. Div. 406, 40 L. T. N. S. 813, 27 Week. Rep. 797, 48 L. J. Q. B. N. S. 693.

In *McGowan v. Interstate Consol. Street R. Co.* 20 R. I. 264, 38 Atl. 497, however, it was held that a verdict for \$5,000 in an action for damages for personal injuries sustained through negligence will not be set aside as inadequate, though the evidence shows a very serious, and probably permanent, injury.

And in *The William Branfoot*, 8 U. S. App. 47 L. R. A.

129, 52 Fed. Rep. 390, 3 C. C. A. 155, an award of \$2,286 to the libellant in a libel against a steamship for damages for personal injuries was held sufficient on appeal from the award. It appearing that he was a stevedore's laborer between twenty-five and thirty years old, earning \$375 per year, and that the injury necessitated the amputation of his leg below the knee.

And a verdict for \$1,100 in an action for damages for personal injuries to the plaintiff, resulting in the loss of her right leg below the knee, will not be set aside and a new trial granted solely on the ground that the damages are inadequate. *Berry v. Lake Erie & W. R. Co.* 72 Fed. Rep. 488.

Nor is a verdict for \$1,000 in an action for damages for personal injuries so inadequate as to require the court to set it aside, though it appears that some of the plaintiff's ribs were fractured and one of her hips injured, perhaps permanently, and that she was laid up for several weeks and her health seemed impaired, and that three years afterwards at the time of the trial she was still somewhat lame, and complained of pain. *McDermott v. Chicago & N. W. R. Co.* 85 Wis. 102, 55 N. W. 179.

And refusal of the trial judge to set aside a verdict for \$100 in an action for damages for personal injuries on the ground of inadequacy as the result of passion, prejudice, or partiality, will not be reversed on appeal though the plaintiff received a compound fracture of the leg and injuries to his back and head. *Dowd v. Westinghouse Air Brake Co.* 132 Mo. 579, 34 S. W. 493.

And a verdict for the plaintiff for \$30 in an action for negligent injury will be allowed to stand, though the plaintiff claimed to have been kept from his business two months at a loss of \$50 per day, and that he paid a physician's bill of \$160, where there was some contradiction in the evidence, so that the jury may have believed that the nature and extent of the injury were exaggerated by the witness, and that it was in fact too light and too trivial to render necessary either his absence from his ordinary business or the protracted employment of medical assistance. *Brooks v. Ludin*, 1 N. Y. Supp. 333.

So, merely nominal damages of 1s. in favor of the plaintiff in an action for a personal injury will not be set aside as inadequate where there was nothing improper in the conduct of the jury, and the plaintiff was not much hurt, and was at the time of the trial as good a man as ever. *Howard v. Barnard*, 11 C. B. 653.

And a verdict for the plaintiff for \$1, in an action for injuries alleged to have been caused by the plaintiff's being pushed from the defendant's train while in motion, will not be regarded as being so small as to show prejudice on the part of the jury, where it appears by the evidence that it happened about 10 or 11 o'clock at night, and that the plaintiff walked to his home and retired to his bed where he remained until morning, without calling attention to the fact that he had been hurt, and was seen walking about town as usual the next morning with a small plaster on his face, though his testimony that he received severe bruises and had experienced much suffering, and that his capacity for labor had been much impaired, was corroborated by his wife. *Allison v. Guilf. C. & S. F. R. Co.* (Tex. Civ. App.) 29 S. W. 425.

A new trial cannot be granted in an action for a personal injury under Iowa Code, § 2839, on account of the smallness of the damages, where no proof was made on the trial of any actual pecuniary damage sustained. *Kinser v. Soap Creek Coal Co.* 85 Iowa. 26, 51 N. W. 1151.

2. Statutory provisions as to smallness of damages for personal injury.

Iowa, and perhaps other states, have provided by statute that a new trial shall not be granted on account of the smallness of the damages, in an action for injury to the person or reputation, where the damages equal the actual pecuniary injury sustained.

It may properly be inferred from this provision that a new trial may be granted when the damages found by the jury are less than the actual pecuniary damages sustained. *Kinser v. Soap Creek Coal Co.* 85 Iowa, 26, 51 N. W. 1151.

But it is not to be inferred that courts are required to grant new trials where the damages do not equal such injury. *Hubbard v. Mason City*, 64 Iowa, 245, 20 N. W. 172.

So, a number of the other states have provided by statute that a new trial shall not be granted on account of the smallness of the damages in an action for an injury done to the person or reputation, nor in any other action where the damages shall equal the pecuniary injury sustained.

The rule adopted by this provision follows the common law. *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304.

And a new trial will not be granted in an action for injury to the person or reputation because of the smallness of the damages assessed by the jury whether they equal the pecuniary injury or not, but may be granted in other actions where the damages do not equal the pecuniary injury. *Sharpe v. O'Brien*, 39 Ind. 501.

The statute prohibits the court from granting a new trial on account of the smallness of the damages in case the damages assessed by the jury equal the pecuniary loss, the words "nor in any other action where the damages shall equal the pecuniary injury sustained" qualifying all the rest of the section. *Sullivan v. Wilson*, 15 Ind. 246.

And it does not require that the damages must be equal to the actual pecuniary injury in an action for damages for an injury to the person or reputation, and a verdict for assault and battery will not be set aside and a new trial ordered on account of the smallness of the damages. *Shoff v. Wells*, 1 Neb. 168.

And an action brought by the administrator of a minor to recover damages for causing the minor's death is an action for a personal injury within the meaning thereof. *Gentile v. Cincinnati Street R. Co.* 4 Ohio N. P. 9.

But while it applies to actions for assault, libel, slander, and false imprisonment, it does not extend to those cases in which the action is technically founded in tort, but the damages are to be measured by the amount of the actual expenses the party has incurred, the loss of his time, the duration of his disability, and other circumstances that can be estimated in a large measure by ordinary computation. *Bailey v. Cincinnati*, 1 Handy (Ohio) 438.

And it does not apply as to special damages when they are pleaded and proved in such a case; and where the verdict is such as to show plainly that as to them both the proof and the law as contained in the instructions have been disregarded by the jury, a new trial should be granted. *Jesse v. Shuck*, 11 Ky. L. Rep. 463, 12 S. W. 304.

Nor does it apply to the assessment of the actual pecuniary damages resulting directly from the wrong, and when the damages can be measured and the injury is such as to demonstrate that as to the damages the proof and the law of the case were disregarded, a new trial ought to be granted. *Ray v. Jeffries*, 86 Ky. 47 L. R. A.

307, 5 S. W. 867; *Taylor v. Howser*, 12 Bush, 465.

But while such provision does not prevent the granting of a new trial for inadequate damages in a case where the damage may be arrived at by ordinary computation, and the inadequacy of the verdict ascertained by mathematical demonstration, as in case of damages consisting of loss of time, of wages, expenditures incurred, loss of business, etc., it will not be granted where there was no loss of health or permanent injury, and the plaintiff was a minor living with her mother, and was therefore neither entitled to her earnings nor responsible for her doctors' bills or other expenses or losses that may have resulted from her injuries. *Landneller v. Cincinnati Street R. Co.* 4 Ohio Dec. 265.

And such a provision is not to be read in connection with and as a proviso to another statute giving a right of action for the unlawful killing of a person, and is not therefore a rule of property binding on the Federal courts in an action under the latter section so as to prevent it from setting aside a verdict in such an action as inadequate. *Hughey v. Sullivan*, 80 Fed. Rep. 72.

V. Effect of uncertainty as to cause of injury.

Uncertainty as to the cause of the injury suffered, and as to the defendant's responsibility for it, and as to whether or not the plaintiff might not be equally to blame, appears to have been made a subject of consideration on the question of setting aside a verdict for inadequacy, as going to sustain the verdict.

Thus, a verdict for the plaintiff in an action to recover damages for injury to property will not be set aside for inadequacy where the cause of the injury was a matter of conjecture because it was not as large as it probably would have been had the cause of injury been fully proved. *Benson v. Burlington & M. River R. Co.* 13 Neb. 659, 26 N. W. 467.

And a verdict for nominal damages only, in an action for damages for overflowing lands of the plaintiff, will not be set aside where the jury had reason to believe from the evidence that some part of the injury complained of was occasioned by an unlawful act of the defendant, but that the damages resulting from such act bore no appreciable proportion to those actually sustained by the plaintiff and resulting from other causes. *Phillips v. Phillips*, 34 N. J. L. 208.

Nor will a verdict for twenty-five cents in favor of the plaintiff, in an action for damages to grain destroyed by hogs, be set aside as inadequate where it appears that the injury was not all committed by the defendant's hogs, and there is nothing to show the comparative amount of damage committed by them, or the whole number of hogs committing the injury. *Blanchard v. Loges*, 11 Neb. 460, 9 N. W. 568.

So, a verdict for the plaintiff in an action for damages to his pasture because of failure of a railroad company to erect proper cattle-guards, for a less amount than the estimates given by the witnesses by several hundred dollars, will not be set aside where the evidence was confused and uncertain, and in such a shape as to render it impossible to determine accurately how much of the damages was caused by stock going in on the right of way of the railroad, and how much was caused by stock going in at other places. *Chicago, R. I. & T. R. Co. v. Yarbrough* (Tex. Civ. App.) 35 S. W. 422.

And a verdict for \$167 in an action for damages for personal injuries will not be set aside as inadequate where the testimony tends to

show that the plaintiff was to some extent an invalid before she was injured, and that the pain and disability she had suffered since should in part at least be attributed to previous ill health. *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809.

And a verdict for the plaintiff for \$700 in an action for a personal injury to a child not quite two months old, alleged to have caused her to become deaf and dumb, will not be set aside as inadequate where her parents were both mutes, and the testimony was voluminous and conflicting, consisting largely of that of experts, and there was a conflict as to whether the injury caused her condition, or as to whether it was hereditary. *Davis v. Central R. Co.* 80 Ga. 323.

So, a verdict for the plaintiff in an action to recover for a year's service for a sum less than full wages will not be disturbed where there was proof of misconduct, but that the plaintiff was not discharged, and it does not appear for what length of time of service the verdict had been given, as the jury may have taken the misconduct into the estimate under the *quantum meruit*. *Scott v. Baldwicke*, 2 Mill, Const. 410.

And a new trial on writ of inquiry on a covenant to pay a certain sum, and a grant that upon default it should be lawful for the covenantee to enter and take profits, will not be granted because the damages are too small, where entry and taking profits are pleaded, unless there was some trick or contrivance in the case. *Anonymous*, 2 Salk. 647.

And a new trial will not be granted on the ground that the small amount of damages shows that the jury must have come to a compromise, in an action against the defendant for excavating under his own house and removing his own soil, whereby the plaintiff's house was deprived of support and sank, unless from the circumstances of the case it is evident that there was a total refusal on the part of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent, and it will be sustained where there was some color for the view that some of the injury might have arisen from the plaintiff's house being built upon a foundation that gave way. *Richards v. Rose*, 24 Eng. L. & Eq. 406, 9 Exch. 218, 23 L. J. Exch. N. S. 8, 17 Jur. 1086, 2 C. L. Rep. 811.

So, a nominal verdict for the plaintiff in an action against a bailee for injury to and destruction of goods will not be set aside on the ground that the damage must have been more, or there was no cause of action, where it is possible to reconcile the verdict as the result of an opinion that although the negligence or misconduct of the plaintiff had not occasioned the injury, it had in some way contributed to it. *Mostyn v. Coles*, 7 Hurlst. & N. 872, 31 L. J. Exch. N. S. 151, 10 Week. Rep. 355.

And a new trial will not be granted on the ground that the verdict was perverse, in an action for negligently driving against and killing the plaintiff's horse proved to be worth £30, because the jury gave a verdict for only £15, though the court was of the opinion that the damages were too small, where there was strong evidence to negative negligence on the part of the defendant, and some evidence of negligence on the part of the plaintiff. *Hawkins v. Alder*, 18 C. B. 640.

So, in *Flanders v. Meath*, 27 Ga. 358, the court refused to set aside a verdict for the plaintiff for \$50 in an action for personal injuries received by being run over by a dray, where there was evidence of negligence on the part of the plaintiff, upon the theory that where both

parties were in fault but small damages should be awarded.

In *Wilson v. Hicks*, 26 L. J. Exch. N. S. 242, however, which was an action on a charter party for not loading a cargo, the captain of the vessel having been directed to go to a designated place, but as no cargo could be obtained there, he was requested to go back to the place he came from or elsewhere with the hope of obtaining a cargo, which he declined to do, and remained inactive until the time for loading had elapsed, the amount of freight lost being £2,750, a verdict for £500 was set aside as too low, notwithstanding a direction to the jury that if they deemed the master's conduct unreasonable they might diminish the damages on that account on the theory that the jury had acted unreasonably and arbitrarily.

And a verdict for one dollar in an action for damages for an alleged nuisance will be set aside as not supported by the evidence, where it appears that the plaintiffs were largely and seriously damaged by water flowing on to and over their land, and that a large part of the water was caused to flow there by the acts of the defendants, though a part of the flow was otherwise caused, where there was nothing to warrant a finding that all of the damage was done by the water coming from the other source. *Learned v. Castle*, 78 Cal. 454, 21 Pac. 11, 18 Pac. 872.

VI. Who entitled to relief.

As a general rule, where the jury gives the plaintiff less than he is entitled to recover upon the finding of the issues, it is an error of which the plaintiff alone can complain, and if he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff. *Wolf v. Goodhue F. Ins. Co.* 43 Barb. 400; *Lamberty v. Roberts*, 31 N. Y. S. R. 148, 9 N. Y. Supp. 607.

And a verdict in an action for damages in favor of the plaintiff will not be set aside at the instance of the defendant because it was for one half of the amount that the plaintiff claimed was due him, though the evidence as to the amount due was uncontradicted. *Alderman v. Cox*, 74 Mo. 78.

A party against whom a verdict is rendered is not entitled to a new trial upon the ground that the other party ought to have recovered more or nothing. *Wright v. Griffey*, 44 Ill. App. 115.

And a new trial will not be granted at the instance of the defendant where the plaintiff recovered apparently less, rather than more, than the evidence warranted. *Smith v. Lee*, 32 Ga. 674, 10 S. E. 201.

And a verdict in an action upon an insurance policy in which it was claimed that the insured set fire to the property himself, and that he was guilty of fraud and perjury in preparing the preliminary proofs, will not be set aside on motion of the defendant because it is for less than the amount of the policy, upon the theory that the fact that it was less furnishes evidence that he was guilty of the fraud and perjury alleged, where the motion for a new trial virtually concedes that if the verdict had been for the whole amount insured it could not be disturbed. *Wolf v. Goodhue F. Ins. Co.* 43 Barb. 400.

And the allowance of a counterclaim asserted by the defendant where the court had withdrawn it from the consideration of the jury is not a ground for a new trial on motion of the defendant; the plaintiff is the only one who can complain. *Wood v. Belden*, 54 N. Y. 658.

It has been held, however, that a verdict for

a much less sum, in an action on contract in which the plaintiff was entitled to recover his whole claim or nothing, will be deemed to show that the jury, in determining the case, either wholly disregarded the evidence, or misapprehended its effect, or overlooked some important fact, or necessarily found some fact in favor of defendant, which is wholly inconsistent with a verdict for any amount in favor of the plaintiff, and may therefore be set aside, even on motion of the defendant. *Powers v. Gouraud*, 19 Misc. 268, 44 N. Y. Supp. 249.

But the defendant cannot complain because the plaintiff did not recover against him as large a verdict as he was entitled to unless the amount of the verdict shows that the jury in determining the case either wholly disregarded the evidence, or misapprehended its effect, or overlooked some important fact, or must have necessarily found some fact in favor of the defendant which is wholly inconsistent with a verdict for any amount in favor of the plaintiff; and a verdict for the plaintiff will not be set aside on such an application upon the ground that if plaintiff was entitled to recover at all he should have recovered more, where a counterclaim was pleaded and evidence given to support it, and the jury was charged that if they should find in favor of the plaintiff on such pleading they should deduct the amount they found him entitled to from the amount which the plaintiff would otherwise be entitled to. *Harton v. Bloom*, 1 Jones & S. 115.

So, the court possesses the power at common law to grant a new trial on its own motion, and the power is not limited to cases where the error is that of the court, or where there is misconduct of the jury, but extends to an award of insufficient damages in an action for personal injury. *Fort Wayne & B. I. R. Co. v. Wayne Circuit Judge*, 110 Mich. 178, 68 N. W. 115.

A plaintiff not entitled to recover at all, however, cannot have a verdict in his favor set aside because the damages are inadequate. *O'Malley v. Chicago City R. Co.* 83 Ill. App. 854, 30 Ill. App. 309; *Lovett v. Chicago*, 35 Ill. App. 570; *Hubbard v. Mason City*, 64 Iowa, 245, 20 N. W. 172; *Gray v. Second Ave. R. Co.* 65 N. Y. 561.

And a judgment to which the plaintiff was not entitled will be affirmed on appeal taken on the ground that the damages were inadequate where the defendant entered no motion for a new trial. *O'Malley v. Chicago City R. Co.* 30 Ill. App. 809.

But in *Gaither v. Kansas City, etc., R. Co.* 27 Fed. Rep. 545, a verdict for \$250 for the plaintiff in an action for a personal injury caused by negligence, though accepted by the defendant, was set aside on motion of the plaintiff made upon the ground that it was inadequate, where the case was such that if the defendant had asked a new trial the court would have granted it on the ground that the verdict was given to the plaintiff merely through sympathy for a poor man.

A new trial will not be granted in an action by a father for the death of his minor child alleged to have been caused by negligence on account of the smallness of the damages, where, if the child had lived and brought the action, he would not have been entitled to a new trial on that ground, as the father, under Ind. Code, § 784, stands in the place of the child as to the right of action. *Gann v. Worman*, 69 Ind. 458.

See also *Rafferty v. Missouri P. R. Co.* 15 Mo. App. 559, *infra*, IV. c. 2.

VII. Matters of procedure.

An application to set aside a verdict on the 47 L. R. A.

ground of inadequacy may be properly made to the judge who tried the cause. *Platz v. Cohoes*, 8 Abb. N. C. 392.

And the trial judge may entertain a motion for a new trial on the ground of inadequacy of the verdict upon his minutes, and need not compel the plaintiff to take the more formal proceeding of moving at special term upon a case made at the first instance for that purpose. *McDonald v. Walter*, 40 N. Y. 551; *McKeever v. Weyer*, 11 N. Y. Week. Dig. 258; *Emmons v. Sheldon*, 26 Wis. 648.

McDonald v. Walter, 40 N. Y. 551, *supra*, apparently overrules *Moore v. Wood*, 19 How. Pr. 405, holding that N. Y. Code, § 264, does not permit a motion for a new trial upon the ground that the damages were inadequate to be heard upon the justice's minutes, the only remedy of the plaintiff in such a case being by a motion for a new trial upon a case.

But a motion for a new trial for inadequacy of damages must be made either at special term or upon the minutes, the proceeding to obtain a new trial being analogous to that to obtain one for excessive damages. *Carpenter v. Beare*, 4 Hun, 609.

And where a party in whose favor a verdict was rendered depends upon the circumstance that it was too small, he may rely upon the ground that the verdict was not sustained by the evidence on a motion for a new trial. *Bennett v. Hobro*, 72 Cal. 178, 18 Pac. 478; *Du Bruts v. Jessup*, 54 Cal. 118; *Emmons v. Sheldon*, 26 Wis. 648; *Gartner v. Saxon*, 19 R. I. 461, 36 Atl. 1182.

And the ground on which the courts set aside verdicts and grant new trials for the reason that the damages are inadequate under statutes similar to the Minnesota act is that such verdicts should be treated as not supported or justified by the evidence. *Henderson v. St. Paul & D. R. Co.* 52 Minn. 479, 55 N. W. 53.

It has been held, however, that passion or prejudice of a jury exhibited by the rendition of a verdict for insufficient damage is not proper as an independent ground for setting aside a verdict, where the whole matter is statutory, and there is no provision authorizing the setting aside of a finding on that ground. *Benjamin v. Stewart*, 61 Cal. 605.

And that the rendition of a judgment for a smaller amount than that to which the successful party appears from the evidence to be entitled does not go to the question of the sufficiency of the verdict upon a motion for a *renvoi de novo*. *Paxton v. Vincennes Mfg. Co.* 20 Ind. App. 253, 50 N. E. 588.

And in *Moore v. Wood*, 19 How. Pr. 405, it was held that a verdict upon insufficient evidence means a verdict for a party upon evidence insufficient to establish his right to recover, and which therefore ought not to stand; and a party cannot move to set aside a verdict in his own favor because of inadequacy on the ground that the evidence was insufficient to sustain it. But see *supra*, *McDonald v. Walter*, 40 N. Y. 551.

Where a motion is made to set aside a verdict for inadequacy of damages on the statutory ground of insufficiency of the evidence to justify the verdict, the statement must specify the particulars in which the evidence is alleged to be insufficient, and if such particulars are not stated, the motion will be disregarded. *Benjamin v. Stewart*, 61 Cal. 605.

But specifications that the injuries of the plaintiff were very serious, and that the sum found by the jury was unreasonable and grossly inadequate, are sufficient on motion for a new trial on the ground that the verdict was not

sustained by the evidence. *Bennett v. Hobro*, 72 Cal. 178, 18 Pac. 478.

And specifications on motion for a new trial, made on the ground that the evidence is insufficient to justify the verdict, that by the evidence it is shown that the plaintiff was wrongfully assaulted and beaten, and that he was previously in good health and able to earn \$80 per month, and that the injuries resulted in the loss of his arm and great physical and mental pain, and rendered him unable to earn his support, and that the verdict for \$500 was wholly inadequate, are sufficient. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108.

That a judgment was rendered for too small a sum is no ground for a writ of error; the remedy is by petition for a new trial under the statute. *Whitwell v. Atkinson*, 6 Mass. 272.

And an omission to make a motion for a new trial on the ground of inadequacy of damages is fatal to a proceeding by appeal where the appeal rests entirely upon the inadequacy of the sum named by the jury and upon the plaintiff's right to a new trial for that reason. *Carpenter v. Beare*, 4 Hun, 509.

But where a verdict is set aside the appellate court will usually sustain the action of the trial court on the principle that such motions are addressed to the sound discretion of the court. *Lefrols v. Monroe County*, 88 Hun, 109, 34 N. Y. Supp. 612; *O'Shea v. McLearn*, 15 N. Y. Civ. Proc. Rep. 69, 1 N. Y. Supp. 407.

And the court of appeals in New York will not review the discretion of the court on this ground. *Jung v. Keuffel*, 144 N. Y. 381, 89 N. E. 340.

And the appellate court is not justified in reversing the action of an inferior court on a motion for a new trial on that ground unless it appears that the discretion vested in the lower court had been abused. *McKeever v. Weyer*, 11 N. Y. Week. Dig. 258.

Or that the discretion was unreasonably exercised. *Chouquette v. Southern Electric R. Co.* (Mo.) 53 S. W. 897; *Lee v. George Knapp & Co.* 137 Mo. 385, 38 S. W. 1107.

But see *BENTON v. COLLINS*, holding that the discretion of the trial court is not reviewable on appeal.

And to entitle a party to have a judgment in his favor reversed it must appear that he was deprived of his full right by some error of the court, and not by his own neglect, and where a verdict gives the plaintiff damages for only a portion of the time to which he is entitled, and this is not in consequence of any erroneous instruction, but of a mere omission, his remedy is not to enter a judgment on such verdict and then reverse it on error, but he should move either for a new trial or that the jury be directed to amend and complete the verdict, and if he goes on and enters judgment in his own favor for such sum as the verdict finds, he cannot then reverse it because the rest was not included. *Newton v. Allis*, 16 Wis. 198.

The appellate powers of the court of common pleas in New York with respect to appeals from the general term of the marine court are similar to those of the court of appeals in cases of appeals to that court, and the same rules must obtain, and if the general term of the marine court sets aside a verdict upon the ground that it was the result of a compromise, having the power to do so in the exercise of its discretion, the court of common pleas can only consider upon appeal the exceptions taken during the trial, and cannot correct the error of the jury. *Rowe v. Comley*, 11 Daly, 818.

So, refusal of the court below to grant a new trial upon the ground that the verdict was too

small will not be reviewed on appeal where the record does not purport to contain all the evidence in the cause, though it does contain the opinion of the trial judge that the verdict should have been for a larger sum. All the evidence must be abstracted and submitted to the court. *Kinser v. Soap Creek Coal Co.* 85 Iowa, 26, 51 N. W. 1151.

The grounds for awarding a new trial under 1 Va. Rev. Code, § 96, authorizing it where the damages found are manifestly small, need not be stated on the record. *Rixey v. Ward*, 3 Rand. (Va.) 52.

And an order stating that a verdict for the plaintiff for nominal damages had been returned, and that a motion on behalf of the plaintiff was made upon the minutes of the court for a new trial, but that such motion was denied, sufficiently discloses the fact that the motion was made for inadequacy, to warrant the consideration of that ground on appeal. *Cowles v. Watson*, 14 Hun, 41.

So, while the general rule is to require the party obtaining an order for a new trial to pay costs where the damages found by the jury are so small as to force upon the mind the conviction that by some means the jury acted under the influence of a perverted judgment, the court might properly relieve the party from such payment. *Emmons v. Sheldon*, 26 Wis. 648.

And the cost of a former trial in an action for damages for negligence in which a verdict of six cents was set aside and a new trial granted because substantial damages were proved on the ground that it was against the evidence, and also the cost of subsequent proceedings and of the appeal from the order setting aside the verdict, will be regarded as costs of the cause to abide the event. *Robbins v. Hudson River R. Co.* 7 Bosw. 1.

But the payment of the costs of the first trial is a condition precedent to the second trial, under a judgment awarding a new trial for inadequacy, under 1 Va. Rev. Code, § 96, though the judgment directing the payment of the costs says nothing about when they shall be paid. *Rixey v. Ward*, 3 Rand. (Va.) 52.

VIII. Increase of verdict by court.

In some of the early English cases the court, instead of granting a new trial for inadequacy of damages, claimed and exercised the power to increase the verdict given to such an amount as it deemed just.

Thus, in *Brown v. Seymour*, 1 Wils. 5, it was held that the court had discretionary power, in an action for damages for mayhem, to increase the damages given by the jury, though the declaration was generally for an assault, battery, and mayhem without any description of the mayhem, but that the court must take into consideration all the circumstances of the case, and that where the plaintiff did not appear to have received great damage a verdict for £150 was enough where it appeared that great provocation was given.

So, in *Cook v. Beal*, 1 Ld. Raym. 176, 3 Saik. 115, it was held that in an action for a battery if the wound was visible and the damages are inadequate the court will increase them either after verdict or writ of inquiry, though the wound was not technically described in the declaration as a mayhem, although in fact it was not one, provided the declaration particularizes it, or the judge at nisi prius makes a certificate of it either by indorsement or by word of mouth, but not unless the plaintiff appears in person, and the judge at nisi prius cannot increase the damages.

This practice, however, seems to be obsolete

in England. See English cases of more recent date set forth *supra* in this note. But it seems to be the rule in Louisiana though that state derives its jurisprudence from the civil, and not the common, law.

Thus, in Louisiana it is a matter within the discretion of the court to increase the verdict of a jury when it is satisfied that the jury have failed to do justice, though the court rarely finds occasion to do so. *Caldwell v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 624, 6 So. 217; *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800, 2 So. 586.

And in *Caldwell v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 624, 6 So. 217, a verdict in an action for a personal injury for \$1,000 was amended by the court by increasing it to \$2,000 upon the ground that, considering the expenses and trouble incurred by the plaintiff for medical attendance and in the necessary prosecution of his legal right, the sum allowed would leave him no compensation for his suffering and injury at all commensurate with their serious character.

And in *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800, 2 So. 586, a verdict in an action for personal injuries for \$100 was amended by the court by increasing it to \$600, where the plaintiff was knocked senseless and his ear cut in two, and he received a gash on his head, and his face was bruised, and his leg severely sprained, and he was laid up for several days suffering great pain, and did not recover for some weeks, and incurred expenses for board and medical treatment.

In some, if not all, the other states, however,

the court on a motion for a new trial for inadequacy of damages may direct that a new trial will be allowed unless the defendant will consent that the verdict shall be raised to the amount shown by the instrument sued on to be due, and upon such consent being given may enter judgment accordingly. *James v. Morey*, 44 Ill. 352.

And see *Richards v. Sandford*, 2 E. D. Smith, 849, *supra*, IV. e. 2.

And the defendant against whom a judgment was rendered may, on motion for a new trial on the ground of inadequacy of damages, obviate the error where the amount for which the verdict should have been found can be ascertained by computation by agreeing to increase the verdict to the proper amount. *Carr v. Miner*, 42 Ill. 179.

And the supreme court may, on appeal, correct a judgment in an action for damages for the appropriation of land under the right of eminent domain, where it appears that interest had not been allowed in the court below, where it should have been, without reversing and remanding the case. *Alloway v. Nashville*, 38 Tenn. 510, 8 L. R. A. 122, 13 S. W. 123.

But the practice of directing a new trial unless the defendant will consent to an increase of the verdict to the proper amount should be sparingly indulged in, and never adopted except in clear cases. *Carr v. Miner*, 42 Ill. 179.

As to the power of appellate courts to interfere with verdicts for excessive damages, see *note* to *Burdick v. Missouri P. R. Co.* (Mo.) 26 L. R. A. 384. F. H. B.

COLORADO SUPREME COURT.

Re Thomas A. MORGAN.

(.....Colo.....)

1. Regulations authorized by Const. art. 10, for the proper ventilation of mines, for escapement shafts, "and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein," embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations.
2. A statute making it unlawful to work more than eight hours per day in mines or smelters is in violation of Const. art. 2, § 3, guaranteeing liberty and the right to acquire, possess, and protect property.
3. It is for the courts to determine what are the subjects upon which the police power is to be exercised, and the reasonableness of that exercise.
4. Legislation to protect a citizen against the consequence of his own acts is not within the constitutional exercise of the police power.
5. A decision of the Supreme Court of

the United States, holding that an eight-hour law of a certain state does not violate the Federal Constitution, is not binding on the courts of another state in favor of the validity of such a law under the Constitution of that state.

(July 17, 1899.)

APPPLICATION for a writ of habeas corpus to obtain the release of petitioner from custody to which he had been committed for violation of a statute regulating the hours of labor in mining occupations. *Petitioner discharged.*

Statement by Campbell, Ch. J.:

At a preliminary examination before a justice of the peace upon a charge of contracting to labor in a smelter in excess of eight hours per day, the defendant was committed to jail, in default of giving the required bail, and, to secure his liberty, has filed in this court his petition for a writ of habeas corpus. The prosecution was under § 2 of "An Act Regulating the Hours of

NOTE.—As to statutory limitation of hours of labor, see *People v. Phylle* (N. Y.) 19 L. R. A. 141, and *note*; also *note* to *State v. Loomis*, (Mo.) 21 L. R. A. on page 798; *Low v. Rees* Printing Co. (Neb.) 24 L. R. A. 702; *Ritchie v. People* (Ill.) 29 L. R. A. 79; *State v. McNally* (La.) 36 L. R. A. 533; *Holden v. Hardy* (Utah) 37 L. R. A. 103 (Affirmed in 169 U. S. 366, 42 L. ed. 780); *State v. Holden* (Utah) 37 L. R. A. 47 L. R. A.

108; and *Short v. Bullion, B. & C. Min. Co.* (Utah) 45 L. R. A. 603.

As to statutory provisions to secure health and safety of employees, see *State v. Hoskins* (Minn.) 25 L. R. A. 759, and *note*; *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 848, and *note*; and *People v. Smith* (Mich.) 32 L. R. A. 853, and *note*.

Employment in Underground Mines, and in Smelting and Ore Reduction Works, and Providing Penalties for Violations Thereof," passed by the twelfth general assembly, the material provisions of which are embraced in the first two sections:

"Sec. 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters, and in all other institutions for the reduction or refining of ores or metals, shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger."

Section 3 makes the violation of the foregoing provisions a misdemeanor, and provides the penalty therefor. Sess. Laws 1899, chap. 103. The following sections of the Constitution are referred to in the opinion:

Article 2:

"Sec. 1. That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

"Sec. 3. That all persons have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness."

"Sec. 28. The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

Article 5:

"Sec. 25. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

... [Subdivision 23] Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. [Subdivision 24] In all other cases, where a general law can be made applicable, no special law shall be enacted."

Mr. Charles H. Toll, with Messrs. Wolcott & Valle, Charles W. Waterman, and William W. Field, for petitioner:

The unconstitutionality of this law is *stare decisis* in Colorado.

Re House Bill No. 203, 21 Colo. 27, 39 Pac. 431.

When a question is once clearly and positively decided in a certain way, the general public conform themselves to the law as laid down in that decision, and a repudiation of that decision, and the rendering of one directly contrary thereto, would destroy and unsettle all the rights arising under, and all the acts taken in reliance upon, the former decision.

Broom, *Legal Maxims*, 7th ed. 147; *Sydney* 47 L. R. A.

nor v. Gascoigne, 11 Tex. 455; *Giblin v. Jordan*, 6 Cal. 418.

The supreme court of a state will "certainly not reverse itself but for an overwhelming conviction that it has committed a serious and palpable error."

Atchison, T. & S. F. R. Co. v. Farrow, 6 Colo. 498; *People ex rel. Bentley v. Le Fevre*, 21 Colo. 218, 40 Pac. 882; *Harrow v. Myers*, 29 Ind. 489; *Carver v. Louthain*, 38 Ind. 530; *Lindsay v. Lindsay*, 47 Ind. 283; *Seale v. Mitchell*, 5 Cal. 403.

Where an individual is of full age and sound mind, the attempt to assert paternalism over him is an invasion of the personal rights reserved to him by the Constitution.

Re House Bill No. 203, 21 Colo. 27, 39 Pac. 431; *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Ritchie v. People*, 155 Ill. 98, 22 L. R. A. 79, 40 N. E. 454; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

A law such as the one under consideration is in violation of § 25 of the Bill of Rights, which declares "that no person shall be deprived of life, liberty, or property without due process of law."

It is for the courts, and the courts alone, to decide what are the proper subjects for the exercise of the police power, and the province, and only province, of the legislature is to determine whether the exigency exists which calls for the exercise of police power.

Tiedeman, Pol. Power, 1886, § 3, pp. 12, 13; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71.

That police power can only be exercised to prohibit things which are hurtful to the health, safety, and welfare of society,—the public at large,—and cannot be exercised for the sole and special benefit of individuals or any special class or classes of individuals.

Tiedeman, Pol. Power, § 1, p. 4; 18 Am. & Eng. Enc. Law, 1st ed. p. 739.

Mr. John M. Waldron, also for petitioner:

The supreme court of this state clearly concedes the existence of personal immunities, fully reserved to the people at large.

Packer v. People, 8 Colo. 365, 8 Pac. 564.

No department of the government possesses unlimited power under a Constitution like ours.

Greenwood Cemetery Land Co. v. Routt, 17 Colo. 103, 15 L. R. A. 369, 28 Pac. 1125; *People ex rel. Connor v. Stapleton*, 18 Colo. 583, 23 L. R. A. 787, 33 Pac. 167; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 662, 22 L. ed. 461; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *Von Holst, Constitutional History*

of United States, § 271; *Cooley*, Const. Lim. 5th ed. p. 208; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *Parker v. Com.* 6 Pa. 511; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *People v. Morris*, 13 Wend. 325; *People ex rel. Townsend v. Porter*, 90 N. Y. 75; *People ex rel. Dunn v. Detroit Super. Ct. Judge*, 29 Mich. 228; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *West Point Water Power & Land Improv. Co. v. State ex rel. Moodie*, 49 Neb. 218, 66 N. W. 6.

The Colorado eight-hour act violates the essential individual rights secured to the people of this state by the provisions of the bill of rights in undertaking to place restrictions upon persons *sui juris* to enter into contracts of employment for the prosecution of a lawful business.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 314; *Ritchie v. People*, 155 Ill. 98, 22 L. R. A. 79, 40 N. E. 454; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Tiedeman*, Pol. Power, § 86; *Waters v. Wolf*, 162 Pa. 153, 29 Atl. 646; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *John Spry Lumber Co. v. Sault Ste. Bank, Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204, 43 N. W. 718; *State v. Goodwill*, 33 W. Va. 183, 6 L. R. A. 621, 10 S. E. 285; *State v. Julow*, 129 Mo. 183, 29 L. R. A. 257, 31 S. W. 781; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Frer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Re Grice*, 79 Fed. Rep. 627; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *People v. Mara*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 51 N. E. 1006; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670, 682; *State v. Fire Creek Coal & O. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Low v. Kees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *People v. Gillson*, 109 N. Y. 389; *Tacoma v. Kreck*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Keim v. Chicago*, 46 Ill. App. 445; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Cooley*, Const. Lim. 5th ed. 486; *Re Eight Hours Bill*, 21 Colo. 32, 39 Pac. 328.

A given legislative act may not be violative of any personal rights of the citizen, so far as the Federal Constitution is concerned, while at the same time the same act would unquestionably be adjudged void by the state judiciary as contravening the bill of rights of the state Constitution where the law was enacted.

Patterson v. Kentucky, 97 U. S. 501, 24 47 L. R. A.

L. ed. 1115; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 759, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 663, 31 L. ed. 221, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 29, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Marchant v. Pennsylvania R. Co.* 153 U. S. 390, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Dolph*, 17 Colo. 35, 28 Pac. 470; *Re Lourie*, 8 Colo. 505, 9 Pac. 489; *Cooley*, Const. Lim. 432 *et seq.*

The right of contract with reference to business which is in itself lawful and proper is beyond legislative control, whether under the guise of the exercise of police power or otherwise.

Tiedeman, Pol. Power, p. 233; *Cooley*, Const. Lim. 5th ed. p. 745; 2 Hare, Am. Const. Law, p. 779; *Ex parte Neuman*, 9 Cal. 508; *McCarthy v. New York*, 96 N. Y. 5, 48 Am. Rep. 601.

The Colorado eight-hour act is not applicable where the contract of hiring fixes the unit or period of employment on some other basis than by the day, i. e., an express contract of hiring by the hour, week, month, or year is not within its purview.

Helphenstine v. Hartig, 5 Ind. App. 172; *Bartlett v. Grand Rapids Street R. Co.* 82 Mich. 658, 46 N. W. 1034.

Messrs. David M. Campbell, Attorney General, *Booth E. Malone*, *Daniel Prescott*, *Calvin E. Reed*, *Dan B. Carey*, *Thomas M. Patterson*, and *John H. Murphy* for respondent.

Campbell, Ch. J., delivered the opinion of the court:

The petitioner challenges the validity of the statute, as inhibited by the foregoing clauses of the organic law. The position of the attorney general is that it was passed as a health regulation, and may be vindicated as coming within the range of the police powers of the state. Four years before it became an act, this court, on a inquiry of the house of representatives of the tenth general assembly as to the constitutionality of a bill reading, "Eight hours shall constitute a legal day's work for all classes of mechanics, workmen, and laborers employed in any mine, factory, or smelter of any kind whatsoever in the state of Colorado," replied that it was "not competent for the legislature to single out the mining,

manufacturing, and smelting industries of the state, and impose upon them restrictions with reference to the hours of their employees from which other employers of labor are exempt." And it was further said that the section "violates the right of parties to make their own contracts,—a right guaranteed by our bill of rights." *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328. The twelfth general assembly must have been aware of this, and another decision concerning the power of the legislature to pass what is called a "coal-screening bill,"—the opinion being reported in 21 Colo. 27, and 39 Pac. 431 (*Re House Bill No. 203*)—in which this species of legislation was condemned as hostile to the Constitution. But, wholly disregarding these decisions, binding alike on all departments of government, it proceeded to enact the measure now before us. Though it affords no justification for such legislative action in defiance of and against the solemn decision of this court, we presume the excuse that might be offered therefor is that, after these decisions were handed down, in a sister state an act in the same language was passed and approved by its highest court, and, as is claimed, sanctioned by the Supreme Court of the United States. Following the rule of *stare decisis*, we might content ourselves with a mere affirmation of our previous announcements, made, as they were, upon full consideration; but, in view of the importance of the questions involved, we have thought it best fully to discuss the principles by which this act must be tested.

The question presented for our determination is, Does the act under which the petitioner is being prosecuted violate any constitutional provision? In this resolution the provisions of our own Constitution must govern. Decisions of other jurisdictions, defining the limits of legislation under their Constitutions, are not always to be followed elsewhere, upon the supposition that the same limitations everywhere prevail. This is illustrated in the answer of the judges of the supreme judicial court of Massachusetts in response to an inquiry by the house of representatives as to the validity of a proposed bill. In the course of the opinion, after referring to the fact that legislation similar to that proposed had been held by the courts in some states unconstitutional on different grounds, and without expressing an opinion as to the correctness of those decisions tested by the respective constitutions, the honorable judges said: "The legislative power granted to the general court by the Constitution of Massachusetts is perhaps more comprehensive than that found in the Constitutions of some of the other states." *Opinion of Justices in House Bill No. 1,250*, 163 Mass. 590, 28 L. R. A. 344, 40 N. E. 713. A similar observation was made by the supreme court of Illinois in *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454. It is peculiarly appropriate, we think, to our organic act. A comparison of many other Constitutions with

ours shows that the latter probably contains more restrictions upon the power of the legislature than are to be found in any other instrument; and whether measured by the decisions of the courts of that state, or as the result of our own construction, we think it clear that the general court of Massachusetts has, in the field of legislation under review, much wider latitude, and is hampered by fewer restrictions, than is our general assembly.

The extent and meaning of the act in question are not difficult of ascertainment, though it is not a model of statutory composition. That it operates as a limitation both upon the employer and the employee seems clear. It forbids a certain kind of employment. There can be no employment without the concurring acts of him who contracts for employment and of him who contracts to be employed. Both are within the inhibitions of the enactment, and, if it is valid, each is liable to the penalty for making the forbidden contract. The petitioner, therefore, as a laboring man, is prohibited from entering into a contract to work in a smelter more than eight hours in any one day. If, in our Constitution, there was, as there seems to be in that of Utah, a specific affirmative provision enjoining upon the general assembly the enactment of laws to protect the health of the classes of workmen therein enumerated, it might be that acts reasonably appropriate to that end would not be obnoxious to that provision of our Constitution forbidding class legislation; for it could hardly be said that a classification made by the Constitution itself was arbitrary or unfair, or that it clashed with another provision of the same instrument inhibiting class legislation. The two provisions should be construed together, so as to harmonize, if that be possible under sound canons of construction, and the general clause forbidding class legislation might be regarded as qualified by the special one which authorizes such legislation in respect to the enumerated classes. Article 16 of our Constitution is devoted to mining and irrigation, and § 2 directs that "the general assembly shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein." These regulations manifestly embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations. Whether this command, addressed to the legislature, to protect the health of these workmen by requiring the mines to be furnished with the appliances specified, does not restrict the law-making power to the things named, on the principle that when authority to do a particular thing is given, and the mode of doing it is prescribed, all other modes are excluded, might be a material inquiry, where the validity of the act was challenged by a minor; but as that question relates to work-

men in mines, and not in smelters, we prefer to put our decision upon impregnable grounds that cover both cases. Be that as it may, we have no constitutional provision which authorizes the legislature to single out workmen in underground mines and smelters, and impose upon them restrictions as to the number of hours they shall work at these industries, from which workmen in all other departments of industry are exempt. To this effect is our decision in *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328; and we have heard no argument in the case at bar, nor have we been cited to any authority, that leads us to a different conclusion.

The act is equally obnoxious to the provisions of our bill of rights, set out in the statement, which guarantee to all persons their natural and inalienable right to personal liberty, and the right of acquiring, possessing, and protecting property. Liberty means something more than mere freedom from physical restraint. It includes the privilege of choosing any lawful occupation for the exercise of one's physical and mental faculties which is not injurious to others. The right to acquire and possess property includes the right to contract for one's labor. The latter is essentially a property right. The arbitrary classification of rights into rights of persons and rights of things, made by Blackstone and other jurists for purposes of convenience in treatment, has been the occasion for hostile criticism by those favoring socialistic or paternal legislation. Employing the *argumentum ad hominem*, they say that those decisions in which courts have carefully guarded rights of property put property above the man. A moment's calm reflection will show the falsity of this charge. Property, as such, has no claim upon the protection of the law. When a property right is spoken of, the right of some person over or concerning the property is meant. All rights recognized by the law pertain to persons, natural or artificial. The absolute rights are commonly designated as personal rights. They are such as are annexed to the person, like life and reputation, while property rights are those unconnected with the person, but which none the less belong to some person. All rights, both those spoken of as personal and those denominated as property rights, belong to the individual citizen; and, when it is said that property rights must not be infringed, what is meant is merely that the right of some person to or concerning property must not be interfered with. That this act infringes both the right to enjoy liberty and to acquire and possess property seems too clear for argument. While not conceding that this limitation is not permissible, counsel for respondent, as we understand them, recognize the fact (but, if they do not, the same is only too apparent) that these natural rights are violated by the provisions of the act. The limitation is claimed to be warranted on the ground that these and all other constitutional guaranties must yield

to the paramount and sovereign right of the state to exercise its police power to protect the public health; and to this, the principal question in this proceeding, we now address ourselves.

The protection of the public health is mentioned neither in the body of the act nor in its title, as is usually the case in similar acts of other states. When it is clearly perceived from the terms of an act that the thing prohibited necessarily affects the public health, it may not be necessary expressly to declare therein what the object of the act is; but, where the result is doubtful, the object of the act ought, somewhere and somehow, to be stated, and, in accordance with some decisions, must be thus proclaimed, else the act will be held invalid on the ground that it is deceptive in not expressing its real object. Possibly such declaration would not be conclusive that its real character is what it is expressed to be, any more than the absence of a declaration would be that such was not its true nature. Where there is a mandatory requirement in the Constitution (Colo. Const. art. 5, § 21) that no bill except the general appropriation bill shall contain more than one subject, which shall be clearly expressed in the title, the title of this act is at least questionable. Certainly, unless "regulating the hours of employment" is synonymous with or equivalent to "protecting the public health," the title would seem to be dubiously stated. But, as counsel have not made this point, we pause only to mention, but not to decide, it. It is upon the hypothesis, however, that it is the duty of the judiciary to sustain every act of the legislative department, if it can be done on any conceivable rational constitutional ground, that, for the present purpose, we assume with counsel for respondent that the object of the legislature was the enactment of a health measure, and that in effectuating the same it has complied with the clause of the Constitution just referred to.

Starting, then, with the premise, which is practically admitted to be true, that this act contravenes the constitutional provisions quoted in the statement, let us see if, notwithstanding this conflict, it can be justified as a valid exercise of the police power. It is difficult to define, or with precision to describe, the police power. It has rarely been attempted by the courts, and the attempt has never been attended with complete success. Following the authorities, we may say that it extends to the protection of the public health. It is upon the specific ground that limiting the time a workman may labor in a smelter to eight hours a day conduces to and preserves the health of the laborer himself that this act is sought to be upheld. With sincere respect for the ability of the courts in whose opinions the remarks are found, but with a profound conviction of their erroneous conception of the nature and limits of the police power, we submit that much loose reasoning has been indulged in, and some decisions rendered that cannot be

defended upon principle. As we understand it, the "police power" is the name given to that function of government by which is enforced the maxim, *Sic utere tuo ut alienum non laedas*. In Cooley, Const. Lim. 6th ed. 710, we read that this maxim "is that which lies at the foundation of the power." Prof. Tiedeman, in his work on the Limitations of Police Power, in § 1, says: "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights.

The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them." He further quotes with approval the language of Judge Redfield in the case of *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." And Prof. Tiedeman immediately follows this quotation with the statement that "any law which goes beyond that principle—which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security—cannot be included in the police power of the government." It thus appears that, in proceeding under this power, the legislature must choose proper subjects for its exercise, and must observe constitutional limitations just as closely as when it enacts laws pertaining to the public revenue, or provides for the exercise of the power of eminent domain. In our form of government, unlimited power does not exist in any department (Prentice, Pol. Powers, 267; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455), and whenever the constitutionality of an act of any department is challenged the judicial department is the final arbiter.

Notwithstanding this general rule, we are here met with the argument, and the assertion is baldly made, that in the exercise of its police power the legislature is subject to no restriction except its own unbridled discretion as to what subjects it may select for regulation, and the kind of regulation it may prescribe. We cannot assent to this doctrine. It may find apparent sanction in unguarded expressions of text writers or in judicial opinions, but it is contrary to every well-considered decision. It is for the legislature to determine the exigency (that is, the occasion) for the exercise of the power; but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which the power is to be exer-

cised, and the reasonableness of that exercise. Tiedeman, Pol. Power, § 3; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; 18 Am. & Eng. Enc. Law, 746 *et seq.*; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343. In that great repository of constitutional learning, Cooley, Const. Lim., Judge Cooley, at page 208, 6th ed. well says: "The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments." This observation, as we take it, is as pertinent to the general police power vested in, though not expressly conferred upon, the legislature under written constitutions, as it is to some express power therein delegated. At page 711 of the same work is quoted with approval the following language of Judge Christianity, found in his able opinion in *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285: "Powers, the exercise of which can only be justified on this specific ground [that they are police regulations], and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it." The opinion in *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313, discusses the nature of the police power. Reserving opinion as to the correctness of the determination of the court in that case with reference to the law before it, which has been repudiated in *Jones v. Great Southern Fireproof Hotel Co.* 58 U. S. App. 397, 86 Fed. Rep. 370, 30 C. C. A. 108, its remarks in discussing one phase of the general subject, meet with our approval. In reply to the argument of counsel, who claimed the most sweeping power of the legislature in restricting the right of contract when the general good requires it, the court said: "It may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, by force of popular clamor or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people." To the same effect, see *John Spry Lumber Co. v. Sault Sav. Bank, Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204, 43 N. W. 778.

In the light of these principles every act of this character must be tested. While invoking as a warrant for this act that phase of the police power extending to the public health, its supporters do not claim that its real and primary object is to protect the public health, or the health of that portion of the community in the immediate vicinity, or affected by the operation, of smelters. If that purpose is present at all, it is only so inferentially, and the means employed to secure it are neither adequate nor appropriate. The smelting of ores is a continuous process, night and day, the year through. It is not claimed that the business is injurious to public health. It would be absurd to argue that, while the process itself is continuous, limiting the hours of those laboring in a smelter in any wise conduces to preserve the health of any portion of the public. That is to say, three shifts of laborers, working eight hours each, would affect the public health to the same extent, if at all, as would two shifts at twelve hours each. It is not contended that the business of smelting is unlawful; nor is it claimed that the act was passed to prevent employers from perpetrating fraud upon employees, or to protect the latter from trespasses. Indeed, the only object that can rationally be claimed for it is the preservation of the health of those working in the smelters. Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others, or the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, "So use your own right or property as not to injure yourself or your own property." Perceiving the inconsistency that must follow an attempt to vindicate a law on the principle that underlies the police power, counsel adroitly invoke the maxim, *Salus populi suprema est lex*. So far as we can ascertain, no commentator and no judge has ever sought to borrow this wholesome maxim and use it as a prop to uphold a law whose object is to protect a man against himself. The welfare of the people is indeed the supreme law, but this maxim cannot be twisted to sustain a law violating private rights, which contemplates the promotion of the

welfare of less than the entire people. Our bill of rights expressly says that government is instituted solely for the good of the whole.

In this we must not be understood as limiting the legislature, where the facts justify apparent discrimination, in passing health laws affecting only certain classes. Indeed, laws having for their object the protection of small portions of a community have been upheld, as in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, where a nuisance, obnoxious probably only to part of a village, was abated; but what we mean to decide is that in a purely private, lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, it is beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may, or probably will, injure his own health. *At Lim v. Territory*, 1 Wash. 156, 9 L. R. A. 395, 24 Pac. 588, held valid an act of the territory providing that any person who smoked or inhaled opium was guilty of a misdemeanor, notwithstanding the object, or at least one object, of the act was to protect the smoker or inhaler himself from the effect of his own act. This regulation was thought by three of the five judges to be warranted by a provision of the organic act of the territory (no question of conflict with a state Constitution being in issue) extending, as they said, "the power of the territorial legislature to all rightful subjects of legislation; and, when once we concede the rightfulness of the subject, the extent and character of the legislation on that subject cannot be called in question by the courts." Possibly some courts would uphold such legislation, if confined to appropriate cases, on the ground that smoking or inhaling opium was necessarily demoralizing to society, degrading to public morals, and injurious to the general welfare. But the position taken by the Washington tribunal, that courts cannot inquire into the character of an act, or question legislation, finds no sanction in any well-considered case or standard text-book. In the dissenting opinion the true doctrine is recognized. In some of the other cases are found such expressions (*dicta*, it is true) as that the state has such an interest in each citizen that it may protect him against the consequences of his own rashness, and, upon the theory that the state is made up of the sum of all its parts, it may, for each individual, and for his supposed good, prescribe any regulations that are appropriate and suitable for the whole. In other words, this theory is based upon the proposition that each part making up the whole includes the whole itself, in the same sense that the whole includes each part. This, in principle, is the same as the theory that would authorize the state to prescribe any regulations it saw fit for keeping a citizen out of its jails, hospitals, or poor-houses, because it is a legitimate function of government to levy and collect taxes to build such

institutions. The argument in support of such a theory is specious, and, while in one sense (but to a limited extent only) true, yet, like all argument from analogy, it is dangerous, and should be carefully circumscribed. If the theory is correct, the state would be justified in prescribing the most minute details for the regulation of the personal conduct of individual citizens, as to things in no wise affecting the great public interests. Whenever a man fails in business, or loses a fortune by some great calamity, or droughts or floods destroy his crops, the legislature could levy a tax or make an appropriation, and therefrom establish him in business or make good the loss. The practical application of the theory would destroy the fundamental principles upon which our government is founded.

Let us make some further applications of this principle, and see to what such legislation would lead. It is, of course, no objection to this act to say that hereafter the legislature may pass another act that is invalid. But if the principle of the decision by which the present one is saved, in its logical extension, will protect others that every rational mind will declare void, it is well to stop for reflection; for it is a question of power, and not discretion, we are now considering. The business of operating smelters and working underground mines is purely a private business. It is not affected with a public interest, or devoted to a public use. Even here the general and better rule is that regulations of such businesses are confined to their public side, and do not descend to interference in contracts and strictly private dealings between employers and employees. Hence smelting does not come within the operation of the principle of those decisions in which have been upheld reasonable regulations of a business affected by a public interest. If, to protect the health of workmen engaged in these two occupations, the legislature may limit them to eight hours' labor per day, it may hereafter, upon the ground that idleness, resulting from short hours of labor, leads to drunkenness and gambling, and industry, promoted by longer hours, to happiness and health, enact that workmen must labor at these occupations fourteen or sixteen hours per day; and by extending the same principle to other occupations, it may say, to use an illustration employed in argument, that a man weighing 120 pounds or less shall not work in a stone quarry, because only large and powerful men can safely work therein; that only men free from a tendency to tuberculosis shall work at indoor occupations, because those so afflicted need more pure air and sunshine than they can get if excluded from the open air; that only persons not needing the aid of eyeglasses shall become makers or repairers of watches, because labor, with such mechanical aids, upon delicate mechanisms, tends to destroy vision; or that those suffering from sluggish livers shall not engage in sedentary occupations, because their health demands active, muscular effort. Then it is only one step further to provide by law the style and

quality of garments the citizen may wear, the quantity and quality of food he may eat, and the beverage he may drink. And, because one cannot support and properly educate his family for less than a certain amount of money, the legislature may declare that, to promote the general welfare, no employer shall contract to pay, or pay, an employee less than an arbitrary wage, so fixed as to produce the required sum. Such and other illustrations that readily suggest themselves are germane, and each and every supposed act could be sustained upon the same principle that would make the act before us valid. If counsel's contention be sound, that, to promote the general welfare and protect the public health or safety, the legislature is above the Constitution, and brooks no restraint; if it is the sole judge, not merely of the exigency, but also of the subjects, for the exercise of the police power, and its reasonableness,—then, indeed, all these, and almost all other conceivable, regulations of private affairs are permissible. If we stop to consider the form of government under which we live, and what pains the framers of our organic acts took to protect the rights of the individual citizen, we would naturally expect to find that measures passed for the alleged protection of the citizen against the consequences of his own acts would clash with constitutional safeguards inserted therein to conserve the inalienable rights of man. This maxim, like many others, has been much abused; but restricting legislation to measures clearly within its scope is not abusing, but merely giving proper effect to, it.

In this connection we notice—what has already been suggested—an argument pressed upon us in support of this species of legislation. We are told that the law is, to a large extent, a progressive science; that during our national existence many changes and reforms, both in procedure and in substantive law, have been made; and that to conform to the complex conditions of modern society, and to solve the many problems arising out of the industrial relations, many more such will likely take place, and the law will be forced to adapt itself to these new conditions, if society is to be kept together and government preserved. We are not disposed to dispute the accuracy of these observations, or the correctness of the prediction made, but we fail to perceive the force of the application to the statute in hand. Such legislation does not denote an advance in the law of the domestic relations. On the contrary, it is a distinct and emphatic return—a retrogression—to that period in English history when Parliament busied itself in passing numerous acts interfering with the freedom of conscience in religious matters, and in prescribing minute regulations of the personal conduct of the individual, against which our ancestors rebelled, and which was one among other causes that prompted them to found here a government under which it would be impossible thus to interfere with the purely private affairs of the citizen.

Our conclusion as to the invalidity of this act is grounded upon principle. Let it now

be tested by the authorities. Except as to the penalty, the act is identical in terms with a law of Utah, which, in three cases in the supreme court of that state, has been held valid; and in two of the cases, on writ of error from the Supreme Court of the United States, the judgment of the state court has been affirmed. *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105; *Short v. Bullion B. & C. Min. Co.* (Utah) 45 L. R. A. 603, 57 Pac. 720; *Holden v. Hardy*, 169 U. S. 366, 42 L. R. A. 780, 18 Sup. Ct. Rep. 383. They are the only authorities directly in point that are cited as sanctioning our act, and the only additional ones which may fairly be considered, either in the reasoning of the opinions or in the principles involved, as tending to uphold it, are *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000. In the Massachusetts case the act construed provided that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm, or corporation in any manufacturing establishment in this commonwealth more than ten hours in any one day," etc. This enactment, under some authorities, might be held valid, applying, as it does, only to women and minors, since the former class, on account of sex and supposed physical infirmities, and the latter, because of their tender age, are under the guardianship of the state, and, not standing on an equality with adult men, are subjects of restraining regulations. But it is not clear whether the act was sustained on this ground, or that it was a valid police regulation. Probably not the latter, for the court remarked that such legislation might be maintained either as a health or police regulation, if it were necessary to resort to those sources for power. If the former, the case would not be apposite. Whatever the basis for the decision may be, the reasoning of the court in support of it is not satisfactory; for, in answer to the argument that the prohibition of the act violated the right of an adult woman to labor as many hours per day as she chooses, the court said: "The obvious and conclusive reply to this is that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week which is so clearly within the power of the legislature that it becomes unnecessary to inquire whether it is a matter of grievance of which this defendant has the right to complain." We may apparently digress to remark that if this construction is correct, and if the real object of the act be to protect the health of a certain class of working women by shortening the hours of labor, that object is frustrated, since, if the act permits one of the designated class, after working the eight hours, to engage in any other than the forbidden kind 47 L. R. A.

of labor for as many additional hours as she chooses in any one day, practically there is no limit at all upon the length of time that she may work, provided she can get employment. But the disposition made of the case evades the real question. To one who desires to devote her entire time and energies in laboring at one particular occupation, in which the legislature seeks to restrict her, it is no answer to say that her right to make contracts for her labor is not curtailed because she may work as many additional hours as she pleases at some other occupation. The value of the right consists in freedom to labor in any lawful business she may select, for as many hours each day as she chooses. This case is the only authority cited in some of the text-books for legislation of this character, but we cannot follow it. Its doctrine, as applicable to adult men, at least, is materially weakened, if not overthrown, by the subsequent decision in *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126, where an act providing that no employer shall impose a fine upon an employee engaged at weaving, or withhold his wages, in whole or in part, for imperfections that may arise during the process of weaving, was held to be in conflict with the Constitution of that commonwealth, as interfering with the right of acquiring, possessing, and protecting property; and in the latter case are cited with approval several authorities hereinafter to be discussed, which are squarely in conflict with the former.

In the Constitution of Utah there is an entire article (16) devoted to the rights of labor. For our present purpose, §§ 1, 6, and 7 only need be here reproduced. They are:

"Sec. 1. The rights of labor shall have just protection through the laws calculated to promote the industrial welfare of the state."

"Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county, or municipal governments; and the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines."

"Sec. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

While disclaiming any expression of opinion as to whether the act in question might or might not be upheld as an exercise of the police power, which, though unexpressed in the Constitution, resides in every sovereign state, the supreme court of Utah clearly grounded its decision upon the mandatory nature of the foregoing § 6. The imperative command thereof was thought to operate both upon the legislature and the courts,—upon the legislature as an express injunction requiring the enactment of legislation to protect the health of the classes enumerated, and upon the courts as an implied restriction, withdrawing from them an inquiry into such legislation as should be passed in obedience to that command, upon which investigation, in the absence of the constitutional limitation, and with respect to such legisla-

tion as comes within the range of the general police power, the court might enter to ascertain if it accords with the Constitution. This extract from the opinion of Zane, Ch. J., bears out our statement: "The provision of the state Constitution quoted makes it the duty of the legislature to 'pass laws to provide for the health and safety of employees in factories, smelters, and mines.' And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the Constitution to the lawmaking power." *State v. Holden*, 14 Utah, 95, 37 L. R. A. 103, 46 Pac. 762. And the remark of Mr. Justice Brown in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, further corroborates it, when he said: "The supreme court of Utah was of opinion that, if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the Constitution of the state which declared that 'the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines.'" As the question is not necessarily before us, perhaps we properly withhold opinion upon it; but we are not prepared to say, with counsel for petitioner, that this provision of the Utah Constitution is so far different from ours that the former instrument will, and the latter will not, permit of such legislation. Rather we may say that we are impressed with the able argument of counsel appearing *amici curiæ* in behalf of the law, wherein they maintain, with strong reasoning, that the presence in the Utah Constitution of article 16, on which the Utah court founded its decision, adds nothing to the power which the legislature would have without it, unless it be, as we are disposed to concede, that its presence removes the objection that otherwise might be made to an act on the ground that it is class legislation. However this may be, upon the claim that the decision of the state court in the Utah cases is a precedent for us, it is sufficient now to say that no effort was there made, as there is here, to vindicate the law as a valid exercise of the general unwritten police power, and for this reason the cases cannot be treated as authority. And since we are entitled to presume that the court there chose the the strongest, if not the only, ground on which to rest its determination, but little, if any, weight is to be given to the claim that the reasoning of the opinion supports respondent's contention that our act is in harmony with our own Constitution.

It is chiefly on account of the authoritative character of decisions of the Supreme Court of the United States that we are asked to uphold this act. It goes without saying that if a Federal question were involved in the case at bar, and had been passed upon by that tribunal, our duty in the premises would be clear. But the petitioner does not invoke the protection of any provision of the national Constitution. He maintains that

his sacred rights of liberty, and freedom of contract embraced in his right of property, and his exemption from arbitrary and unjust discriminations, all of which are guaranteed to him in the sections of our Constitution above quoted, are violated by this act. It is a mistaken notion that the 14th article of amendment to the National Constitution created any civil rights, or entitled citizens of states to transfer from the states to the Federal government their security and protection. In a long series of decisions, beginning with the *Slaughter-House Cases*, 16 Wall. 28, 21 L. ed. 394, and, among other great cases, in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 759, 23 L. ed. 585, 591, 4 Sup. Ct. Rep. 652; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1004; *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; and *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427,—the Supreme Court of the United States has held, as well expressed by Miller, J., in the *Slaughter-House Cases*: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that, 'whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.'" And by Field, J., in the *Barbier Case*: "Neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." See also 118 U. S. 365, 30 L. ed. 225, 6 Sup. Ct. Rep. 1004. And so long as any state observes the requirements of the 14th Amendment, and, in its legislation, gives to citizens of other states the same privileges and immunities that are enjoyed by its own citizens, and provides that no person shall be deprived of life, liberty, or property without due process of law, and affords to all persons within its jurisdiction the equal protection of its laws, the Federal courts cannot interfere therewith, even though the policy of the state be unwise, and its laws arbitrary and oppressive, and flagrantly in violation of the state Constitution. And so it might well be that a law is valid so far as a clause of the Federal Constitution is concerned, and yet be expressly inhibited by the Constitution of a

state. It does not necessarily follow, therefore, that because an act has met the approval of the Supreme Court of the United States, as not infringing any provision of the Federal Constitution, it is for that reason free from a prohibition contained in a state Constitution. This distinction is not always observed, and some confusion exists on account of the loose talk about it. It should be said that counsel for respondent recognize it. Nevertheless they would have us sustain this law on the authority of a decision which, when rightly considered under the facts of this case, is not an authority at all. In many of its own decisions the Supreme Court of the United States has clearly indicated the extent and scope of its jurisdiction in cases like that before it in the *Holden Case*. In the *Barbier Case*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, Mr. Justice Field, speaking for the court, said: "In this case we can only consider whether the 4th section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the state. Our jurisdiction is confined to a consideration of the Federal question involved." And in *Yick Wo v. Hopkins*, 118 U. S. 350, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, Mr. Justice Matthews, speaking for the court, says: "The question whether his imprisonment is illegal, under the Constitution and laws of the state, is not open to us. And although that question might have been considered in the circuit court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in that inquiry."

In *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 569, 22 N. E. 670, 682, we find, both in the majority and dissenting opinions, admirable statements of what consideration should be given by a state court to a decision of the Supreme Court of the United States on a question of constitutional law, where the point relates to the validity of a state statute claimed to be void because it deprives a citizen of life, liberty, and property without due process of law, and the decision sustains the validity of the law. Mr. Justice Andrews, speaking for the majority, thus states the rule: "Since the 14th Amendment, the question whether a state statute infringes the constitutional guaranty protecting life, liberty, and property, where it arises in a state court, involves the consideration of both the Federal and state Constitutions, although the ground of construction and decision is identical under either instrument. But whether the decision of the state court presents a Federal question reviewable on appeal to the Supreme Court of the United States depends on the nature of the decision of the state court; that is to say, whether it affirmed the validity of the statute, or held it to be unconstitutional and void. If the state court decides that the statute does violate the constitutional guaranty, its deci-

sion is now, as before the 14th Amendment, final and conclusive, and no appeal can be taken to the Federal court, as in that case no right under the Constitution and laws of the United States has been denied. If, on the other hand, the state court sustains the statute and denies the right asserted, the Federal jurisdiction attaches, and an appeal may be taken to the United States Supreme Court. It cannot be maintained, we think, that a decision of the Federal court sustaining a state statute is *res judicata* and binding upon a state court, when the same question subsequently arises there under a similar statute. It would still be the duty of the state court to examine the question, and decide it according to its interpretation of the constitutional guaranty." Peckham, J., tersely and to the same effect, on page 35, 117 N. Y., and page 682, 22 N. E., says: "In construing a clause in our state Constitution similar to one in the Federal instrument, should we follow the interpretation of such clause as given by the Federal court, which interpretation compels us to deny to these defendants the relief they ask for, although otherwise we are satisfied that they are justly entitled to that relief. If any right, privilege, or immunity claimed under the Federal Constitution or laws be denied by this court, its decision is reviewable in the supreme court, and in such cases it is our duty to follow in the footsteps of that court, and to be guided and controlled by its decisions. But in this case the right is claimed under our state Constitution, and in matters pertaining to its proper construction our decision is final, excepting that if, as construed by us, the Constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the Federal Constitution or laws, our decision is reviewable by the Federal court, not for the purpose of reviewing our construction of our own Constitution or laws, but to see whether, under the Constitution or laws as construed by us, any right or privilege existing by virtue of the Federal Constitution or laws has been violated or denied, and, if so, to give it effect notwithstanding the state law or Constitution. But where we deny no right or privilege claimed, and, on the contrary, assert and protect it, there is no review by the Federal court possible." In *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, and 51 N. E. 80, the same rule is laid down, and numerous authorities are cited.

We have made these extracts from the authorities chiefly for the reason that they furnish a complete answer to the contention of respondent's counsel that the decision of the Supreme Court of the United States in the *Holden Cases* is, in the circumstances here present, a binding authority, or any authority, upon this court. In all such questions, when it is once determined that no Federal question is involved, that is the end of the inquiry by the Federal court. For the sake of brevity, we desire, in this connection (though the reference might be equally pertinent elsewhere) to notice what Mr. Justice Brown, who wrote the opinion of the ma-

jority, said of these decisions of the various state courts declaring unconstitutional eight-hour statutes: "We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts." The last sentence, removed from its proper setting, in its literal signification might seem to support respondent's contention that in exercising police power the legislature may override all constitutional limitations. If it be conceded, as it is not, that in the pending cause it was competent for that tribunal to make an announcement as to the power of the legislature in this connection that would bind the state courts, we think it clear that none such as is claimed here was made; for when this sentence is read, as it should be, with what immediately precedes and follows, it is not susceptible of the interpretation put upon it. What follows is a declaration that, if the legislature has exercised a reasonable discretion its act will be enforced, but if its action is a mere excuse for an unjust discrimination, or the oppression of a particular class, it is a nullity. What precedes, indicates, in the view of the court, that no criticism could be made upon the decisions of these state courts. These considerations, coupled with the closing words of the opinion, in which it is said that "the act in question was a valid exercise of the police power of the state," are persuasive that the learned justice intended his language to have only the scope to which language in an opinion must always be restricted, *viz.*, the facts of the particular case, and that therefore this language, which would seem to be general in its application, was intended to be restricted to a case in which there was express constitutional authority, as in Utah, for the enactment of legislation like that then and now challenged. But, if we should be wrong in this construction, we must still for ourselves determine whether acts of our own legislature are or are not in contravention of our own Constitution. If the language used by that august tribunal in *Holden v. Hardy* is to be understood as limiting or defining how far a state legislature may go in the exercise of the police power without transcending any of the limits prescribed by the Federal Constitution, we agree with counsel for petitioner that it was needful to the ascertainment of the question before the court. But if it is not to be thus restricted, and if it was employed with the view of determining what are the true limits of the police power of a state under the provisions of the Constitution of that state, the remarks in that connection are wholly *obiter*, and not authority in that court itself, much less in any other jurisdiction. *Wadsworth v. Union P. R. Co.* 18 Colo. 600, 610, 23 L. R. A. 812, 33 Pac. 47 L. R. A.

515; *Carroll v. Carroll*, 16 How. 275, 287, 14 L. ed. 936, 937, 2 Black, Judgm. § 611. In other words, as to whether a given act of a state legislature does or does not violate the Federal Constitution, the decision of the Supreme Court of the United States is supreme, to which all other tribunals must yield obedience. On the other hand, upon the question as to whether or not a state law is valid or invalid under a state Constitution, the decision of the supreme court of that state is supreme and binding upon the Federal as well as the state courts, with well-recognized exceptions, not applicable here, as illustrated in *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10.

In the light of these authorities it is clear—First, that the decision of the supreme court of Utah in construing the Utah statute is not an authority here, for the reason that the decision there was based entirely upon the mandatory nature of a provision of the Utah Constitution which is not present in our organic act; second, in affirming the judgment of the Utah court, the decision of the Supreme Court of the United States in the *Holden Cases* is not a precedent for this court in construing our act, for the reason that the sole question before the Federal court was whether or not the Utah act violated the Federal Constitution. If, however, it could be maintained that this affirmance was in effect a determination that the Utah law was in harmony with the Utah Constitution, the decision of the Federal court would not be an authority here, because we have no such constitutional provision.

In *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000, the court construed two acts,—one prohibiting any corporation or person engaged in any business from paying its employees wages in anything but lawful money; the other providing that persons operating coal mines should weigh and measure coal at the place where mined, before the same is screened; the former being generally known as the "Scrip Act," and the latter as the "Coal-Screening Act." Both were held constitutional. It appears from the majority opinion that the decision, as stated by the court, was based upon two propositions: First, that defendant was a corporation which, under the laws of West Virginia, enjoyed unusual and extraordinary privileges, which enabled it to surround itself with a vast retinue of laborers, who needed to be protected against all fraudulent or suspicious devices in the weighing of coal or payment of labor; second, that the defendant as a licensee was pursuing a vocation which the state had taken under its general supervision for the purpose of securing the safety of employees by ventilation, inspection, and governmental report; and the defendant therefore must submit to such regulations as the sovereign thinks conducive to the public health, morals, or public security. Two of the four judges dissented, and in vigorous opinions, fortified by cogent reasoning, held both acts to be unconstitutional. Considering the grounds upon which the de-

cision was based, it is so manifestly not against our conclusion, under the facts of this case, that we need not stop to analyze the opinion. We now proceed with cases squarely condemning such enactments.

In *Lov v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362, an act providing that for all classes of mechanics, servants, and laborers, except those engaged in farm or domestic labor, a day's work shall not exceed eight hours, was held unconstitutional—First, because the discrimination against farm and domestic laborers is special legislation; and, second, because by the act in question the constitutional right of parties to contract with reference to compensation for services is denied. In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, an act providing for the weighing of coal at the mines, and requiring owners of mines to furnish and place upon the railway track adjacent thereto a track scale of the standard measure, was held to be unconstitutional, both upon the ground that it was class legislation, and that it prohibited persons *sui juris* from making their own contracts. The opinion of Mr. Justice Scholfeld is a very able and instructive one. In *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395, an act directed against the truck system, which sought to prohibit persons engaged in the mining or manufacturing business from keeping a truck store, was held to be unconstitutional on the ground that it was class legislation; and in discussing the limitations upon the police power the following is pertinent: "And it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination is conclusive,—for that would make the general assembly omnipotent,—since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen." See also *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624. In *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454, is an exhaustive discussion of the scope and limitations of this power. The act there construed provided that no females shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week. In a lucid opinion by Mr. Justice Magruder this measure was held void as violating those clauses of the Illinois Constitution against class legislation, and prohibiting the enactment of laws which deprive a person of life, liberty, or property without due process of law. The reasoning of the opinion goes beyond anything we have said respecting these limitations. Though many others equally pertinent might be made, we take the liberty of making therefrom the following extracts: "The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man who is forbidden to acquire and enjoy property in the same manner in which the

rest of the community is permitted to acquire and enjoy it is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right." "But the police power of the state can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling." In this connection may be cited a leading case in the court of appeals of New York (*Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 630), in which was nullified a pretended health law that sought to prohibit the manufacture of cigars and preparations of tobacco in any form in tenement houses, in certain cases. Mr. Justice Earl, in the course of the opinion, says: "To justify this law, it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture, but it would have to be injurious to the public health."

Mr. Tiedeman, at § 86 of his work, says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the state, and their actions can be controlled so that they may not injure themselves. But when they have arrived at majority they pass out of the state of tutelage and stand before the law free from all restraint, except that which may be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the state to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child; but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron-smelting works, because the lives of the men so engaged are materially shortened." And at § 178: "Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the pub-

lie. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant, except for the purpose of preventing frauds and trespasses." Judge Cooley, in his standard work on Constitutional Limitations, 5th ed., at page 486, says: "If the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness,' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negative." And at page 745: "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them." In his work on Torts, the same learned author, at page 326, remarks: "Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others. This is one of the first and highest of civil rights." And at page 337: "Every man controls his own property as he pleases, puts it to such use as he pleases, improves it, or not, as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the state and to his fellows. The state cannot substitute its judgment for his as to the use he should make of it for his own advantage." In his work on Constitutional Law, at page 312, Mr. Black, in speaking of laws limiting the hours of labor, after stating that they might be held valid as to women and children, and as to occupations affected with a public interest, thus proceeds: "But, where none of these circumstances apply, it is very doubtful whether such laws do not unwarrantably interfere with the right of contract."

Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, contains a valuable discussion of this subject, which is in line with our own decisions; and 47 L. R. A.

in the course of the opinion it is said that the *Peel Splint Coal Co. Case*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385, is against the weight of authority. At page 421, 58 Ark., page 270, 23 L. R. A., and page 79, 25 S. W., of the opinion it is said: "We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist; for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the Constitution of this state." "When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof." *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350, in discussing a scrip law, held that it was violative of the constitutional guaranty of due process of law, and void. *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, in passing upon the same sort of an act, held it unconstitutional, as infringing the right of persons *sui juris* to make their own contracts. The supreme court of West Virginia, in *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285, held a scrip law unconstitutional on the ground that it was class legislation. In *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670, 682, while the court held constitutional an act regulating elevator charges, on the ground that elevators were affected with a public interest, and their owners had received special benefits from the state canal, yet the act itself was distinguished from one regulating a strictly private business. In respect thereto the court said: "That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty." In the dissenting opinion of Peckham, J., now a member of the Supreme Court of the United States, is one of the most masterly discussions of the police power to be found in the books, and while it is a matter of regret that in dissenting from the decision of the majority of the court in *Holden v. Hardy*, in which he was joined by Mr. Justice Brewer, he did not state anew the grounds thereof, yet a careful reading of his dissenting opinion in the case to which we now refer discloses his objections to the doc-

trine announced in the *Holden Case*; and prior decisions of Mr. Justice Brewer upon the same subject attest his reasons for such dissent. The late case of *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006, holding invalid an act prohibiting all persons except the agents of a transportation company from engaging in the passenger ticket brokerage business, is in line with the current of authority on the limitations of the police power. *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781, condemns as void a law making it unlawful for an employer to prohibit an employee from joining, or to require an employee to withdraw from, a trade or labor union, or other lawful organization, upon the ground that it is special legislation, and that it deprives the employee of property without due process of law. The following excerpt from the opinion places far greater restrictions upon the legislature in the exercise of the police power than it is necessary for us to do in the case at bar. After citing with approval the authorities which we have considered in this opinion, the court, by Mr. Justice Sherwood, says: "Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the Constitution intended to secure against diminution or abridgment. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and cases cited." *Ex parte Kuckack*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737, was a case in which was construed a municipal ordinance making it a misdemeanor for any person, when having labor performed for the purpose of carrying out a contract with the city, to demand, receive, or contract for more than eight hours' labor in any one day from any person; and the same was held void as an infringement of the right of such persons to make and enforce their contracts, and could not be upheld as a sanitary or police regulation, as it might be if the employment was unfit for certain persons, as, for example, females or infants.

This summary review of the leading authorities shows clearly to our minds that the great weight of authority, as well as reason, supports the conclusion which we 47 L. R. A.

have reached. The result of our deliberation, therefore, is that this act is an unwarrantable interference with, and infringes, the right of both the employer and employee in making contracts relating to a purely private business, in which no possible injury to the public can result; that it unjustly and arbitrarily singles out a class of persons, and imposes upon them restrictions from which others similarly situated and substantially in the same condition are exempt; and that it is not, under our Constitution, a valid exercise of the police power of this state, either in the subject selected or in the reasonableness of the regulation. We cannot do better, in conclusion, than to quote from the opinion in the case of *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, construing an act authorizing summary destruction, without a jury trial, of boats used by one person in interfering with oyster beds, etc., belonging to another; for, in one respect, it so fitly characterizes the act before us: "It is to be observed that the statute does not relate to the health, morals, safety, or welfare, of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish that purpose. But, on the contrary, they are plainly oppressive, and amount to an unauthorized confiscation of private property for the mere protection of private rights. It is in no manner attempted by this statute to protect any public interest or defend any public right. Nor is it calculated to accomplish that end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights, and private property. . . . It is manifest that this extraordinary and extreme statute is not necessary, and was not intended, for the protection of the public. Its sole purpose was to regulate private interests and enforce private rights. In no sense can it be regarded as a police law, and consequently is not within the police power. In this statute we have another example of class legislation, where the legislature has attempted to improperly interfere with the private rights of the citizen. This species of legislation has been so often condemned by this and other courts as to render any further discussion of its impropriety and invalidity wholly unnecessary."

The petition therefore should be, and the same is hereby, granted, and the petitioner should be, and hereby is, discharged from custody.

KANSAS SUPREME COURT.

STATE of Kansas *vs* rel. W. A. McCausland, County Attorney,
v.

L. A. FREEMAN *et al.*

(.....Kan.....)

*The act of the legislature (Laws 1899, chap. 189), in arbitrarily establishing a high school, and requiring its maintenance by the people of a county, is not an unconstitutional interference with the rights of local self-government, nor is it invalid because the tenure of office of the trustees of such school is three years.

(November 11, 1899.)

APPPLICATION for a writ of mandamus to compel defendants to carry out the provisions of an act for the establishment of a school at Howard, Elk County. *Writ issued.*

The facts are stated in the opinion.

Mr. L. Scott, with Mr. W. A. McCausland, for plaintiff:

It was not necessary to submit the question to a vote of the people of the county.

Leavenworth County Comrs. v. Miller, 7 Kan. 479, 12 Am. Rep. 425.

The statute is constitutional and valid.

Eichholz v. Martin, 53 Kan. 486, 36 Pac. 1064; *Glass v. Billings*, 59 Kan. 776, 53 Pac. 125.

Messrs. Keeler & Hite for defendants.

Johnston, J., delivered the opinion of the court:

This is a proceeding to compel the county commissioners of Elk county to carry out the provisions of chapter 189 of the Laws of 1899,—“An Act to Establish a High School at Howard, Elk County, Kansas.” Two of the commissioners declined to appoint a board of trustees as the act required, upon the alleged ground that it is an unconstitutional interference with the right of local self-government. The contention made in their behalf is that the county cannot be compelled to build and maintain a high school without the consent of those who are required to pay for it, and that the legislature exceeded its power when it attempted to impose such a task and burden upon them. No express prohibition of such legislation is called to our attention, and no inherent or fundamental right implied in the Constitution, that we know of, is violated. The matter of education is one of public interest, which concerns all the people of the state, and is therefore subject to the control of the legislature. Municipalities and

political organizations are the creations of state authority, and are all within legislative control. While education is a matter of state interest and public concern, the high school being especially beneficial to the people of the community in which it is established, the burden of maintaining it may be rightfully cast upon them. It is conceded that the legislature has full power to compel local organizations of the state to maintain common schools, and, as schools of a higher grade are authorized by the Constitution (§ 2, art. 6), no reason is seen why such organizations may not be compelled to maintain high schools. *Koester v. Atchison County Comrs.* 44 Kan. 141, 24 Pac. 65. The power of the legislature in this respect was carefully examined in the case of *State v. Shawnee County Comrs.* 28 Kan. 431, and it was sustained in an elaborate opinion delivered by Justice Brewer. It was held that it was competent for the legislature to establish a state road, and cast the cost and expense thereof upon the county in which the road lies, without the consent of the officers or people of the county, and, in like manner, that it might require the county to build a certain kind and number of bridges at specified places, another county to open roads in particular localities, and another to build public buildings, and that for these and other public purposes the counties or other municipalities could be required to levy a tax, and make other provisions for the payment of such improvements. If the obligations which the municipalities are required to assume and discharge are for institutions and necessities of purely public concern, and for which taxes may ordinarily be levied, the power of the legislature in respect to them is supreme, and its determination, if reached by constitutional methods, is not subject to review. The matter of establishing schools is certainly a public purpose, and the case at bar falls within the cited case, with which decision we are entirely satisfied. See also *Eichholz v. Martin*, 53 Kan. 486, 36 Pac. 1064; *Glass v. Billings*, 59 Kan. 776, 53 Pac. 125.

The only other objection is that the tenure of office fixed for the trustees of the high school is three years, and is therefore obnoxious to § 3, art. 9, of the Constitution. That section provides that county officers, except county commissioners, shall hold their offices for a term of two years; and it is contended that the trustees are county officers, and therefore within this limitation. The special act establishing the high school at Howard provides for the appointment of trustees by the county commissioners at their first regular session after the taking effect of the act. No specific provision is

*Headnote by JOHNSTON, J.

NOTE.—For local self-government, see *Com. v. Plaisted* (Mass.) 2 L. R. A. 142; *State vs rel. Holt v. Denny* (Ind.) 4 L. R. A. 65; *State vs rel. Jameson v. Denny* (Ind.) 4 L. R. A. 79; *Evansville v. State vs rel. Blend* (Ind.) 4 L. R. A. 47.

A. 93; *State vs rel. Terre Haute v. Kolsem* (Ind.) 14 L. R. A. 566; *Davock v. Moore* (Mich.) 28 L. R. A. 783; *Rathbone v. Wirth* (N. Y.) 34 L. R. A. 408; *State vs rel. Smyth v. Moores* (Neb.) 41 L. R. A. 624.

made as to the election of their successors, but it does provide that the school, when established, shall be governed in all respects in accordance with the general law of the state relating to county high schools. Assuming, however, that the terms provided for trustees in the general act (Laws 1886, chap. 147) control, the trustees are not county officers, within the meaning of that provision of the Constitution. The only function of these trustees is the management of the school, and they are officers of the school, rather than of the county. Under the general law, a high school cannot be established in all the counties of the state, but only in counties having more than 6,000 inhabitants, and not in any of them unless a majority of the electors shall vote in favor of the establishing of such school. The constitutional limitation in question applies to such officers as are common to all the counties of the state, and not to peculiar and anomalous officers that may be created, and whose duties may be the control of a particular institution within the county. Like the officers who govern other educational institutions of a higher grade, a trustee of a high school is exceptional in character, and his duties pertain wholly to the institution for which he is appointed. They are no more county officers than are the principal and others who are appointed to conduct the high school. Some duties are imposed by the act upon the officers of school districts, but that certainly does not make them county officers; and yet they hold their offices, like the trustees of the high school, for a term of three years. Their functions are performed within the township and county, and yet their tenure of office is longer than that fixed by the Constitution for either county or township officers. Being exceptional in character, the offices fall within the limitation of § 2, art. 15, of the Constitution, which provides: "The tenure of any office not herein provided for may be declared by law; when not so declared, such office shall be held during the pleasure of the authority making the appointment; but the legislature shall not create any office the tenure of which shall be longer than four years." The term provided does not exceed that limitation, and hence the objection cannot be sustained.

The act being valid, the *peremptory writ of mandamus will issue*, as prayed for by the plaintiff.

All the Justices concur.

Re Thomas PAGE.

(60 Kan. 842.)

*Chapter 249, Laws 1899, entitled "An Act Providing for the Taxation of Contracts of Insurance Made with In-

*Headnote by JOHNSTON, J.

NOTE.—As to the taxation of insurance policies, see also *State Bd. of Tax Comrs. v. Holliday (Ind.)* 42 L. E. A. 826.
47 L. R. A.

Insurance Companies not Authorized to Do Business in Kansas, and Providing for the Enforcement Thereof," in part authorizes the imposition of a tax for other than public purposes. It is also a distinct departure from the constitutional rule of uniformity and equality, and is invalid.

(October 7, 1899.)

APPPLICATION for a writ of habeas corpus to procure petitioner's release from custody to which he had been committed for refusal to disclose the insurance upon his property to aid in the assessment of taxes thereon. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. Troutman & Stone, for petitioner:

A contract of insurance has no property value upon which a tax can be based.

Equality and uniformity are constitutional prerequisites to a valid tax.

Const. art. 2, § 1.

Chapter 249 violates this provision in two respects; the tax is not uniform, and there is no method of assessment prescribed.

State v. Hunt, 141 Mo. 626, 43 S. W. 389; *Cooley*, *Taxn. chap. 4*, p. 164; *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 764, 5 Pac. 397.

In the case at bar the legislature nominally levies a tax upon the insured, but the real purpose and the effect of the act are to impose a burden on nonresident insurers who have not obtained a license.

Resident citizens, companies, associations, partnerships, and corporations are permitted under the laws to do insurance business in the state without fulfilling any requirements or obtaining any authority.

If the citizens of this state may, without restriction, enter into contracts of insurance, the same right is guaranteed to the citizens of other states.

Barnes v. People ex rel. Moloney, 168 Ill. 425, 48 N. E. 91; U. S. Const. art. 14, § 1; Bill of Rights, § 18; 3 Am. & Eng. Enc. Law, 714, 726; *Cooley*, *Const. Law*, 351, 354, 356, 393; *Hoover v. McOhesney*, 81 Fed. Rep. 472; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 398; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

The contract having been completed when the money was accepted, and the policy written outside of the state, this removes it from the jurisdiction and control of the state of Kansas.

Allgeyer v. Louisiana, 165 U. S. 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The act provides for unreasonable search and seizure.

May, *Constitutional History of England*, chap. 11; *Cooley*, *Const. Lim.* 300; *United States v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,893; 2 Story, *Const.* § 1902; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

It is equivalent to a compulsory production of papers to make the nonproduction of

them a confession of the allegations which it is pretended they will prove.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Hoover v. McChesney*, 81 Fed. Rep. 472.

A compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding is within the spirit and meaning of the amendment that no person shall be compelled, in any criminal case, to be a witness against himself.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Cooley*, Const. Lim. chap. 10.

Messrs. A. A. Godard, Attorney General, and *J. S. West*, *contra*:

The state has full power to prohibit or prescribe terms to insurance business in Kansas.

Leavenworth v. Booth, 15 Kan. 634.

Insurance is not interstate commerce.

State v. Phipps, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, 31 Pac. 1097; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

Many kinds of business may be prohibited or be licensed, restrained, and regulated. Insurance may come within this category.

Leavenworth v. Booth, 15 Kan. 634;

Lamb v. Lamb, 6 Biss. 420, Fed. Cas. No. 8,018; *Lamb v. Bowser*, 7 Biss. 315, Fed. Cas. No. 8,008.

Johnston, J., delivered the opinion of the court:

At the last session of the legislature there was passed a law entitled "An Act Providing for the Taxation of Contracts of Insurance Made with Insurance Companies not Authorized to Do Business in Kansas, and Providing for the Enforcement Thereof." Laws 1899, chap. 240. On May 26, 1899, Thomas Page, owner of the Mid-Continent Mills, in Topeka, wrote to the Indiana Millers' Mutual Fire Insurance Company of Indianapolis, Indiana, proposing to take out insurance on his mill property with that company. At the same time he remitted \$30 to pay for a five-year policy on \$2,000 of insurance. The money was received and accepted by the company, and on May 29, 1899, the company, at its office in Indianapolis, issued a policy in accordance with the request of Page, placed it in the postoffice, and by due course of mail it was received by Page at Topeka. The company was not authorized to do business in Kansas, and had no office, agent, solicitors, or representatives in the state. In June, 1899, the superintendent of insurance made a demand on Page to exhibit his contracts and policies of fire insurance, and especially those issued by companies not authorized to do business in Kansas, but the demand was refused. Page never reported the policy mentioned to the superintendent of insurance, and never paid any tax on the premium therefor. The demand was made and the payment of the tax required in an 47 L. R. A.

attempt to enforce the act above mentioned. The statute provides that persons insuring property in Kansas with companies not authorized to do business in the state shall report the contracts of insurance to the superintendent of insurance for the purpose of taxation. All such contracts are to be taxed "in a sum equal to ten per cent of the amount of premiums paid or contracted to be paid thereon, which said tax shall be paid by such insured to the superintendent of insurance, and the payment thereof shall be enforceable by process of law as other like taxes are, and said tax shall be a lien on said property so insured together with other taxes lawfully assessed against the same." It further provides that the taxes, when collected, shall be applied as follows: Three fifths thereof to the payment of the expenses of the insurance department, and two fifths thereof shall be paid by said superintendent of insurance to the treasurer of the city or township in which said property so insured is situate, for the benefit of the fire department thereof, if such department exists or be organized, whether paid or volunteer; otherwise, to be used in the general fund of said city or township." There is a provision requiring the owners of property to exhibit, on demand, to the superintendent of insurance, and to certain city or township officers, all policies or contracts of insurance, other than life and accident, made by companies or parties not authorized to do business in the state, but such policies or contracts are not required to be exhibited oftener than once every six months. Any violation of the provisions of the act is deemed to be a misdemeanor, and the failure to report the making of such a contract of insurance to the superintendent of insurance is punishable by a fine not exceeding \$100, and a like penalty is inflicted on any person who fails or refuses to exhibit such insurance policies on demand of the officers. Page denied the validity of the law, and refused to comply with its requirements; and, with a view of testing its validity and to enforce its provisions, the superintendent of insurance caused the arrest of the petitioner. It is challenged upon several grounds, one of which is that it conflicts with § 1, article 11, of the state Constitution, requiring that "the legislature shall provide for a uniform and equal rate of assessment and taxation."

It will be observed that the burden imposed by the act is not a license, nor a charge placed upon a privilege, franchise, or occupation. It is specifically designated as a tax, and is levied upon insurance contracts, which are treated as taxable assets and property of the insured. The act is an anomaly in the method of raising public revenues, and constitutes a wide departure from the means of taxation heretofore employed in this state. It is said that a tax is ordinarily levied on the property, income, or receipts of the taxpayer, and not upon what he has paid out. Counsel for the petitioner assert that "this is the pioneer effort to tax losses and disbursements, instead of profits and accumulations. It is the only recorded in-

stance of requiring a man to pay a tax, not upon what he hath or seemeth to have, but confessedly upon what he hath not." Such contracts, however, indemnify the insured against loss, and have some of the characteristics of bonds, mortgages, and other like securities which are made the subjects of taxation. They have property value susceptible of measurement, and it was competent, therefore, for the legislature to treat them as property, as it did, and to make them subject to taxation. *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 737, 5 Pac. 397. Being a property tax, the constitutional limitations upon the taxation of all the property in the state are applicable and controlling. In the absence of constitutional restrictions, the sovereign power of the state may be exercised almost without limitation in determining what should be subject to taxation, and the manner of levying and collecting taxes. Of course, arbitrary and unequal exactions cannot be levied upon persons or property, nor can revenues raised by the exercise of this power be expended for other than public purposes. Unless, however, a tax for public purposes is imposed on false and unjust principles, or violates an express provision of the Constitution, the will of the legislature is conclusive. Our Constitution contains an express limitation on the power to tax, by requiring the legislature to "provide for a uniform and equal rate of assessment and taxation." While this provision has no application to license, capitation, or special taxes, it does apply to direct taxes on property. *Hines v. Leavenworth*, 3 Kan. 200; *Ottawa County Comrs. v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101. As will be observed, the Constitution contemplates that there will be an assessment or valuation of the property to be used as a basis of the levy, and in this way equality and uniformity of taxation may be had upon all the property within the taxing district. Although assessment is the most important of all the steps in the imposition of taxes, no assessment or valuation is required by the act, or made, upon the property sought to be taxed in this case. "It will be observed that the Constitution does not in terms require that the property in the state should be taxed according to its value, but it must be apparent to everyone that such was the intention of the Constitution makers. Taxes cannot be levied by an equal and uniform rate, except upon the value." *Hines v. Leavenworth*, 3 Kan. 200. To accomplish the uniformity and equality required by the Constitution, it would appear that assessment or valuation is indispensable; and yet in this case the legislature, without assessment or valuation of the property, attempts to make an arbitrary exaction. All other property in the state is required to be taxed at its true value in money, but here no account is taken of the solvency of the company or the value of the security or policy. However values of other property may fluctuate or the rate of taxation thereon may change from year to year, no change is made on the tax levied on the property in question. The 47 L. R. A.

lack of uniformity is manifest in another way: One taxpayer has a policy written in the state by a company with authority, upon which no tax is imposed, while his neighbor has one written by an unlicensed company at Indianapolis, or other place outside of the state, which is subject to taxation. Taxes are uniform and equal when imposed upon all property of the same character within the taxing district, and yet here the insured pays a 10 per cent tax upon a policy written outside of the state, while his neighbor pays nothing upon a policy of equal value, and affording the same protection, because it is written within the state. Contracts of insurance written outside of the state cannot be regarded as illegal. Aside from the consideration that they may not be Kansas contracts, and are therefore beyond the reach of the legislature, the act itself contemplates that such contracts may and will be made, and when made are to be treated as property within the state, and become the subject of taxation here. This is an invidious discrimination, purposely made, and is a distinct departure from the constitutional rule of uniformity. *State ex rel. Atty. Gen. v. Leavenworth County Comrs.* 2 Kan. 61; *Hines v. Leavenworth*, 3 Kan. 200; *Graham v. Chautauqua County Comrs.* 31 Kan. 473, 2 Pac. 549; *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 737, 5 Pac. 397; *Marion & M. R. Co. v. Champlin*, 37 Kan. 682, 16 Pac. 222. See also *People v. Hastings*, 29 Cal. 449; *Marsh v. Clark County Supers.* 42 Wis. 502; *Slaughter v. Louisville*, 89 Ky. 112, 8 S. W. 917.

Another ground upon which the act is assailed is that in part the tax is levied for a private and illegal purpose. Two fifths of the taxes to be raised are to be used for the benefit of the fire department of a city or township, whether paid or volunteer. All will agree that taxation for other than public purposes is unjustifiable. For the maintenance of a fire department public money may be raised and expended; and, if the municipality incurs any legitimate expense in providing such an organization, taxes may be imposed therefor. The taxing power of the state, however, can hardly be exercised in order to bestow public money upon a department made up of volunteers who are not employed by the municipality, and for whose services no expense is assumed or incurred by it. However commendable the object of such an organization may be, and however valuable the services of the members may be, it is clear that public money can only be used to discharge a public liability. As will be observed, the money, when collected, is to be applied to the benefit of such a department, and not for the benefit of the municipality; but taxes cannot be imposed nor public money expended for the benefit of private individuals or enterprises, nor can it be given away for such purposes.

For the reasons stated, we conclude that the statute is invalid and the tax illegal, and therefore the petitioner will be discharged.

All the Justices concur.

STATE of Kansas
v.
Henry WILSON, Appt.

(.....Kan.....)

1. "An Act to Regulate the Weighing of Coal at the Mine," being chapter 188 of the Laws of 1893, is constitutional and valid, as a proper exercise of the police power. It does not purport to prevent the operators of coal mines and the miners employed by them from making such agreements as they choose concerning the amount of wages to be paid, or in any wise infringe upon the freedom of contract.

2. Where miners are employed at bushel, ton, or other quantity rates, it is a valid requirement of the law that the output of coal mined by them shall not be passed over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employees and accounted for at the legal rate of weights. Information is by this means furnished to the miner by which he may act intelligently, and rest his demand for wages upon the calculated results of what he has accomplished in the past. It also affords the operator knowledge, from the use of which wages may be adjusted, based upon known facts. Such law is further beneficial in that it supplies the public with statistics showing the total amount of coal produced in the state.

(Smith, J., dissents.)

(November 11, 1899.)

APPEAL by defendant from a judgment of the Court of Appeals, Southern Department, Eastern Division, affirming a judgment of the District Court for Crawford County convicting him of violating the statute requiring the weighing of coal at mines. *Affirmed.*

Statement by Smith, J.:

The appellant was convicted in the district court for the violation of § 1, chap. 188, of the Laws of 1893, entitled "An Act to Regulate the Weighing of Coal at the Mine." It is charged in the information that the Mt. Carmel Coal Company on or about the 21st day of October, 1897, was a corporation organized and existing under the laws of the state of Kansas, engaged in the business of mining coal from its mines, located in Crawford county, at ton rates; the wages of miners employed being based upon the quantity of coal produced by each of them. The appellant, Henry Wilson, was then and there an agent and superintendent of said corporation, having on its behalf the care and management of its coal mines and mining business. Said Wilson had a large number of miners in his employ at ton rates. As such agent he used certain scales for the purpose

of weighing the output of coal at said mines, and did unlawfully and knowingly employ and make use of certain devices and screens to screen the output of said mines before the same had been weighed. The output of said mines was screened with the knowledge and by virtue of contracts with said miners, and said Wilson then and there failed, and refused to, and did not, weigh the output of said coal mined by said miners so employed before the same was passed over said screens, but said Wilson unlawfully directed and caused all of the output of coal produced by said miners so employed to be passed over screens before the same had been weighed, whereby a large part of the value of the output of said coal mined by said miners was taken therefrom before the same had been weighed and duly credited to said miners and accounted for at the legal rate of weights as fixed by the laws of the state of Kansas. Chapter 188 of the Laws of 1893 reads:

"An Act to Regulate the Weighing of Coal at the Mine.

"Sec. 1. It shall be unlawful for any mine owner, lessee, or operator of coal mines in this state, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employees and accounted for at the legal rate of weights as fixed by the laws of Kansas.

"Sec. 2. The weighman employed at any mine shall subscribe an oath or affirmation, before a justice of the peace or other officer authorized to administer oaths to do justice between employer and employee, and to weigh the output of coal from mines in accordance with the provisions of § 1 of this act. Said oath or affirmation shall be kept conspicuously posted in the weigh office, and any weigher of coal, or persons so employed, who shall knowingly violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than twenty-five nor more than one hundred dollars for each offense, or by imprisonment in the county jail for a period not to exceed thirty days, or by both such fine and imprisonment.

"Sec. 3. The miners employed by or engaged in working for any mine owner, operator, or lessee in this state shall have the privilege, if they so desire, of employing at their own expense a check-weighman, who shall have like rights and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman.

"Sec. 4. Any person or persons having or using any scale or scales for the purpose of weighing the output of coal at mines, so arranged or constructed that fraudulent weigh-

*Headnotes by SMITH, J.

NOTE.—For contracts of miners as to weighing coal, see *Harding v. People* (Ill.) 32 L. R. A. 445.

For constitutionality of restrictions on right of contract between master and servant in general, see *Com. v. Perry* (Mass.) 14 L. R. A. 325, and *note*; *State v. Loomis* (Mo.) 21 L. R. A. 789, and *note*; and *Ritchie v. People* (Ill.) 29 L. R. A. 79.

ing may be done thereby, or who shall knowingly resort to or employ any means whatever, by reason of which such coal is not correctly weighed and reported in accordance with the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction, for each offense be punished by a fine of not less than two hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed sixty days, or by both such fine and imprisonment.

"Sec. 5. Any provisions, contract, or agreement between mine owners or operators thereof and the miners employed therein, whereby the provisions of § 1 of this act are waived, modified, or annulled, shall be void and of no effect; and the coal sent to the surface shall be accepted or rejected, and if accepted shall be weighed in accordance with the provisions of this act; and right of action shall not be invalidated by reason of any contract or agreement.

"Sec. 6. The provisions of this act shall also apply to the class of workers in mines known as loaders, engaged in mines wherein mining is done by machinery. Whenever the workmen are under contract to load coal by the bushel, ton, or any quantity, the settlement of which is had by weight, the output shall be weighed in accordance with the provisions of this act.

"Sec. 7. This act shall take effect and be in force from and upon the first day of September, 1893, after its publication in the official state paper."

The constitutionality of the act was sustained by the court of appeals, and the judgment of the district court affirmed. *State v. Wilson*, 7 Kan. App. 428, 53 Pac. 371.

Messrs. Morris Oliggitt and Perry & Crain, for appellant:

The statute is void for the following reasons:

1. It is so arbitrary and unjust, so subversive of liberty, and so contrary to the fundamental principles of free government, that it cannot be considered as an exercise of legislative power, independent of any express constitutional prohibition.

2. It deprives coal operators and coal miners of the inalienable natural rights of liberty and the pursuit of happiness guaranteed by § 1 of our Bill of Rights.

3. It deprives the operators and miners of their property, which is destroyed, not for a public purpose, and without compensation therefor.

4. It deprives the operators and the miners of their liberty and property without due process of law, and denies to them the equal protection of the laws in violation of § 1 of article 14 of Amendments to the Constitution of the United States.

An act of the legislature may be unconstitutional and void, though no express provision of the Constitution which it violates can be pointed out.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542.

47 L. R. A.

Deprivation of property without due process of law is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority, both of the states and the nation.

Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Wynehamer v. People*, 13 N. Y. 394; *Wilkinson v. Leland*, 2 Pet. 658, 7 L. ed. 553; *Regents of the University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572; *Campbell's Case*, 2 Bland, Ch. 209, 26 Am. Dec. 360; *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 72; *Gibson v. Pulaaki County*, 2 Ark. 309; *Cincinnati, W. & Q. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *Cass v. Dillon*, 2 Ohio St. 607; *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 236; *Brown v. Hummel*, 6 Pa. 86; *Andrews v. Russell*, 7 Blackf. 474; *Booth v. Woodbury*, 32 Conn. 118; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Ah Jow*, 20 Fed. Rep. 181; *Arrowsmith v. Burlingim*, 4 McLean, 489, Fed. Cas. No. 563; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Taylor v. Ross County Comrs.* 23 Ohio St. 22; *East Kingston v. Towle*, 48 N. H. 57; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Griffith v. Crawford County Comrs.* 20 Ohio, 609; *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, 19 S. E. 458; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; 2 Kent, Com. 13, note (b).

While in terms the statute does not declare that coal miners lack sufficient capacity to contract, in effect it does so declare by making contracts unlawful which, since the foundation of our government, have always been lawful, and thus renders it impossible for coal miners to enter into such contracts, whether they decide it is to their advantage or not.

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *National Bank v. Iola*, 9 Kan. 689; 2 Hare, Am. Const. Law, pp. 749, 750; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State ex rel. Griffith v. Osaukee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *McConnell v. Hamm*, 16 Kan. 228; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, 12 Am. L. Reg. N. S. 481, and Redfield's note; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Prouty v. Stover*, 11 Kan. 235; *Wyandotte County Comrs. v. Abbott*, 52 Kan. 148, 34 Pac. 416.

Liberty and the pursuit of happiness include the right to acquire, possess, and dispose of property; and whatever arbitrarily interferes therewith deprives the citizen of his rights of liberty and the pursuit of happiness.

2 Story, Const. 5th ed. § 1950; 13 Am. &

Eng. Enc. Law, p. 505; *Re Jacobs*, 98 N. Y. 385, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343.

Man's right in his labor is the highest right of property.

Wynehamer v. People, 13 N. Y. 378; 2 Hare, Am. Const. Law, 779; 1 Hare, Am. Const. Law, 357; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48.

"Due process of law" means a course of legal proceedings according to those rules and principles which have been established for the protection and enforcement of private rights.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Kennard v. Louisiana ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Re Parrott*, 1 Fed. Rep. 481; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

The great weight of authority is against the law.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Frerer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395, and 32 N. E. 366; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Godcharles v. Wigeman*, 118 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & O. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Aligeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Re Grice*, 79 Fed. Rep. 627; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Re Ziebold*, 23 Fed. Rep. 791; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 284, 25 S. W. 75; *McMaster v. West Chester State Normal School*, 162 Pa. 260, 29 Atl. 734; *Waters v. Wolf*, 162 Pa. 153, 29 Atl. 646; *Re House Bill No. 10*, 15 Colo. 600, 26 Pac. 824; *Re Eight Hours Bill*, 21 Colo. 29, 39 Pac. 328; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *State v. Paint Rock Coal & C. Co.* 92 Tenn. 81, 20 S. W. 499; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *State v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

The act is not a valid exercise of the police power.

2 Hare, Am. Const. Law, pp. 760, 784; *Palairret's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *McCandless v. Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440, 16 S. E. 429; *Mo-47 L. R. A.*

Cullough v. Brown, 41 S. C. 220, 23 L. R. A. 410, 19 S. E. 458; *Com. v. Alger*, 7 Cush. 53; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546, 18 Am. L. Reg. N. S. 676, and note by Cooley; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *State v. Divine*, 98 N. C. 778, 4 S. E. 477; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *St. Louis v. Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *Colon v. Lisk*, 163 N. Y. 188, 47 N. E. 302; *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L. R. A. 672, 71 N. W. 400; *Tacoma v. Kreech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

Coal mining is not a public business, nor a business affected with a public interest.

Whether or not a business is public, or is "affected with a public interest," is a judicial question.

Rockwell v. Nearing, 35 N. Y. 302; *Re Townsend*, 39 N. Y. 171; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 Am. Rep. 86; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *State ex rel. Griffith v. Osawakee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455.

Mr. A. A. Godard, Attorney General, for appellee.

Smith, J., delivered the opinion of the court:

In this opinion I give the views of the majority of the court. On the argument and in the briefs much time and space were consumed in discussion of the question whether the act under consideration affects the right of contract, and whether the law as it reads has a meaning that the wages paid to coal miners are to be measured by the gross output of valuable product mined and brought to the surface by the laborers employed therein. In our judgment, the law in no wise affects the right of contract, and does not hinder or prevent the mine operator or miner from making such agreements as they choose concerning the amount of compensation to be paid for labor in mining coal. Nor does the act prohibit the employment of miners at day wages, or make void contracts for the payment of wages based on the quantity of screened coal produced. In fact, the law permits complete freedom of action in the respect mentioned. The act does, however, in positive terms, make it unlawful for any mine owner, lessee, or operator of coal mines, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take away any part from the value thereof before the same shall have been weighed and duly credited

to the employees at the legal rate of weights fixed by law. Of the intent of the legislature in enacting the statute, it is hardly necessary to inquire. We can see, however, a useful purpose to be accomplished. In the exercise of the police power, the legislature may pass such laws as in its judgment are necessary, regulating the measuring or weighing of commodities. In *Tiedeman*, Lim. p. 509, it is said: "By virtue of the police power, regulations have been imposed on the practice of the law, medicine, and dentistry, as well as upon bakers, millers, and wharfingers; and it has been accepted as a proper exercise of the police power to regulate pawnshops, junkshops, and loan offices. Inspection laws and those regulating the weighing of articles offered for sale are generally regarded as suitable and valid regulations of police." The utility of the act (if we have the right to enter upon such an inquiry) can be defended for the reason that the weighing of the gross output from the mine gives information to the miner, whose labor has separated it from the general mass of the vein, concerning the result of his effort. He is thus advised how much in weight of all grades of this fuel he has extracted from the earth in a day, a month, or a year; enabling him, when armed with this knowledge, to make contracts in the future based upon actual information of the benefits the employer has in the past derived from his labor. Thus informed he may act intelligently, resting his demand for pay upon the actual value of his labor as shown by the calculated results of what he has theretofore accomplished. On the other side, the employer may also have this knowledge before his eyes when contracting with the miners for their services, enabling him to make an adjustment of wages based upon known facts. By this system of weighing, deception as to the amount of coal mined is rendered impossible, and fraud prevented. Standing in the light of such knowledge gained from established data, the miner may make a claim of right to wages he knows he can earn, fortifying his demand by reference to what he has done, as found recorded in the weighmaster's books. Further, it is important that the public should have within reach data sufficient to furnish information regarding the amount of coal produced from the mines within the state. A compliance with this law provides means for the compilation of statistics showing the entire output of coal. The dissemination of knowledge concerning the wealth and material resources of a state is a laudable employment, and legislation which tends to accomplish or in any wise assist in such work ought to be upheld and encouraged. For this object alone the act in question is useful, and, being so, we cannot say that the legislature did not have such purpose in view when the same was enacted. We agree with the court of appeals in saying [7 Kan. App. 431, 53 Pac. 372]: "Counsel throughout their whole argument assume that the object of this act is to regulate the rate of wages to be paid by mine operators to their employ-

ees. We think this assumption is unwarranted, and that, in so far as the arguments of counsel rest upon it, the arguments upon that contention are irrelevant to the questions which properly arise in the case." The law is devoted to other purposes than an interference with or a regulation of contracts. It merely prohibits the screening of coal mined at ton or quantity rates before the same is weighed. This is a legitimate exercise of the police power, coming properly within the sphere of legislative action, upon the grounds above stated.

The judgments of the District Court and the Court of Appeals will be affirmed.

Dexter, Ch. J., concurs.

Johnston, J., concurring specially:

I think the judgment should be affirmed, and only desire, in a few words, to add another to the well-stated reasons already given for affirmance. All the authorities unite in sustaining a statute requiring the weighing of a commodity, like coal, intended to be sold, and there is no contention here that this is not a proper exercise of the police power of the state. The contention is that the statute goes further, and interferes with and infringes upon the right to contract; and, if it did, I would readily agree with my Brother Smith, as well as the court of appeals, that the act would be invalid. I think the act requires but little interpretation. In plain terms, it requires the weighing of the output of coal before it is disposed of, provides how it shall be done, and prescribes punishment for any evasion or failure to observe its requirements. Nothing in the language of the act expressly prohibits or interferes with the freedom of contract, and such a meaning can only be found in far-fetched implications or remote inferences. The legislative intent of an act can best be learned from its words, and when the meaning is clear no interpretation is necessary or allowable. While contemporary history and well-known facts may sometimes be considered in determining the legislative purpose of an act a court is never warranted in departing from the obvious import of unambiguous language, and entering the field of conjecture and speculation in search of a legislative purpose, or in learning it from newspaper statements, or the gossip in the corridors of the state house, when the act was passed. A still more important consideration is that, if the meaning sought to be imported into this act is given, it would, in my judgment, destroy its validity. If it be conceded that the statute is ambiguous and open to two interpretations, which should be adopted,—the one that upholds, or the one that defeats? The presumption, so far as it can obtain, is that the legislature did not intend to do a vain thing, or to enact a statute that was ineffectual and invalid. Every presumption is in favor of the validity of the law, and, if there is room for two constructions, the court must, in deference to the legislature, assume that it did not intend to violate the Constitution, and should there-

fore adopt the one which would uphold the validity of its act. In *Sutherland, Stat. Constr.* § 332, it is said that "where one construction will make a statute void for conflict with the Constitution, and another would render it valid, the latter will be adopted, though the former at first view is otherwise the more natural interpretation of the language." 23 Am. & Eng. Enc. Law, p. 349. "It is no part of the duty of the court to be astute in order to invalidate a statute; it will, rather, strive to so interpret it as to sustain its validity, and give effect to the intention of the legislature." *Ferguson v. Stamford*, 60 Conn. 447, 22 Atl. 782. The title to the act, to which we may look as an aid to its construction, does not indicate a purpose on the part of the legislature to trench on the freedom of contract, nor to do anything else than to require the weighing of the output of the coal before it is disposed of, nor do I find in it any express provision or necessary implication compelling us to impute a purpose to the legislature that would overthrow the validity of the act.

Smith, J., dissenting:

The construction applied to this law by the majority of the court seems to me to be a perversion of legislative intent, and we need not go beyond the language of its several sections to ascertain that the obvious and sole purpose of the enactment was to control and restrict the right of contract. The title, "An Act to Regulate the Weighing of Coal at the Mine," conceals its true purpose as revealed in the body of the law. The title only partially indicates its object. In *Mugler v. Kansas*, 123 U. S. 623-661, 31 L. ed. 205-210, 8 Sup. Ct. Rep. 297, it is said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." "But the Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature, as upon other departments of the government, and individual citizens, according to the spirit and intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although it may not be within the letter, is as much within the purview and effect of a prohibition as if within the strict letter." *District Court Case*, 34 Ohio St. 431-440.

Analyzing the whole act, together, we find that the first section prohibits the passing of the output over any screen which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employees and accounted for at the legal rate of weights fixed by the laws of Kansas. This latter clause, employing, as it does, words of well-known import in the commercial world, certainly conveys a meaning at variance with the idea that such crediting to employees of the gross weight of all the output of value, and the "accounting"

for the same at the legal rate of weights, were intended as a basis for statistics merely, or simply to enlighten the miner for his future guidance concerning the amount of coal mined by him. Section 5 provides: "Any provisions, contract, or agreement between mine owners or operators thereof and the miners employed therein, whereby the provisions of § 1 of this act are waived, modified, or annulled, shall be void and of no effect; and the coal sent to the surface shall be accepted or rejected, and if accepted shall be weighed in accordance with the provisions of this act; and right of action shall not be invalidated by reason of any contract or agreement." If the design of the act is as stated by my brethren, does it further the objects contended for in the opinion to declare, "and the coal sent to the surface shall be accepted or rejected, and if accepted shall be weighed in accordance with this act, and right of action shall not be invalidated, by reason of any contract or agreement." If to give knowledge to the miner of the amount of labor he had expended in digging out a ton of coal was the aim of the statute, why mention the subject of rejecting or accepting any part of the coal, or refer to rights of action? The language, "and right of action shall not be invalidated by reason of any contract or agreement," has reference to a remedy sought in the courts by someone having by contract bound himself to do something which this statute, coming in the way, says he cannot do. The obvious meaning is that if a miner contracts to take out coal for, say, \$1 per ton for all screened coal mined by him, he must be paid \$1 per ton for the mine run. That is the total weight of the substance extracted from the earth by him having a marketable value, and all contracts for determining the amount of his compensation on any other basis, when he works by ton or quantity rates, are invalidated. It means that, when the miner makes a contract to take out coal at so much per ton for screened coal, the bargain does not bind him; that when he sues his employer for wages the court must give him judgment, not on the contract, but, finding the weight of all coal he has taken out (both screenings and lump), the gross product is to be credited to him, and compensation given on the basis of its weight. Section 5 can certainly have no reference to a right of action brought by a miner to recover wages computed on the basis of screened coal, for he had such a right of action independent of the statute. But it was manifestly the purpose of the act to give the miner a right of action to recover his wages computed on the basis of coal weighed in accordance with the provisions of the law,—that is, computed on the basis of coal weighed before screening,—and that notwithstanding any contract to the contrary. This seems to me to be the plain, palpable, and obvious meaning of the statute.

In determining legislative intent, we have the right to consider the nature of the demands upon the lawmakers which induced legislation for the remedy of an existing evil. As was said by Mr. Justice Valentine in *To-*

peka v. Gillett, 32 Kan. 431-437, 4 Pac. 804: "Courts may take judicial notice of the census returns, of the general history of the country, of what the members of the legislature ought to know when passing the statute which the courts are called upon to construe, and, indeed, of what all well-informed persons ought to know." We know that the demand for such legislation was based upon the claim that coal miners were not paid enough for their labor; that they were at the mercy of the operators, who, by screening the product, robbed them of a portion of the proceeds of their labor which should have been paid for. The object was to right this wrong, and to this end the statute under consideration was passed. To rule otherwise is a wresting of obvious language from its purpose. No clamor rang in the ears of the lawmakers from oppressed and starving miners demanding a law which would furnish them with statistics, when they were crying for bread. As we have the right judicially to know what the legislature ought to have known, for the purpose of arriving at their intent, can we say that it had the remotest design to make a statute for the purpose indicated in the majority opinion? If information to the general public (including the miner and operators) was the object sought, in order that statistics might be based thereon, the legislature was exceedingly magnanimous, under § 3, in affording to the miners the privilege of employing weighmen at their own expense if they so desired. The right vouchsafed to them of going down in their pockets and paying therefrom the expenses of check weighmen to determine the output of the mine for statistical purposes was certainly an exhibition of sincere generosity. Again, no account is required to be kept of coal taken from the mines unless the miners are to be paid at ton, bushel, or quantity rates. So the collection of information as to the amount produced depends on the continuance of a ton, bushel, or quantity rate method of paying wages. If this system of payment is abandoned, there is no preservation of statistics; suggesting the argument that, if the furnishing of exact knowledge to the miner and operator was one of the objects of the law, why does not the law require the weighing of coal mined under all circumstances, and under every plan of payment? If partial knowledge on this subject was a thing so desirable that a whole legislature was moved to furnish it, why was complete means of knowledge withheld, when ample power existed to obtain it?

As against the remote probability that the act, as interpreted by the majority, will result in any benefit to the miner, is the certainty that the public at large will suffer by its enforcement, if the quantity or ton rate of payment prevails. The total output of coal in the state for the year 1898 was, in round numbers, 3,860,000 tons. It is estimated that about one third of the production is slack coal, which goes through the screens. The cost of this compulsory weighing must be added to the price of the fuel which the consumer (the public) is compelled to pay in 47 L. R. A.

order that it may be known with mathematical certainty how many tons the mines of the state have yielded. This tribute is exacted from consumers of Kansas coal to satisfy the contention that the law contemplates some other object than the regulation of wages.

In justifying this legislation as a proper exercise of the police power, I think that power has been unwarrantably extended. Such power must have relation to the health, comfort, safety, or necessities of the people. This is asserted in all the books upon the subject. It cannot include matters which are connected merely with the convenience of the public. In *Black, Constitutional Prohibitions*, p. 82, it is said: "There is no possibility, upon any principle of logical deduction from the adjudged cases or the nature of the subject, of stretching the limits of the police power so as to make it include matters which are merely connected with the convenience of the public. There are decisions which might seem, at first blush, to lend countenance to such a proposition, but an attentive consideration will show that they either used the term in its broad and general sense, or had reference to matters concerning the safety of the people, not their convenience." It is for the courts to define the limits of the police power, and confine same within constitutional bounds. It may be convenient for the miner and the public generally to have the means of knowing how much coal has been mined in the state, for the purposes mentioned in the opinion, but the necessity of such knowledge is not apparent. It would be interesting to know with accuracy the total yield of corn in Kansas during the present year. But the enactment of a law requiring the farmer to measure every bushel of his crop as soon as it is ready for market could hardly be justified, even though it might assist the persons who gathered it in determining the amount of profit the farmer would derive from their labor. General laws and city ordinances relating to the weighing of commodities before sale have been upheld as coming within the police power, for the reason that purchasers are protected. In the case of *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631-636, the supreme court of Illinois passed upon the validity of an act quite similar to this, relating to the weighing of coal at the mines. In holding the law unconstitutional, as infringing upon the right to contract, the court answered the argument that the act might be defended on the ground that it required the keeping of a public record for the information of the public. Scholfeld, J., says: "We recognize fully the right of the general assembly, subject to the paramount authority of Congress, to prescribe weights and measures, and to enforce their use, in proper cases, but we do not think that the general assembly has power to deny to persons in one kind of business the privilege to contract for labor, and to sell their products without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege; there

being nothing in the business itself to distinguish it in this respect from any other kind of business. And we deny that the burden can be imposed on any corporation or individual, not acting under a license or by virtue of a franchise, of buying property and hiring labor merely to furnish public statistics, unless upon due compensation to be made therefor." It would be a mere affectation of industry to collate here the great number of decisions which denounce legislation of this kind, infringing upon the right to contract by persons *sui juris*, like the miners employed by the appellant, who, according to the agreed facts, "are of full age, sound mind, and of full and legal capacity to contract and be contracted with." The court of appeals had no doubt of its invalidity if its provisions related to the regulation of wages. That court said [7 Kan. App. 434, 53 Pac. 373]: "As we have already stated, we should hold this law to be invalid if it in terms expressed such purpose [the regulation of wages], but that neither the title of the act nor the act itself directly or indirectly purports to relate to the matter of wages." In my judgment, the design of the framers has been misconstrued and perverted. A law thought by them to be endowed with strength and virility, aiming at the correction of abuses in the field of labor, has been disfigured by its interpreters, its true purpose denied. Strained and imaginary reasons are put forward as excuses for its existence, and explanations made of its utility which are highly fanciful and speculative. By a process of refined construction its original identity has been effectively destroyed, until recognition by its creators is now impossible.

ATCHISON, TOPEKA, & SANTA FÉ RAILROAD COMPANY *et al.*, *Plffs. in Err.*,
v.

S. G. CLARK *et al.*

(60 Kan. 826.)

*Chapter 263 of the Laws of 1895 (Gen. Stat. 1897, chap. 170), providing for the levy of a fire tax, and which excludes the property of railroad companies on which such tax is levied from the benefit and protection which the law should afford, is invalid.

(October 7, 1899.)

ERROR to the Court of Appeals, Southern Department, Western Division, to review a judgment reversing a judgment of the District Court for Edwards County in plaintiff's favor in a suit to enjoin the collection of certain taxes. *Reversed in part; affirmed in part.*

The facts are stated in the opinion.

*Headnote by JOHNSTON, J.

NOTE.—As to municipal taxation of rural lands, see note to *Briggs v. Russellville* (Ky.) 34 L. R. A. 193; also *Farwell v. Des Moines Brick Mfg. Co.* (Iowa) 85 L. R. A. 63; and *Kaysville* 47 L. R. A.

Messrs. A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiffs in error:

Railroad property was not only to be left unprotected, but other property lying between the railroad right of way and the fire guards, which in no case should be nearer to the right of way than $\frac{1}{4}$ of a mile, and might be located as far as $2\frac{1}{2}$ miles away, is left unprotected from fires originating in the operation of the railroad.

This being the case any levy of this fire tax against the railroads would be clearly unauthorized and void.

If the act intended that railroads should be taxed for this purpose, then the act is in contravention of the Constitution of the United States and of the Constitution and laws of the state of Kansas, being an attempt to deprive persons of property without due process of law and without compensation, and denying to railroad companies the equal protection of the laws.

Corporations are persons, within the meaning of the 14th Amendment to the Federal Constitution.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. ed. 653, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 391, 35 L. ed. 1051, 1053, 12 Sup. Ct. Rep. 255.

This act did not provide for the levy of a tax for general revenue purposes, but it was strictly in the nature of a local assessment, to be collected from the property benefited.

Cooley, Taxn. p. 418; *Hale v. Kenosha*, 29 Wis. 599; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Dec. 63; *Alexander v. Baltimore*, 5 Gill, 383, 46 Am. Dec. 630; 2 *Desty, Taxn.* pp. 1237, 1238.

If it was a general tax it must have been levied upon all of the property in the county at a uniform and equal rate.

Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781; *Hammitt v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Dyar v. Farmington*, 70 Me. 515.

Property outside of the district cannot be taxed for the benefit of the district.

Cooley, Taxn. 104-106; *Wells v. Weston*, 22 Mo. 384; *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *Wilkey v. Pekin*, 19 Ill. 160; *Ham v. Sawyer*, 38 Me. 37; *Ritchie v. Mulvane*, 39 Kan. 241; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649-657, 39 L. ed. 567-570, 15 Sup. Ct. Rep. 484.

While there is no provision in the Constitution of the state of Kansas, which provides

v. Ellison (Utah) 43 L. R. A. 81, the latter of which is overruled by *Kimball v. Grantsville City* (Utah) 45 L. R. A. 628.

that private property shall not be taken for public use without compensation, yet the courts have universally held that, in the absence of any such provision of the state Constitution, any act of the legislature not recognizing this right would be void.

Mills, Em. Dom. § 1, p. 81; 2 Desty, Taxn. p. 1238.

Messrs. A. A. Godard, Attorney General, *A. C. Dyer*, and *F. Dumont Smith*, for defendants in error:

A general tax is an ad valorem percentage levied upon all property in the state, or some civil division thereof.

25 Am. & Eng. Enc. Law, p. 17, and notes.

Such tax must be uniform, but only uniform throughout the particular taxing district, whether state, county, township, or school district.

Marion & M. R. Co. v. Ohamplin, 37 Kan. 682, 16 Pac. 222; *Ottawa County Comrs. v. Nelson*, 19 Kan. 237, 27 Am. Rep. 101.

The fire tax is such a tax.

The state may provide by general taxation for the prevention of calamities, such as fires, floods, contagious diseases, and the like.

Cooley, Taxn. 2d ed. p. 134.

Johnston, J., delivered the opinion of the court:

This was a proceeding to enjoin the collection of a special fire tax levied by the county commissioners of Edwards county upon railroad property located in three townships of that county. In two of the townships a levy of two mills was made, and in the other the levy was one mill, on the dollar. The contention of the railway company is that chapter 263 of the Laws of 1895 (Gen. Stat. 1897, chap. 170) discriminates against railroad companies by excluding their property from the benefits provided; that the tax is not equal and uniform, as the Constitution requires; that the enforcement of the tax is an attempt to deprive them of property without due process of law; that it denies to them the equal protection of the laws, and is therefore void.

The act provides that the county commissioners may levy a fire tax on the property of the county, and in addition thereto may levy a like tax in each or any of the townships of the county. The township trustee is required to make a map of his township, and subdivide it into suitable and convenient fire districts; and, if there is a railroad in the district, he is to divide his township, where it is possible, so that the line of the district shall come to the line of the right of way, but shall not cross the railroad. The road overseers are made fire overseers, and on them is devolved the duty of breaking, plowing, mowing, or burning fire breaks. The law appears to prescribe two methods for protection against fire: One, where there is no railroad, as provided in § 5, where at a certain time the overseer is required to plow strips on the outside lines of his district, 6 rods apart, where there is open prairie, and also in fenced pastures, where the owners' consent can be obtained, and to burn the

grass between the strips of breaking. The other, which is provided in § 6, where there is a line of railroad; and it is there made the duty of the overseer "to cause to be plowed two strips of at least three furrows each, at least 6 rods apart, on all open prairie or fenced pasture, with the owner's consent, along the section lines running the nearest parallel with said railway, not nearer than $\frac{1}{4}$ of a mile to nor more than $2\frac{1}{2}$ miles from said railroad, making said strips continuous by running at right angles when necessary to keep within the distance above mentioned, and cause the grass to be carefully burned off between said strips; provided, that where there is open and unoccupied prairie, the road overseer may plow and burn said strips running parallel with said railway, not closer than $\frac{1}{4}$ of a mile to the said railroad." As will be observed, the act is somewhat crude and inconsistent in its provisions. Aside from the manifest purpose to exclude railroad property from fire districts to be created, the provision relating to where the fire guards shall be made is in conflict. First, the act requires fire guards to be plowed and burnt on all exterior lines in the district. In a later provision, however, it provides that, where there is a railroad, like fire guards are to be made on section lines running nearest parallel with the railroad, but which are not to be closer than $\frac{1}{4}$ of a mile to the railroad, nor more than $2\frac{1}{2}$ miles distant therefrom. In order to place fire guards within the limits mentioned, and make them continuous, they are to run, when necessary, at right angles on section lines, but there is an express provision that in no instance are they to be made closer than $\frac{1}{4}$ of a mile of a railroad. The exterior limits of a fire district which extend to and run parallel with the right of way would ordinarily be only 50 feet distant from the railroad, and according to one provision there would be a fire guard thereon, but by the other provision it would be $\frac{1}{4}$ of a mile away, and might be $2\frac{1}{2}$ miles. Then, again, no provision is made for placing the tax upon the tax books, nor that it shall become a lien at any time upon the property taxed. Neither does it provide that it shall be collected the same as other taxes are collected. No provision is made for the collection of this tax in money, but persons residing in the district may work out the tax under the direction of the road overseer, at specified rates of compensation. How far these omissions might affect the validity of the law in the absence of other defects, we need not determine. It appears, however, from the provisions referred to, that railroad property is excluded from districts organized for fire protection, and that the fire guards are so remote as to afford the company but little, if any, protection from fire. Much of the property of the company is of such a nature as may be injured or consumed by fire, and what protection would a fire guard located $2\frac{1}{2}$ miles from the property afford? Or even if it was but $\frac{1}{4}$ of a mile away, which is as near as it may be made? It is well known that fires are sometimes started

from locomotives used on the railroads, and that railroad companies are required to respond in damages for property destroyed by fire originating in that way. This act, as we have seen, affords no protection to the railroad companies' property; neither does it afford any protection to property destroyed by fire originating in the operation of the railroads, and for which the companies may be held responsible. It may have been the theory that railroad companies had provided and would provide their own protection in their own way, but, being required to do this, the tax is more burdensome on them than on other taxpayers in the township. As some of the taxpayers appear to have been purposely excluded from the benefit and protection of the law, the tax therefore lacks that equality and uniformity essential to its validity. It is a discrimination against one

taxpayer in favor of others, and is a denial of the equal protection of the law required by both state and Federal Constitutions. Absolute equality in taxation is, of course, unattainable, but a law the manifest purpose and legitimate result of which is discrimination and inequality cannot be sustained.

As to the fire tax the judgment of the Court of Appeals will be reversed, and the judgment of the District Court will be affirmed. The other question presented by the record, namely, the validity of the state delinquent tax, received consideration in Atchison, T. & S. F. R. Co. v. Clark (No. 11,317), 60 Kan. 831, 58 Pac. 561. That tax is held to be valid, and for the reasons stated in that case the judgment of the Court of Appeals with respect thereto is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

Clarence LEBUS, *Appt.*,

v.

Margaret A. BOSTON *et al.*

(.....Ky.....)

Parol evidence that a grantor agreed that he should not have any passway over land conveyed, because he did not need it, is admissible to rebut a claim of an implied reservation of a passway as an easement of necessity.

(June 7, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Harrison County in favor of defendants in an action brought to recover damages for obstructing a passway leading from a public highway to appellant's lands. *Affirmed.*

The facts are stated in the opinion.

Messrs. Blanton & Berry for appellant.
Messrs. Collier & Dedman for appellees.

Barnam, J., delivered the opinion of the court:

This action was brought by appellant against appellees to recover damages for obstructing a passway leading from a public highway over lands of appellees to those of appellant, and to enjoin the further interference of the use of said passway by appellant. The facts necessary to be stated, and about which there seems to be no dispute, are these: In November, 1871, Henry Cox and his wife conveyed to Charles Ann Cosby, for life, with the remainder to her children, a tract of 80 acres of land, and subsequently, in November, 1872, the same grantors conveyed to Judge Redmond, the father of Mrs. Cosby, a tract of 103 acres of land, which was located between the 80 acres conveyed to Mrs. Cosby and the public road.

There was no passway to or from the 80 acres conveyed to Mrs. Cosby and her children to the public highway, and in the fall of 1872 Redmond gave to his daughter a passway over his tract, and Mrs. Cosby and her family used this passway over the 103 acres until the death of her father, Judge Redmond, from whom she inherited the 103 acres. On the 14th day of November, 1890, Mrs. Cosby and her husband sold and conveyed by general warranty deed the tract of 103 acres to N. W. Frazier, which deed contained this reservation: "The first party is to give possession March 1, 1891, and it is further understood that the 80 acres above named is to bear its part of expenses as to gate," etc., "to the said 80 acres by the passway." A short time thereafter,—in December, 1890,—Frazier also purchased the 80 acres deeded to Mrs. Cosby and her children, which were sold under a judgment of the Harrison circuit court; thus becoming the owner in fee simple of both tracts of land, which he continued to own until the 24th of February, 1896, when he sold and conveyed by general warranty deed 93.54 acres of the land to appellee Margaret Ann Boston. Frazier died in 1897, and on the 2d day of October, 1897, his heirs sold and conveyed the remainder of the 183 acres, consisting of 90.11 acres, to appellant. It is alleged and shown by the proof that during the time that Frazier was the owner of both tracts of land he used the passway to get to the 80-acre tract. The land conveyed to Mrs. Boston included that portion of the 103 acres occupied by the passway, but there was no reservation thereof in the deed to her, while in the conveyance of the residue by the heirs of appellant this passway was expressly conveyed. It is alleged by appellee that at the time of the sale and conveyance of the 93.54 acres by Frazier to her it was expressly agreed

NOTE.—As to right of way by necessity, see *Logan v. Stogdale (Ind.)* 8 L. R. A. 58, and *note*; *Kingsley v. Gouldsboro Land Imp. Co.* 47 L. R. A.

(*Me.*) 25 L. R. A. 502; *Ritchey v. Welsh (Ind.)* 40 L. R. A. 105; and *Ellis v. Blue Mountain Forest Assn. (N. H.)* 42 L. R. A. 570.

and understood, and was a part of the consideration for said conveyance, that no passway should remain over the land sold to her in favor of the residue of the tract retained by the vendor. This averment is denied, but is proved by W. R. Gregory; and Durbin (who examined the title of this land for Mrs. Boston) testifies that it was agreed that there was to be no passway over the land, and that Frazier stated that there was no necessity for such passway, as he had another outlet to another pike, and other ways to get out; and that it was only with this understanding that Mrs. Boston accepted the deed. In 1890 the unity of possession and title to both tracts was in Frazier, and continued in him uninterruptedly until the sale, in 1896, to appellee. It is the contention of appellee that Frazier could not have an easement in his own land, as the uses of an easement are covered by the general right of ownership; that the easement was merged and suspended in the larger estate; and, having sold and conveyed that portion of the boundary occupied by the passway by unqualified grant, there is no implied reservation of the use of it for the benefit of the grantor. While on the other hand, it is contended by appellant that as Frazier, during the time that he was the owner of both tracts of land, continuously used the passway over the 103 acres in traveling to and from the 80-acre tract, and at the time of the sale it was notorious, visible, and well marked, and the purchaser took subject to its continued use, without express reservation to that effect, the parties are presumed to contract in reference to the condition of the property at the time of the sale; and neither has the right, by altering arrangements then openly existing, to change materially the relative value of the respective parts,—relying upon Jones, Easements, § 141. The legal question, then, is, Does the law attach to the unqualified grant from Frazier to Boston of the 93.54 acres, which includes the whole of this passway, an implied reservation of the use of it for the benefit of the 90.11 acres which he still retained? An examination of this question shows that there is a general concurrence of authority, both in England and in this country, in support of the proposition that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted, but upon the question whether upon such a grant, the law will ingraft reservation of such easements in favor of the part retained by the grantor, the authorities until quite recently have been very conflicting, but the later cases hold that, if the grantor intends to reserve any right from the right of any tenements granted it is his duty to reserve it expressly in the grant, and to this the only exception is of ways or easements of necessity. See *Mitchell v. Seipel*, 53 Md. 202, and cases cited; *Strohmeir v. Leahy* (Ky.) 9 S. W. 238. 47 L. R. A.

All the text writers and decisions have drawn a distinction between implied grants and implied reservations. Jones, in his work on Easements, discusses this difference in chapter 3, citing numerous decisions, and states the general rule to be that, "where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part" (see § 129), but holds that there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and, as a general rule, he cannot retain a right over a portion of his land conveyed absolutely only by express reservation. Thus, if a man makes a lane across one farm to another, which he is accustomed to use, and then conveys the farm without reserving a right of way, it is clearly gone. A man cannot, after he has absolutely conveyed his land, still retain the use of it for any purpose, without an express reservation. It is only in the cases of the strictest necessity that the principle of implied reservation can be invoked. See § 136. The fact that one has been in the habit of using certain land in connection with his adjoining premises does not create an easement upon the first-named land, which, upon a conveyance of that land without words of exception or reservation, will be annexed to such other premises. But there are numerous exceptions to this rule, and the author refers to the case of a man having a field, which he does not sell, in the midst of land which he sells. Of course, it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land; and a way over that is said to be a way of necessity, and that is reserved without express words, as implied reservation. It seems, to us, under the facts of this case, that at the time Frazier sold the land to appellee, if nothing had been said on the subject of a passway, the law would have implied a reservation of the existing notorious and open passway "as a way of necessity" for the benefit of the land reserved, but it is in the proof that this very question was a matter of consideration between Frazier and appellee, and that Frazier expressly agreed to surrender all rights thereunder, and that appellee refused to purchase on any other condition. This testimony is not successfully contradicted or impeached, and it is not objectionable on the ground that it varies from the terms of the deed; but, on the contrary, it is not in conflict with the conveyance. Mr. Jones, in his work on Easements (§ 321), lays it down as a principle that "a purchaser is not entitled to a way of necessity in case he has agreed with his grantor, even verbally, not to claim a way." And in the case

of *Exert v. Burtis* (N. J. Eq.) 12 Atl. 893, it was held that where a bill was filed to secure a way of necessity, it appeared that at the time of the purchase a way of necessity would have passed as an incident, except that the grantor refused to sell if the grantee was to have the right of way over his land; that the grantee declared there was no occasion for such right of way, because he could have one over a railroad company's lands to a highway; that the conveyance was made, and that the grantee had a license to pass over the railroad company's lands, which license was subsequently revoked. It was held that the court would not aid the complainant in establishing a way of necessity by issuing a preliminary injunction. And certainly if a purchaser could verbally waive a way of necessity by implied grant, there is much greater reason why a grantor, who seeks to retain a way of necessity by implied reservation, should lose his right of such way by verbal agreement with the purchaser. The permissive use of this passway by Frazier subsequent to his sale to appellee did not have the effect to vest in him any legal title thereto. The testimony shows that appellant has access to a public road over his lands in another direction, and certainly after the acquisition of the land the passway could not be claimed as one of necessity. But upon the whole case we are disposed to think that Frazier voluntarily surrendered his right to the passway over the land in question, and that appellant can have no higher or better right than belonged to him.

For these reasons the judgment is affirmed.

A petition for rehearing having been filed, *Hobson, J.*, on October 12, 1899, handed down the following response:

It is earnestly insisted by counsel for appellant in their petition for rehearing that parol evidence is inadmissible to show that at the time of the conveyance it was agreed between the grantor and the grantee that there was no necessity for the passway, as the grantor had another outlet to another pike, and other ways to get out, and that it was then agreed that there was to be no passway over the land conveyed, and the deed was accepted only on this distinct understanding. Counsel insist that the passway, being an interest in land, can only be created or destroyed by a contract or agreement in writing, and that to admit the parol evidence referred to is to depart from those broad, fundamental principles of law that have been recognized for time immemorial. This would be true if the evidence infringed the terms of the deed, but that is not the case. The grantor by his deed in this case conveyed to the grantee the whole boundary of land described in the deed. This passed the entire title to all within the boundary so described, from the center of the earth *usque ad cælum*, including the ground over which the passway ran. The passway was therefore included by the terms of the deed, and *prima facie* passed under it. But, as

said in the opinion, the one exception allowed by the authorities in favor of a grantor where he has conveyed the fee of land "is ways or easements of necessity." And, as is well said by the learned author there quoted, "it is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked." Jones, *Easements*, § 136. Appellant's entire claim to the passway rests upon this doctrine of implied reservation. Whether this is a case of strictest necessity, where it would not be reasonable to suppose that the parties intended the contrary, the court can only know when the facts are shown by parol evidence. When these facts are shown by parol evidence, then the presumption of an implied reservation arises. But it is well settled that a presumption raised by parol evidence may also be rebutted by parol evidence. The rule is thus well stated in 3 Greenl. Ev. § 366: "In certain cases of presumptions of law, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled legal rules of construction of instruments, or, in other words, conclusive presumptions, where the construction is in favor of the instrument, by giving to the language its plain and literal effect, and those presumptions which are raised against the instrument, imputing to the language, *prima facie*, a meaning different from its literal import. In the latter class of cases parol evidence is admissible to rebut the presumption and give full effect to the language of the instrument, but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it." In Wharton, Ev. §§ 973, 974, the same rule is fully stated, and illustrated. Though the terms of the deed *prima facie* convey the entire boundary, including the passway, parol evidence of the absolute necessity of the passway is admitted in this case to raise a presumption against the instrument, imputing to it a meaning different from its literal import. This presumption against the instrument may be rebutted by parol evidence, so as to give to its language its plain and literal effect. The proof offered by appellant to show the necessity of the passway might be rebutted by proof that it was unnecessary. It would not, perhaps, occur to counsel that parol evidence for the appellee showing that the passway was unnecessary would be inadmissible. But there is no better proof that it was unnecessary than the agreement of the parties at the time of the conveyance that the grantor had another outlet, and did not need this one. When he agreed it was not necessary, and not to reserve it, in order to induce the grantee to accept the deed, the estoppel may be shown by the same kind of evidence as the implied right.

Petition overruled.

MAINE SUPREME JUDICIAL COURT.

BOSTON EXCELSIOR COMPANY
v.
BANGOR & AROOSTOOK RAILROAD
COMPANY.

(.....Me.....)

1. Contributory negligence of the owner of property destroyed by fire communicated by a locomotive engine is no defense to the railroad company, under Rev. Stat. chap. 51, § 64, which imposes an absolute liability on the corporation for damages.
2. Negligence in piling wood near a railroad, where it is in danger of fire, will not relieve the railroad company from liability for negligence in setting it on fire, if it had full knowledge of the situation, and by the exercise of ordinary care and skill might have avoided the injury.

(June 1, 1899.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Piscataquis County made during the trial of an action brought to recover damages for the loss of wood alleged to have been burned by fire negligently set out by defendant, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. F. H. Appleton and H. R. Chaplin, for defendant:

A railroad corporation owes no duty to trespassers anywhere within its location, beyond abstaining from reckless and wanton conduct towards them.

McCreary v. Boston & M. R. Co. 156 Mass. 316, 31 N. E. 126, 153 Mass. 300, 11 L. R. A. 359, 26 N. E. 864; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 372, 87 Am. Dec. 644; 3 Elliott, Railroads, § 1235; *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 366; *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106.

The poplar wood upon both sides of the line should not be divided as the line runs, but should be all treated as an entirety, because the wood was so closely piled that the destruction of wood which was on the defendant's side of the line necessarily involved in ruin the wood upon the plaintiff's side of the line, and the whole loss was the direct and natural result of the fire first becoming enkindled in the wood unlawfully located "along the route" of the railroad by the plaintiff company.

If the owner of the property is a mere trespasser, and placed his property upon the right of way without the consent of the railroad company, he cannot recover for its negligent destruction by fire.

3 Elliott, Railroads, § 1235; *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 366.

Plaintiff company cannot recover, because

it was guilty of contributory negligence in depositing its wood in a place of known danger.

Post v. Buffalo, P. & W. R. Co. 108 Pa. 585.

Mr. Frank E. Guernsey, for plaintiff:

The mere fact that a building extends a few feet onto the right of way will not exonerate the railroad company.

Sherman v. Maine C. R. Co. 86 Me. 422, 30 Atl. 69.

The fact that the building or other property stood partially or wholly on the railroad location, if placed there by consent, will not relieve the defendant.

Ingersoll v. Stockbridge & P. R. Co. 8 Allen, 440; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356.

A railroad company is bound to use ordinary care to avoid injury, even to a trespasser.

Grand Trunk R. Co. v. Richardson, 91 U. S. 471, 23 L. ed. 362.

Mr. Henry Hudson also for plaintiff.

Whitehouse, J., delivered the opinion of the court:

This is an action on the case to recover damages for the destruction of the plaintiff's property in the town of Milo, May 21, 1896, by fire communicated by a locomotive engine then owned and operated by the defendant.

Section 64 of chapter 51 of the Revised Statutes declares that "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof, less the premium and expenses of recovery."

In the writ the plaintiff claims to recover, in the first place, by virtue of the absolute responsibility imposed upon the defendant by this statute, and, secondly, by reason of the liability of the defendant at common law, on the ground of negligence respecting the condition and management of its locomotive engine.

A portion of the plaintiff's property destroyed consisted of a large quantity of split poplar wood, a part of which, estimated by the jury in a special finding at 200 cords, was piled upon the defendant's land, and the balance upon the adjoining land of the plaintiff. The defendant's right of way at the point in question was 66 feet in width and it had acquired by purchase an additional strip of land, known as the "Moore Land," adjoining its location on the easterly side. The plaintiff's evidence tended to show that

NOTE.—As to the constitutionality of a statute making a railroad company absolutely liable for fire set by engines, see note to *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 25 L. R. A. 161. (This Missouri case was affirmed by the Supreme Court of the United States in 41 L. ed. 611.)

preme Court of the United States in 41 L. ed. 611.)

As to the presumption of negligence in case of railroad fires, see note to *Barnowski v. Helson* (Mich.) 15 L. R. A. on page 40.

the most westerly tier of the wood was 33 feet from the center of the main line of the railroad, and hence that no part of the poplar wood piled on the defendant's land was within the defendant's right of way, but that all of said 200 cords was on the Moore land, adjoining the right of way. On the other hand, the testimony of the defendant tended to show that the westerly line of the poplar was nearly 8 feet within the limits of the location.

It was not controverted by the defendant, however, that these piles of poplar wood were "along the route" of the defendant's railway, and had all the conditions of permanency in their character requisite to establish the responsibility of the defendant under the statute, if the other elements of statute liability were shown to exist. *Thatcher v. Maine C. R. Co.* 85 Me. 502, 27 Atl. 519. But it was earnestly contended, in behalf of the defendant company, that in thus piling its poplar on the defendant's land, and in permitting it to remain after a request by the defendant for its removal, the plaintiff was a trespasser on the defendant's land, and, inasmuch as the fire was first communicated to the most westerly tier of wood, and thence spread to the other property of the plaintiff company, that the defendant is not responsible, either for the wood thus wrongfully piled on its lands, or for any part of the property thus destroyed. The plaintiff sharply controverted this position, claiming that it had a lawful right to use the defendant's land for a piling ground, to the extent shown, by virtue of an uninterrupted use of the premises for that purpose, with the license and permission of the defendant company, for twelve years prior to the time in question, and that such license was never revoked by the defendant. Whether or not such license was revoked in August, 1895, by a notice from defendant not to pile any more wood there, and to remove such part of that already piled as was found to be on the defendant's land, was an issue of fact submitted to the jury, and they returned a special finding that the poplar on the defendant's land at the time of the fire was there by the license or consent of the defendant. The jury also returned a general verdict for the plaintiff in the sum of \$4,966.10, exclusive of insurance effected on the property by the owners to the amount of \$3,100.

The case now comes to the court on exceptions by the defendant, and also on a motion to set aside the verdict and special finding as against the evidence.

1. In regard to the special finding that the poplar was on the land of the defendant company by its license and consent, it was not seriously controverted that the land in question had been used as a piling ground for lumber by the permission of the defendant company for more than ten years prior to August, 1895; but in regard to the alleged revocation of such license, and a request to remove the wood already piled there, the testimony is somewhat conflicting. The defendant's station agent, Drake, who had charge of the yard, testifies that in August,

1895, he notified the plaintiff's foreman, Moore, after he had piled up a portion of the westerly tier of poplar, that he must remove his wood from the company's land, as it was proposed to extend the platform at that point, and he had not left sufficient room for the teams to go around. Moore admits that a conversation took place between Drake and himself, about that time, in regard to the proposed extension of the company's platform, and the space required for it, but denies that he was ordered to remove the wood already piled there, or forbidden to pile more there, and states that he then told Drake that if the wood was on the company's land, and it was needed for the platform, he was there, with his men, ready and willing to remove it. Moore is corroborated by Bradeen, who heard the conversation. It is true that three sectionmen, Lyford, Kerr, and Hodgkins, testify that the next day a further notice, of similar purport to that given by Drake, was given to Moore by Lyford, at the request of Cummings, the general manager of bridges and platforms; but Cummings was not called as a witness, and Moore denies that he ever received any such notice from Lyford. Neither Drake, Moore, nor Lyford appears to have known the location of the dividing line; but it is fairly to be inferred, from all the evidence on this branch of the case, that Drake was evidently willing that Moore should continue to pile on the defendant's land, as he had been accustomed to do in previous years, unless the wood should be found to interfere with the proposed extension of the platform, and, on the other hand, if any of the wood was on the defendant's land, Moore was ready and willing to remove it, if the space was required for the platform. Such, undoubtedly, was the mutual understanding of the parties. There was no suggestion from either Drake or Lyford that there was any purpose or desire on the part of the defendant to change the established practice in regard to the piling ground, except upon the contingency of extending the platform. The platform was not, in fact, extended; the wood remained as originally piled until it was burned, in May, 1896; and in the meantime, from August, 1895, to May, 1896, no intimation of any kind appears to have been given, by Drake or any other agent of the defendant, that Moore was expected to remove the wood. Under these circumstances, and upon this evidence, it is the opinion of the court that Moore was justified in assuming that the defendant acquiesced in such continued occupation of the land, and that the special finding of the jury on this point was warranted by the evidence.

The instructions to which the defendant's exceptions were taken related solely to the rights and liabilities of the parties in the event that the wood piled on the defendant's land was wrongfully there. As it is now found to have been lawfully there by consent of the defendant, it becomes unnecessary to consider the exceptions.

2. But the defendant further contends that the plaintiff company cannot recover in

this action because it was guilty of contributory negligence in depositing its wood in such close proximity to the railroad track, with full knowledge of the danger from fire to which it would be subjected.

The question whether the contributory negligence of a plaintiff, who is not a trespasser, can be successfully invoked in defense of an action founded upon the statute in question, has never been determined by the law court of this state. In every instance in which an instruction has been given to the jury that contributory negligence of the plaintiff was a defense to such an action, the verdict has been for the plaintiff, and the law court appears to have had no occasion to reconsider the question as a matter of law. In *Sherman v. Maine C. R. Co.* 86 Me. 422, 30 Atl. 69, an action based on the statute, the building destroyed by fire extended onto the location of the defendant's roadway some 6 or 8 feet, and the presiding judge instructed the jury "that if there was a want of ordinary care on the part of the plaintiff, in allowing his goods to remain in a building a part of which was within the located limits of the defendant's roadway, whether there by license or otherwise, and such want of care caused or contributed to the result, the plaintiff could not recover." In the opinion of this court it is said: "Could the railroad company rightfully claim more? Can the proposition be maintained that the mere fact that one corner of a building in which goods are kept or stored extends a few feet over one of the side lines of the roadway (though placed there, or permitted to remain there, by express license of the railroad company or its officers) will exonerate the company from all liability for injuries to the goods by fire communicated by its locomotive engines? . . . We think not. The statute contains no such exemption in express terms, and we think none is implied,"—*Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 438, and *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356, being cited in support of that conclusion. The former case (*Ingersoll v. Stockbridge & P. R. Co.*) was based on a statute of the same purport as our own, and the court said: "There is nothing in this statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated from their locomotives. The legislators have chosen to make it a condition of the right to run carriages impelled by the agency of fire that the corporation employing them shall be responsible for all injuries which the fire may cause." The latter case (*Grand Trunk R. Co. v. Richardson*) was a writ of error to the circuit court of the United States for the district of Vermont. The action by the defendant in error was founded on a statute of Vermont of the same scope and effect as those in Maine and Massachusetts. Evidence was 47 L. R. A.

admitted to show that such of the buildings destroyed as were within the lines of the railway had been erected there by the license of the company, and exceptions were taken to the refusal of the presiding judge to give the following instructions: "If the jury should find that the erection of the plaintiffs' buildings, or the storing of their lumber, so near the defendant's railroad track as the evidence showed, was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive." In their opinion the United States Supreme Court say: "We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute,—certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful use of its property by the plaintiffs; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant."

In New Hampshire a statute [N. H. Gen. Stat. chap. 148, § 8] like ours makes the railroad company liable "for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road," and gives the company an insurable interest in property exposed along the line. In *Rovell v. Railroad Co.* 57 N. H. 132, 24 Am. Rep. 59, it was distinctly held, in separate opinions, by two of the justices, that the liability thereby imposed is that of insurers, and that the doctrine of contributory negligence does not apply. In the leading opinion of Ladd, J., it is said: "The liability of the railroad is made absolute by the statute. No question of care or negligence on their part is left open. If they throw sparks or fire upon the land of an adjoining owner, or allow their fire—that is fire from their engines—to escape upon land of such owner, they are made responsible in the same way as the owner of cattle whose nature it is to rove is liable for the damage they do in case they escape upon the land of another, and in the same way one is liable for damage caused by filth or noxious odors originating or accumulating upon his land and passing therefrom to that of another. There is no rule of law that requires the plaintiff to so use his land that it shall not be exposed to injury from the act of another, especially when that act is impliedly forbidden by law. And, even without the statute, the throwing of a spark or coal of fire upon a pile of shavings which I have negligently suffered to accumulate near a house I am building is as much a trespass as would be the throwing of a spark or coal upon shavings which I have packed away, using ordinary care to insure their safety. So, in *Fero v. Buffalo & State Line R. Co.* 22 N. Y. 215, 78 Am. Dec. 178, Bacon, J., says: 'It is difficult to maintain the proposition that one can be guilty of negligence while in the lawful use of his own property upon his

own premises. The principle contended for by the defendant's counsel, if carried to its logical conclusion, would forbid the erection of any building whatever upon premises in such proximity to a railroad track as would expose them to the possibility of danger from that quarter.' In *Vaughan v. Taff Vale R. Co.* 3 Hurlst. & N. 750, Martin, B., says (*arguendo*): 'It would require a strong authority to convince me that, because a railway runs along my land, I am bound to keep it in a particular state.' And Bramwell, B., in delivering the opinion of the court in the same case (p. 752), says: 'It remains to consider another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss. We are of opinion this objection fails. The plaintiff used his land, in a natural and proper way, for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief.' . . . I think the manifest intention of the legislature was to cast upon the proprietors of railroads the substantial liability of insurers against fire with respect to the property specified; and, that being so, the same rule as to contributory negligence by the plaintiff that obtains between the parties to a fire policy in case of loss should be applied." In the concurring opinion in *Rowell v. Railroad Co.* 57 N. H. 132, 24 Am. Rep. 59, Chief Justice Cushing says: "It seems to me that the effect of this legislation is to make the proprietors of a railroad liable as insurers. This construction of the statute makes the liability exactly commensurate with the indemnity which the proprietors are entitled to provide for and to claim under the statute. . . . Negligence, either of the railroad or of the landowner, would not, according to the authorities, be a defense to an action by the proprietors to recover on their policy the amount of the loss insured. It would be odd enough if the proprietors could recover on their policy, and then turn round and defeat the property owner on the ground of contributory negligence. . . . The jury ought to have been instructed that no negligence of the plaintiff would discharge the defendants unless so great as to be equivalent to fraud."

In 1887 a statute of precisely the same effect as those above considered was enacted in Missouri. It is § 2165 of the Revised Statutes of Missouri of 1889, and is substantially a transcript of the Massachusetts act. In 1893 it came before the supreme court of that state for construction in the case of *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161, 24 S. W. 591. At the trial of the cause the defendant company contended, among other grounds of defense, that the plaintiff was guilty of contributory negligence in permitting large quantities of dry grass, leaves, weeds, and other inflammable matter to remain upon his premises, adjacent to the railroad, and near the buildings destroyed. After considering the evidence, and reviewing the authorities applicable to it, the court held that the conduct of the plaintiff in the respect named did not

constitute such contributory negligence as would bar the plaintiff of his right of recovery, and added: "But there is another ground upon which this plea should have been denied, and that is that by virtue of § 2615 the defendant is made an insurer against fire set by its engines, and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance; and this was the view taken and enforced in *Rowell v. Railroad Co.* 57 N. H. 132, 24 Am. Rep. 59."

In Iowa, under a similar statute, which appears as § 2056 in the Revised Code of 1877, it was also held by the court of last resort in that state, in *West v. Chicago & N. W. R. Co.* 77 Iowa, 654, 35 N. W. 479, and 42 N. W. 512, that the rule of contributory negligence was not applicable. In the opinion the court said: "The instruction . . . made the defendant liable . . . regardless of the question of the plaintiff's negligence. . . . It may be conceded that, prior to the statute, contributory negligence on the part of the plaintiff in a case like this would defeat his recovery. . . . But the statute, we think, changes the rule. . . . The statute, we think, was designed to settle a vexed question upon which the courts had been divided. The language used is clear."

In 3 Wood, Railroads, p. 1602, the author says: "In some of the states railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and, as a compensation for this extraordinary liability, are given an insurable interest in such property. . . . Under these statutes the plaintiff is only required to show that the fire was communicated from the defendant's 'engines,' and no degree of care on the part of the defendant will defeat its liability. The company's liability is that of insurer, and the contributory negligence of the plaintiff, unless it amounts to actual fraud, by an intentional exposure of the property, will not, therefore, operate as a defense."

So, also, in 1 Thomp. Neg. 171, referring to statutes which impose such an absolute liability on railroads, the author says: "To an action under them, the defense of contributory negligence is not good."

In Michigan, the statute of 1872 [§ 36, p. 72] required every railroad company to erect and maintain fences on each side of its road, and provided that, until such fences were duly erected, the corporation should be "liable for all damages done to cattle, horses, or other animals thereon, and all other damages which may result from the neglect of such company . . . to construct and maintain such fences." In *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510, an action to recover damages sustained before the erection of such fences, it was held that negligence of the plaintiff in the care of his property, contributory to the injury, constituted no defense. In the opinion of Judge Cooley the court says: "Were this a common-law action, it is clear that such contributory neg-

ligence would be a defense. . . . But this is not a common-law action. It is an action given expressly by a statute, the purpose of which is, not merely to compensate the owner of property destroyed for his loss, but to enforce against the railway company an obligation they owe to the public. . . . And the decisions may almost be said to be uniform that in cases like the present, arising under such statutes, the mere negligence of the plaintiff in the care of his property can constitute no defense. . . . Indeed, if contributory negligence could constitute a defense, the purpose of the statute might be, in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds, in the vicinity of the road, so that, if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."

It is undoubtedly true, as stated by the court in *Hussey v. King*, 83 Me. 568, 22 Atl. 476, that the rule of contributory negligence "applies, not only to actions given by the common law, but also to those given solely by statute, where the gist of the action is the default, omission, or carelessness of the defendant." Of this class are the actions authorized by statute for damages "suffered through any defect or want of repair in any highway." They are based essentially on the fault of the town in not keeping its ways "safe and convenient." So, also, is the action based on § 23 of chapter 17 of the Revised Statutes, which provides that "persons engaged in blasting lime rock or other rocks shall before each explosion give seasonable notice thereof," and makes any person violating this provision "liable for all damages caused by any explosion." Here the ground of liability is obviously an omission or neglect to give the seasonable notice required by the statute; and in *Wadsworth v. Marshall*, 88 Me. 263, 32 L. R. A. 588, 34 Atl. 30, it was accordingly held that the rule of contributory negligence on the part of the plaintiff was applicable. See also *Taylor v. Oarew Mfg. Co.* 143 Mass. 470, 10 N. E. 308.

"There is, however, another class of actions in tort, not based on negligence, in which the defendant's care or want of care . . . is not in issue; in which some direct, positive act of the defendant makes the cause of action. In this class of actions there is no reason nor place for such a rule." *Hussey v. King*, 83 Me. 568, 22 Atl. 476.

Actions based on the statute in question in the principal case, making a railroad corporation responsible for loss by fire communicated by its locomotive engine, fall naturally into this class. The question of the defendant's negligence is not an issue. It is immaterial that the locomotive is equipped with the most ingenious spark arrester that human ingenuity can devise, and its construction otherwise of the most suit-

able material and approved design. It is immaterial that it is operated and managed in the most skillful and prudent manner known to experienced firemen and engineers. The simple fact that the fire causing the injury was communicated by one of the defendant's locomotive engines is sufficient to establish the cause of action. The absolute liability thereby cast upon the defendant cannot be defeated by proof of the highest possible degree of care in the management of its railroad trains. As a compensation for this extraordinary liability, it has been seen that the statute gives the railroad corporation "an insurable interest in the property along the route." No case has been cited by counsel, or otherwise brought to the attention of this court, from which it appears that the contributory negligence of the plaintiff has in fact been successfully invoked in defense of an action based upon such a statute, or in which it has been directly determined, as a matter of law, by the court of last resort in any state, that the doctrine of contributory negligence is applicable to such an action. The only case cited by counsel for defendant upon this branch of the case is *Post v. Buffalo, P. & W. R. Co.* 108 Pa. 585, and that was an action to enforce the defendant's liability for negligence at common law.

In the case at bar, however, the justice presiding at the trial, in his charge to the jury, clearly and distinctly gave the defendant company the full benefit of this rule of contributory negligence. Yet, by returning a general verdict for the plaintiff corporation, the jury necessarily found, as a matter of fact, that, under the circumstances disclosed by the evidence, there was no want of ordinary care and prudence on the part of the plaintiff corporation in occupying land adjacent to the defendant's roadway in the customary manner for the purposes of a piling ground, or, if there were, that such want of care did not proximately contribute to the destruction of the property.

It is true, as noted at the beginning of this opinion, that there was a conflict of testimony as to whether any part of the plaintiff's poplar was piled within the defendant's roadway; but the positive testimony of William P. Oakes, the land surveyor and civil engineer called by the plaintiff, that the westerly tier of poplar, the location of which was still plainly marked by the "remnants of the pile," was 33 feet from the center of the main track, with other corroborating evidence, was sufficient to authorize the jury to find that no part of the wood was piled within the defendant's roadway. The land on which the wood was piled was occupied by the plaintiff by license of the defendant, as it had been occupied by the plaintiff company and its predecessors for more than ten years prior to that time. It was a lawful occupation, and the plaintiff's rights and the defendant's liability with respect to injury by fire from a locomotive were precisely the same as they would have been if the plaintiff had been the owner of the land. *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 438, and

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356. Under these circumstances, even when the action is founded on the common-law liability of the defendant for negligence in the management of its trains, the great weight of authority in this country and in England supports the proposition that a landowner is not justly chargeable with contributory negligence for such a reasonable and legitimate use of his own land. 3 Wood, Railroads, § 338, and cases cited. "He is not required to anticipate such [the defendant's] negligence, nor to give up the lawful use of his property in such manner as would be deemed prudent under ordinary circumstances. . . . Neither will the knowledge of an adjacent landowner that engines on the road are habitually so mismanaged or defective as to cause frequent fires upon or near the track make any difference. Such a fact may add to the evidence of defendant's negligence, but cannot add to the plaintiff's duties." 2 Shearm. & Redf. Neg. 5th ed. § 680. Such ordinary rights of the adjacent landowner are presumably considered in the estimation of damages for the land originally taken for the defendant's roadway.

After a careful examination of all the facts in this case having any material relation to this question of negligence on the part of the plaintiff, it is the opinion of the court that, if the defendant had been entitled to the instruction given in its favor upon this point, there was sufficient evidence to authorize the finding of the jury that the plaintiff was not guilty of negligence, or if

so, that it did not contribute as a proximate cause to the loss of the plaintiff's property.

The fire appears to have caught from coals falling upon the track, and to have been thence communicated, through the dry grass, to the bottom of the nearest pile of wood; but the defendant had full knowledge, from daily observation, of the location of this wood, and of all the existing conditions at that station. And it is a principle of familiar application in cases of negligence, where the plaintiff's negligence is also connected with the injury, that if, by the exercise of ordinary care and skill, the defendant might have avoided the injury, the plaintiff's negligence cannot be set up in defense of the action. 2 Wood, Railroads, § 319a; Addison, Torts, 41. "For, however nearly related two separate negligences may be, the one cannot bar an action for the other unless it is contributory; and though an unseen position might contribute to an accident, a discovered one cannot." Bishop Noncont. Law, § 406. See also *Davies v. Mann*, 10 Mees. & W. 546; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *O'Brien v. McGlinchy*, 68 Me. 557; *Pollard v. Maine C. R. Co.* 87 Me. 51, 32 Atl. 735; *Atwood v. Bangor, O. & O. T. R. Co.* 91 Me. 399, 40 Atl. 67. It was a question between two corporations, with respect to which the deliberations of the jury would not probably be influenced by sympathy or prejudice, and this court would not be warranted by the facts in setting aside their verdict.

Motion and exceptions overruled.

MICHIGAN SUPREME COURT.

MICHIGAN TELEPHONE COMPANY

v.

City of St. JOSEPH.

(.....Mich.....)

1. A court has no authority to establish reasonable rules and regulations for the extension of telephone lines, but its authority is limited to requiring the proper authorities to adopt such rules and regulations, and to passing upon the validity of such action when taken.
2. The permission granted to a telephone company to maintain its lines in a municipality can be alienated to another

company without the consent of the city, by virtue of 3 How. Ann. Stat. § 4904e, which expressly authorizes corporations to alienate their property.

3. The acceptance of the privileges granted by laws of the state to a telephone company and permission to use streets duly given by a municipality, followed by the expenditure of money by the corporation in valuable improvements, constitutes a contract which neither state nor municipality can impair or destroy, unless the power to do so is reserved in the grant itself or in the Constitution.

(October 17, 1899.)

NOTE.—*Right to transfer or mortgage privilege to use streets for telegraph, telephone, or other quasi-public purposes.*

Most of the cases treating of this subject have turned upon the question as to the corporate powers of the grantee of the privilege, rather than upon the language of the grant, the intention of the municipality, or the nature of the privilege as distinguished from other franchises of quasi-public corporations.

San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075, and *Philadelphia v. Fairmount Park Comrs.* 4 Pa. Dist. R. 445, however, were cases in which the grants were to individuals. 47 L. R. A.

The right to assign was upheld in both cases. In the former the grant ran expressly to the grantee and his assigns, and in the latter the granting power assented to the assignment.

The principle questioned by the principal case, that where a franchise or privilege intended in large measure to be exercised for public good has been granted to a corporation it cannot be transferred without consent of the legislature, seems to be established by the weight of authority, including many cases not coming within the subject of this note, notably *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950, which held a railroad lease to be *ultra vires*. Under the influence of this principle the right

CROSS-APPEALS from a decree of the Circuit Court for Berrien County in a suit to restrain defendant from interfering with complainant's right to maintain poles and wires in defendant's street; defendant appealing from so much of the decree as enjoined it from interfering with such right, and plaintiff appealing from so much as attempted to establish rules and regulations for the maintenance of the poles.

Reversed except as to so much of the decree as required the establishment of reasonable rules and regulations.

Statement by Grant, Ch. J.:

The averments of the bill of complaint are substantially as follows: Complainant is a corporation organized under act No. 129, Pub. Acts 1883 (3 How. Anno. Stat. chap. 102a, § 3718a). Its principal office is in Detroit. It carries on in the city of St. Joseph and other cities and towns in the state the construction, maintenance, and operation of telephone lines and exchanges, and connects with the lines of other companies without the state. It has in this state about 460 toll

stations and exchanges, 3,660 miles of lines and 6,550 miles of telephone wire, besides several hundreds of miles of pole lines and wires used in the operation of local exchanges. April 4, 1881, the Telephone & Telegraph Construction Company, a corporation engaged in the telephone business in this state, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate such a system in said village. Permission was duly granted, and that company proceeded at large expense to erect poles and stretch wires within the lines of the streets and alleys of said village until June 5, 1891, when said village became incorporated as a city. Complainant duly acquired by purchase all the property, rights, and privileges of said construction company. It has since continued to do business in said city, and has furnished to said city two telephones free of charge, and four others at rates below the usual charges. It has permitted said city to occupy certain poles with its fire-alarm wires without charge. August 3, 1897, complainant erected in a good and workmanlike

of water, gas, or electric-light companies, to sell, lease, or assign their franchises in the streets, in the absence of special legislative authority, has been denied in *Bath Gaslight Co. v. Claffy*, 74 Hun, 638, 26 N. Y. Supp. 287; *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042; *Brunswick Gaslight Co. v. United Gas, Fuel, & Light Co.* 85 Me. 582, 27 Atl. 525; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746; *State ex rel. Badger Illuminating Co. v. Anderson*, 97 Wis. 114, 72 N. W. 380.

The power of a street-railway company to mortgage its franchise to occupy the streets, in the absence of distinct legislative authority, is denied in *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700, and *Middlesex R. Co. v. Boston & C. R. Co.* 115 Mass. 847. It is true that the court in the former case, in replying to the contention that the power had been conferred by certain statutory provisions, referred as decisive of the case to a statute providing that "no street-railway company shall sell or lease its road or property unless authorized to do so by its charter or by special act of the legislature," but in a previous part of the opinion it recognized and stated the doctrine of nonalienability without distinct legislative authority.

Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 86 L. R. A. 47, 69 N. W. 791, holds that a franchise to operate a street railway is inalienable at common law, but that the power to transfer the same has been conferred by statute in Wisconsin.

Rafferty v. Central Traction Co. 22 Pittsb. L. J. N. S. 15, holds that unless authorized by its charter a street passenger railway company has no power to lease its road or franchise to a traction company.

A telegraph company cannot alien its franchise to maintain its line in the streets without express power from the legislature. *Philadelphia v. Western U. Teleg. Co.* 11 Phila. 327.

The doctrine of non-alienability without legislative sanction was questioned in *Joy v. Jackson & M. Pl. Road Co.* 11 Mich. 155, and apparently repudiated in *Detroit v. Mutual Gas Co.* 43 Mich. 594, 5 N. W. 1039, a case involving the rights of a purchaser under foreclosure of a mortgage on the property and franchises of a gas company. The court says that a corporation 47 L. R. A.

regularly organized under the laws of Michigan may mortgage or convey its property or franchises as though it were a private individual subject only to such restrictions as the legislature may have imposed. It is not entirely clear whether the court intended to decide in favor of alienability without legislative sanction, or merely that such sanction had been granted in Michigan. If the former, the case appears to be without the direct support of other cases, at least those involving street franchises.

Louisville Trust Co. v. Cincinnati, 47 U. S. App. 36, 76 Fed. Rep. 296, 22 C. A. 334, states that the grant of a right to enter upon and occupy a public street for an electric street railway is capable, in the absence of express restrictions, of being sold, conveyed, and assigned or mortgaged. The right in that case, however, was not disputed, and was, in fact, conferred by statute, and the statement was made *arguendo* in illustrating the character of such a right as property.

Union P. R. Co. v. Chicago, R. L. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173, recognizes the general rule that a contract by which a quasi-public corporation disqualifies itself to perform its duties without the consent of the state is invalid, but makes the distinction that the contract involved in that case, though termed a "lease," was a mere agreement for trackage rights, and upheld it, although it was not expressly authorized by charter.

Evans v. Boston Heating Co. 157 Mass. 37, 31 N. E. 698, upholds the right of a corporation organized to supply heat through pipes to be laid in public streets to mortgage its franchise without special legislative authority, distinguishing the case from *Richardson v. Sibley*, 11 Allen, 65, on the ground that under the statute such a company is not a quasi-public corporation, but a manufacturing corporation.

Oakland R. Co. v. Oakland, B. & F. Valley R. Co. 45 Cal. 305, 13 Am. Rep. 181, holds that the question whether a franchise to construct a street railway can be divided is one that concerns the public alone, and cannot be raised by a rival company.

The effect of charter and other statutory provisions to confer the power to mortgage, assign, or lease such privilege has been passed upon in a number of cases.

manner, and in accordance with the terms of the statute, certain poles in said city for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service. August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them; and they adopted a resolution providing that if complainant thereafter should place any telephone poles in any streets or alleys of the city without first having obtained permission, said commissioner should forthwith remove them. The commissioner did remove the poles and wires so erected. After this action was taken complainant, on August 10 and 18, presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused to grant permission, and permitted a rival company, known as the Twin City Telephone Company, engaged in the same business, to set up poles and string its wires in the streets and alleys of the city. Complainant was willing and anxious to conform to all reasonable and valid regula-

tions with reference to the placing of its poles and stringing of its wires, and so stated in said petitions. The erection of these poles and wires is essential to enable complainant to do its business and meet the requirements of its subscribers. There is ample space on the streets, and no public necessity justifies the refusal. Under the act authorizing its incorporation, complainant has power to construct and maintain lines of wire, with the necessary erections and fixtures for use in transmitting messages, along, over, across, or under any public places, streets, and highways in the state. Alleges its duties to receive and transmit messages without discrimination, and to furnish service without unreasonable delay. By the acceptance of the resolution of 1881, and the construction and maintenance of its telephone system, and by the granting of special rates and privileges to the city, a valid contract has been created between the parties, by virtue of which the city is estopped from denying the complainant's right to maintain and use existing poles and wires, and to continue to set poles and string wires over, on, and in the streets

Thus, *New Orleans, S. Fort & Lake R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009, holds that a provision of the statute authorizing railroad companies to mortgage their property and franchises implies power to transfer a right of way through streets granted by city ordinance, and that, in view of such provision, the franchise passed to an assignee in bankruptcy of the company.

Smith v. Reading Pass. R. Co. 2 Pa. Dist. R. 490, holds that the express power conferred by statute upon traction companies to take leases of property of passenger railway companies implies power in the latter companies to make the leases. It was urged against this position that only leases from companies already empowered to make them were intended by the act. The court, however, in reply to the objection, stated that under existing statutes only two passenger railway companies had such power at the time of the act.

Threadgill v. Pumphrey, 87 Tex. 578, 80 S. W. 356, holds that a provision of the Revised Statutes empowering all corporations organized under the provisions of a certain title to mortgage their property, empowers a quasi-public corporation such as an electric light and power company, to mortgage its property including its franchise.

A statute authorizing every corporation to mortgage such real and personal property as its purpose may require is held in *Hovelman v. Kansas City Horse R. Co.* 79 Mo. 682, to authorize a street-railway company to mortgage its right of way.

Africa v. Knoxville, 70 Fed. Rep. 729, holds that a provision of a statute declaring that a corporation formed by the consolidation of street-railway companies shall have all the privileges and franchises of the constituent companies, conferred upon a consolidated corporation the franchise of a constituent corporation to operate its road and occupy the street for that purpose.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692, holds that under the statutes of New York the franchise of a street-railway company to occupy the streets is transferable independently of the life of the corporation; that the franchise and a mortgage thereon sur-

vived the dissolution of the corporation, and that an act providing for the extinguishment of the franchise upon the dissolution of the corporation was invalid.

Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 86 L. R. A. 47, 69 N. W. 791, holds that the Wisconsin statutes have conferred power to alienate franchises of street-railway companies to occupy the streets. And a similar decision in respect to the franchise of electric-light companies is made in *State ex rel. Badger Illuminating Co. v. Anderson*, 97 Wis. 114, 72 N. W. 886.

A provision in the charter of a telegraph company authorizing it to lease "lines, fixtures, and apparatus," is held in *Philadelphia v. Western U. Teleg. Co.* 11 Phila. 327, not to empower the company to lease its franchise in respect to streets not already occupied, although it necessarily implies that the lessee shall have the privilege of operating the lines already constructed, and, perhaps, of repairing or rebuilding them.

Fanning v. D. M. Osborne & Co. 102 N. Y. 441, 7 N. E. 807, denies the right of a street-railway company to transfer its franchise to an individual to enable him to use the road for his own private purposes.

It will be observed that the cases cited have solved the question as to the alienability of the privilege when vested in a corporation by reference to the powers of the corporation rather than the nature of the privilege, considered independently of its relation to the corporation as one of the franchises essential to the discharge of the latter's duties to the public.

The point is illustrated by the distinction made in *Evans v. Boston Heating Co.* 157 Mass. 37, 31 N. E. 698, *supra*, between that case and the case of *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700. The privileges, considered by themselves, were essentially the same in both cases. The distinction lay in the fact that in the latter case the privilege was granted to a quasi-public corporation which owed a duty to the public at large, and in the former, to a corporation which the court held, under the statutes, to be not a quasi-public corporation, but merely a manufacturing corporation which had not been invested with any duty to the general public.

G. H. P.

and alleys of the city. It alleges that the action of the council (1), deprives complainant of its vested rights; (2) impairs the obligation of a contract; (3) deprives it of property without due process of law, and denies to it the equal protection of the laws; (4) operates as a regulation of commerce among the states; (5) will produce irreparable injury. The relief asked is an injunction to restrain defendant from removing or interfering with complainant's poles and wires, and from interfering with the replacing of the poles already removed and with the erection of new ones. The answer denies some of the allegations of the bill and sets up new matter in defense. It does not, however, dispute the substantial and material allegations of the bill. It admits the removal of the poles, and the refusal to act upon the petitions of August 10 and 16. It defends under an ordinance passed June 8, 1897, by which it was enacted that "no telegraph or telephone poles shall be located or erected on any street, alley, or public place, in said city, and any such pole now erected shall not be taken up and again erected, without the consent of the city council." It sets up the ordinance granting a franchise to the Twin City Telephone Company, and states "that it has no doubt whatever that, if the complainant should ask for a similar franchise at the hands of the city council the same would be granted." Issue was duly framed, and the case heard in open court. September 21, 1898, the court made an order holding that the common council had the right to provide reasonable rules and regulations by which the complainant should be governed in the extension of its lines; that the council had no authority to arbitrarily prohibit complainant from erecting poles and wires upon the streets and alleys; that the reasonableness of such rules or regulations was subject to the review of the court; that, unless said council should within thirty days pass and enact rules and regulations by which complainant was to be governed in the extension of its lines, the writ of injunction should issue, prohibiting the defendant from interfering with the complainant in erecting its poles or placing its wires. The order further required that, before extending its lines, complainant should present to the court a statement of the manner in which it proposed to proceed with such extension, and prohibited complainant from proceeding except under such reasonable rules and regulations as the court shall deem necessary for the public safety and convenience. On November 11 following a formal decree was entered substantially the same as the order above recited. From this decree both parties appeal. Complainant attacks only so much of the decree as provides that the court shall establish the reasonable rules and regulations. The defendant attacks the decree in its entirety.

Mr. N. A. Hamilton, with **Messrs. Wells, Angell, Boynton, & McMillan**, for complainant:

A contract exists between the parties, 47 L. R. A.

which justifies the issuance of an injunction in this case.

The grant of permission confers a vested right, and not a mere license; and the acceptance of it and action in reliance upon it give rise to a contract within the contract clause of the Constitutions.

Detroit v. Mutual Gas Co. 43 Mich. 594, 5 N. W. 1039; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 615, 33 N. W. 749; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Saginaw v. Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. Rep. 159; *Africa v. Knoxville*, 70 Fed. Rep. 729; *Arcata v. Arcata & M. River R. Co.* 92 Cal. 639, 28 Pac. 676; *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526, 15 So. 157; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *Quincy v. Bull*, 106 Ill. 337; *State, Hudson Teleph. Co. Prosecutor, v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123.

The form of the grant in question is sufficient.

Saginaw v. Swift Electric Light Co. 113 Mich. 660, 72 N. W. 6.

The rights given to the grantee under the contract are assignable and have passed to the complainant.

Joy v. Jackson & M. Pl. Road Co. 11 Mich. 155; *People ex rel. Maybury v. Mutual Gaslight Co.* 38 Mich. 154; *Detroit v. Mutual Gas Co.* 43 Mich. 597, 5 N. W. 1039; 3 How. Stat. § 4904e.

Impairment of the obligation of a contract, whether by a state law or by a city ordinance, is repugnant to the contract clause of the Constitutions.

Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed. Rep. 159; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. Rep. 218, 82 Fed. Rep. 1; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 694, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; *Planters' Bank v. Sharp*, 6 How. 327, 12 L. ed. 458.

The court ought not to have required complainant to act under its regulation in establishing its lines before enjoining interference by defendant.

Duties nonjudicial in character cannot be imposed upon courts.

Houseman v. Montgomery, 58 Mich. 364, 25 N. W. 369; *Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, 38 Atl. 708; *Express Cases*, 117 U. S. 1, sub nom. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47, 65 N. W. 766; *Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 302, 400, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Messrs. Lawrence C. Fyfe and O'Hara & O'Hara, for defendant:

In 1834 the village of St. Joseph was incorporated. By the act of incorporation the council was empowered to make by-laws relative to its streets and highways.

3 Territorial Laws, 1280.

This power has been continued in subsequent charters and amendments.

Laws 1859, p. 276; Act 267, Laws 1873, § 31; Local Act 323, Laws 1883; Local Act 348, Laws 1891; Act 215, Public Acts 1895, chap. 32, § 1.

The grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee, and cannot be alienated except by consent of the granting power.

25 Am. & Eng. Enc. Law, p. 751; Crosswell, Electricity, § 158.

Grant, Ch. J., delivered the opinion of the court:

1. It is conceded by the learned counsel for both parties that that part of the decree by which the court assumed the right to establish reasonable rules and regulations is void. This is a legislative or administrative function, and not a judicial one. The court has power to put the proper authorities in the defendant city in motion to adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority. *Houseman v. Montgomery*, 58 Mich. 364, 25 N. W. 369; *Manistes v. Harley*, 79 Mich. 238, 44 N. W. 603. Other courts recognize the same rule. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794, 37 Atl. 1080, and 38 Atl. 708; *Nebraska Teleph. Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171.

2. It is urged that the permission granted to the Telephone & Telegraph Construction Company was personal to that company, and could not be alienated without the consent of the city. That company was organized under a general law of the state, and derived its powers and obligations from that law. The only power which a city could have exercised over it was that of regulation. This is also true of the complainant. The transfer was made August 31, 1895, was recognized as valid by the city, and has been acted upon by both the city and the complainant since that time; the latter having expended large sums of money upon its business and improvements. Whether the city is now in position to question the validity of this transfer is at least debatable, but, as it is not argued by counsel, we refrain from discussing it. Counsel for the defendant cite in support of their contention 25 Am. & Eng. Enc. Law, p. 751, where it is stated "that the grant of a franchise, public in nature, like that of a telegraph company, is personal to the grantee and cannot be alienated except by consent of the granting power. Therefore a telegraph company has no power, in the absence of special authority, to alienate the privileges granted to it by the Federal or

state government, and an agreement to transfer such privileges is *ultra vires* and void." The compiler cites, to sustain the text, *United States v. Western U. Tele. Co.* 50 Fed. Rep. 28, and *Western U. Tele. Co. v. Union P. R. Co.* 1 McCrary, 581, 3 Fed. Rep. 721. The general power of alienation was not discussed in the former case, nor was it raised. The conclusion reached was based upon the language of the act of Congress authorizing the construction of the original Union Pacific Railroad. The company sought to transfer its telegraph line, and to avoid its duty to maintain it. It was noted as a significant fact that the words "railroad and telegraph" were used in connection thirty-eight times in the act. The railroad company was not seeking to transfer all its property, rights, and privileges to a successor who would be obligated to perform all the duties imposed by the act of Congress, but was seeking to carve up its franchise and transfer a part of it to another corporation. The duty of the railroad company to maintain a telegraph was held to be personal. The same principle was approved in *Western U. Tele. Co. v. Union P. R. Co.* We are also cited to Crosswell, Electricity, § 158, which reads as follows: "A grant to a telephone, telegraph, electric light, or railway company of the power to use the streets, highways, and post roads for the stringing of its wires and the setting of its poles contains so much of an element of personal obligation, that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject." The same authorities are there cited to sustain the proposition as were cited in the encyclopedia, and in addition *Atlantic & P. Tele. Co. v. Union P. R. Co.* 1 Fed. Rep. 745. That case involved the same act as the others. The last clause of the above section reads, "If the grant is in terms to X, his successors and assigns, or similar language, it is assignable," and cites *Atkinson v. Asheville Street R. Co.* 113 N. C. 581, 18 S. E. 254; *Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co.* 6 Ohio C. C. 362; *California State Tele. Co. v. Alta Tele. Co.* 22 Cal. 398; *Newman v. Avondale*, 31 Ohio L. J. 123. In *Atkinson v. Asheville Street R. Co.* the question is not raised or discussed. The case was disposed of upon a demurrer to the bill of complaint which set up that complainant had obtained a license from the city to build a street railway; that he had assigned it in escrow to one M., who, in breach of the trust reposed in him, assigned it to the defendant corporation. The right of sale and transfer of all the property of the corporation is not alluded to in the decision. In the Ohio case the contest was between two street railways, the question being as to the right of one company to use the tracks of another. I do not find that the power to sell and transfer is even referred to in the case. In the California case the question is neither raised nor discussed. The sale there made was opposed upon other grounds. Page 428. The case of *Newman*

v. *Avondale* I have been unable to find. If defendant's contention be true, a mortgage of the property and franchise of these corporations would be void. The mortgage and bonds would be valueless unless there was a right to foreclose, sell, and convey to another party a valid title to the property. In *Detroit v. Mutual Gas Co.* 43 Mich. 594, 5 N. W. 1039, the grant was to the corporation, or rather to the corporators or their assigns, who were to organize a corporation. The ordinance was silent upon the right of alienation, yet the sale of its entire property was held valid. It is immaterial that the construction company was not organized under the same act as was the complainant. It was organized under another act, empowering such companies to carry on the like business; and one of its objects declared in its articles of association was the purpose of erecting and operating telegraph lines, etc., in the cities and towns of the state. The public was not concerned in the transfer to another corporation. It suffered no injury. The assignee was subject to the same control and obligated to the same duties as was its assignor. Justice Christiancy, in *Joy v. Jackson & M. Pl. Road Co.* 11 Mich. 164, asserted the right of corporations to dispose of their property by absolute sale or mortgage in payment of their debts, unless such right is limited by some express provision or just implication of a statute, or by the general policy of the state, to be deduced from its legislation. In this opinion Chief Justice Martin concurred. The other justices held the mortgage in that case valid under the statute, but reserved their opinions as to the general power of such corporations to mortgage. But, whatever may be the common-law rule, the statute puts the question at rest, and expressly authorizes corporations to alienate their property. 3 How. Anno. Stat. § 4904e. The sale, therefore, to the complainant was valid.

3. When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the Constitution, which becomes a part of all such contracts. The Constitution and the statute clothe municipalities with power to control their streets and alleys and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies. Here its power in the matter ceases. *Detroit v. Mutual Gaslight Co.* 43 Mich. 594, 5 N. W. 1039; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749; *Saginaw v. Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. Rep. 159; *New Orleans v. Great Southern Teleph. & Teleg.* 47 L. R. A.

Co. 40 La. Ann. 41, 3 So. 533; *Quincy v. Bull*, 106 Ill. 337; *State, Hudson Teleph. Co. Prosecutor, v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123; *Arcoata v. Arcoata & M. River R. Co.* 92 Cal. 639, 28 Pac. 676. Since the argument, counsel for defendant have called our attention to the recent case of *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778. The company in that case was acting under a law of Congress, and claimed the right under the act of Congress to use the streets without interference by the city authorities. The circuit court of appeals held that the rights and privileges granted by the act of Congress were subject to the lawful exercise of the police power belonging to the state or its municipalities. This holding was affirmed by the supreme court. That case is no authority for the action of the common council in the case before us. The city of Richmond had, through its common council, adopted an ordinance prescribing the terms under which the telephone company might use its streets. The reasonableness of that order was not questioned. The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petitions it presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city by its act of incorporation obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both, under the police power inherent in municipalities, possessed the right of reasonable regulation. The city succeeded to the rights of the village of St. Joseph, and was in fact the same body politic. *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749.

In reason and authority, it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to establish reasonable rules and regulations for the erection of poles and the stretching of wires. *The decree in this respect is affirmed.* Decree will be entered in this court in accordance with this opinion, and the defendant given thirty days after service upon its mayor of a certified copy of the decree to adopt rules and regulations in accordance therewith. Complainant will recover the costs of both courts.

The other Justices concur.

Horace M. OREN, Attorney General,
v.

Merrie H. ABBOTT.

(.....Mich.....)

A woman cannot be elected prosecuting attorney under Const. art. 10, § 8, which provides that such officers shall be

NOTE.—As to the right of women to hold office, see note to *State ex rel. Crow v. Hostetter* (Mo.) 88 L. R. A. 208; also *State ex rel. Monnett v. Adams* (Ohio) 41 L. R. A. 727.

"chosen by the electors," while there is no express provision conferring on women the right to hold this office.

(*Moore, J., dissents.*)

(October 17, 1899.)

QUO WARRANTO proceedings to determine by what right respondent occupied the office of prosecuting attorney for Ogemaw county. *Judgment of ouster.*

The facts are stated in the opinions.

Mr. Horace M. Orem, Attorney General, for relator:

A woman cannot hold a general public office, in the absence of express constitutional or statutory authority conferring upon her such right.

In order to be eligible to the office of prosecuting attorney one should be twenty-one years of age, a citizen of the United States, a resident and elector of the county.

People ex rel. Hughes v. May, 3 Mich. 598.

The people of this state having placed a construction upon the Constitution with reference to the eligibility to hold the office of prosecuting attorney, to the effect that said office can only be held by a male of proper age and qualifications, which has been the established and unquestioned rule for over sixty years, it is now, and for years has been, the law in this state, and as effective as though it was the express enactment of the people of the state of Michigan; and until such time as the legislature may see fit to grant such political right to females, the respondent, being a female, is precluded from, and cannot lawfully hold, such office.

Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 116; *Atty. Gen. v. Joy*, 55 Mich. 94, 20 N. W. 806; *The Laura*, 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *People ex rel. Platt v. Oakland County Bank*, 1 Dougl. (Mich.) 282; *People ex rel. Atty. Gen. v. Bank of Pontiac*, 12 Mich. 527; *People v. Maynard*, 15 Mich. 463; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 611, 33 N. W. 749; *State v. Flint & P. M. R. Co.* 89 Mich. 481, 51 N. W. 103.

The office of prosecuting attorney is a constitutional office, created by the Constitution of this state, which expressly provides that such official shall be chosen by the electors of the respective counties; and such electors have no authority under the Constitution and laws of this state to elect other than one of their own number to such office.

Throop, Pub. Off. § 72; Cooley, Const. Law, 2d ed. p. 268.

The right of suffrage is not a natural right, but a political privilege, which does not attach to citizenship as a matter of right; and when that privilege is conferred upon males, it does not include and confer the same privilege upon females, though citizens of the United States.

Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, and cases cited.

No one but a qualified elector can hold office.

47 L. R. A.

State ex rel. Off v. Smith, 14 Wis. 497; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *Wilson v. Newton*, 87 Mich. 495, 49 N. W. 869; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239; *Atchison v. Lucas*, 83 Ky. 451; *People ex rel. Tilden v. Welsh*, 70 Ill. App. 644.

Mrs. Merrie H. Abbott in propria persona and Messrs. Thomas A. E. Weadock and John C. Weadock, for respondent:

The Constitution does not require that a prosecuting attorney shall be an elector. The provision relating to that office in the Constitution of 1850 is: "In each organized county there shall be a . . . prosecuting attorney, chosen by the electors thereof."

Art. 10, § 3.

At the common law there were no prosecuting attorneys, and under the common law women might and did hold office.

3 Campbell, *Lives of Chief Justices*, 107, 108; *Oliver v. Ingram*, Strange, 1114.

Judge Cooley, in his *Constitutional Limitations*, says (note 1, p. 748): "Whether . . . one not an elector cannot hold office, in the absence of written law on the subject, is possibly open to question."

Barker v. People, 3 Cow. 686, 15 Am. Dec. 322.

Mechem on Public Officers, § 73, concludes: "It is, of course, competent for the people, by their state Constitutions or by their legislatures, where no constitutional prohibition intervenes, to remove these disabilities, and such is the constant tendency."

Huff v. Cook, 44 Iowa, 639; *Schuchardt v. People ex rel. Hall*, 99 Ill. 501, 39 Am. Rep. 34; *Throop, Pub. Off. § 69*.

The respondent's competency having been certified by the Constitution, the fitness of women for so many occupations, and their excellence in many, being matters of common knowledge, the precise question raised in this case has been decided in woman's favor very recently in the state of Missouri.

State ex rel. Crow v. Hostetter, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270.

Long, J., delivered the opinion of the court:

Merrie H. Abbott, the respondent, a woman of the age of twenty-one years and upwards, was elected to the office of prosecuting attorney of Ogemaw county at the general election held on the 8th day of November, 1898. She duly qualified, and is now in the discharge of the duties of that office. An information in the nature of a quo warranto is filed in this court by the attorney general, in which it is claimed that the respondent unlawfully holds and exercises the duties of that office. The only question raised is whether a woman is eligible under the Constitution and laws of this state to hold such office. Section 3, art. 10, of the Constitution of this state, reads as follows: "In each organized county, there shall be a sheriff, a county clerk, a county treasurer, a register of deeds, and a prosecuting attorney, chosen by the electors thereof, once in two years, and as often as vacancies shall happen,

whose duties and powers shall be prescribed by law." It is the contention of the attorney general that the office of prosecuting attorney is a constitutional office, created by the Constitution of this state, which expressly provides that such official shall be chosen by the electors of the respective counties, and that such electors have no authority under the Constitution and laws to elect other than one of their own number to such office. On the other hand, it is contended by the respondent that the Constitution and laws do not expressly require that the prosecuting attorney shall be an elector, while for some other officers named in the Constitution this qualification is distinctly required, and that this would indicate that as to those officers in regard to which the instrument is silent no such qualification is necessary; for, if the qualification of an elector is needed in order to hold the office of prosecuting attorney, then every other officer elected by the people and named in the Constitution must also be an elector. It is also contended by the respondent that the common law of the state does not forbid a woman to hold the office of prosecuting attorney.

There being no express provision of the Constitution or the laws of the state conferring upon the respondent the right to hold this office, the question must be determined by the principles of the common law, and the manner in which those principles have been construed in this state for the past years. It is conceded that the respondent is not an elector, and that she could not vote for a candidate for this office. Section 1, art. 7, of the Constitution provides who shall be electors. There can be no question of the common-law rule that a woman cannot hold a general public office in the absence of express constitutional or statutory authority conferring upon her such right. If she is eligible to this office then she is eligible to any constitutional office within the state. Judge Cooley, in his work on Principles of Constitutional Law (3d ed. p. 285), in discussing the question of eligibility to office, says: "When the law is silent respecting qualifications to office, it must be understood that electors are eligible, but no others." For more than sixty years this has been regarded as the settled law of this state. It commenced when this state was admitted into the Union, and during all the time since no one, to our knowledge, has ever insisted that women are eligible to those offices which must be filled by the votes of the qualified electors of the state or other municipalities. In Cushing, Law & Practice of Legislative Assemblies, arts. 56, 57, it is said: "It may also be laid down as a general principle founded in the nature of representative government, which presupposes the electors, except in particular instances, to elect from among themselves, that no person can be elected to any office who is not himself possessed of the requisite qualifications for an elector. . . . Whatever other and different qualifications or disqualifications may be specified, every person who is voted for . . . must at all events possess the qual-

47 L. R. A.

ifications and be free from the disqualifications which attach to the character of an elector." This language is quoted by Throop with approval in his work on Public Officers (§ 72). The supreme court of Wisconsin, in *State ex rel. Off v. Smith*, 14 Wis. 497, and *State ex rel. Schuet v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, held that in the absence of statutory authority no one but a qualified elector could hold office. In the latter case it was said: "We have already seen that the ground upon which a person not an elector is excluded from holding public office is that the powers and functions of a free and independent government must be exercised by those by whom such government was instituted,—that is, by the electors thereof; so, if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him." In *Wilson v. Newton*, 87 Mich. 495, 49 N. W. 870, the contention was whether a woman could hold the office of deputy county clerk. Mr. Chief Justice Champlin said: "The relator contends that under the provision of the Constitution none but an elector can be chosen to the office of county clerk. In this I think he is correct, but its decision is not essential to the determination of the present case." In *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239, the right of a woman to vote or hold office was fully discussed; and the common-law rule, that in the absence of express authority a woman has no legal right to hold office, was fully sustained. The case of *Atchison v. Lucas*, 83 Ky. 451, is quite in point with the present. The Constitution of that state confers the right to vote upon white male citizens of the proper age, etc., and bases the right to hold office upon citizenship. It was said: "The Fourteenth Amendment to the Constitution of the United States defines who are citizens, in the following language: 'All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.' It is therefore not necessary to discuss the meaning of the word 'person' or the word 'citizen' as used in the state Constitution, as both include women as well as men, in the most comprehensive sense; but being a citizen does not necessarily entitle one to the right of suffrage or the right to hold any constitutional office. By the provisions of the Constitution of this state adopted in the year 1792, and by a like provision of the Constitution of 1799, as well as in the present Constitution, women were excluded from the right of suffrage by conferring that right up on male citizens alone; and it would be a singular construction of that provision in either Constitution to determine that women should have no voice in the selection of those who are to fill the offices created by the Constitution, and at the same time given the right to fill those offices if elected by the popular vote. . . . It necessarily follows, it seems to us, that when women are excluded from the right to vote when these officers are to be elected, they are also exclud-

ed from the right to hold the offices voted for." Whatever may be said of some of the decisions of other states which counsel contend are at variance with the cases above cited and quoted from, it is difficult to get away from the proposition laid down by Judge Cooley, above quoted, that, "when the law is silent respecting qualifications to office, it must be understood that electors are eligible, but no others." Cooley, *Principles of Const. Law*, 3d ed. p. 285. Judge Cooley undoubtedly wrote that with the full understanding of its significance. He had in mind, without doubt, that that had been the uniform practice in this state for nearly sixty years at that time, and that such was the common law of the state.

It follows that a judgment of ouster must be entered.

Hooker, J., concurring:

The record in this case raises the question of the eligibility of a married woman to the office of prosecuting attorney. The respondent, having received a plurality of the votes cast for that office in her county at the election held in November, 1898, and entered upon the discharge of its duties, responds to a writ questioning her right thereto.

The Constitution does not state who shall be eligible to this office. Therefore it may reasonably be said that any person may hold it who was qualified under the laws as they existed when the Constitution was adopted, such laws being continued in force by Const. Sched. § 1: "The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the legislature." It would also seem that no one could hold office except those qualified under existing laws, for the Constitution, being silent, made no change. At the common law, woman did not enjoy the legal right of participating in the government. The political privileges of voting and holding general public office were denied her. Some question is made over this, but we think it is an historical fact. The fullest discussion of the nature and extent of the right of a woman to hold office at common law, that we have ever seen, is in the opinion of Chief Justice Gray, in *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239, where the authorities are collected. The opinion of Mr. Justice Scholfield in *Schuchardt v. People ex rel. Hall*, 99 Ill. 504, 39 Am. Rep. 34, asserts the same doctrine, following *Re Bradwell*, 55 Ill. 535. In the former case it was held that the disability had been removed by statute, which the latter case had previously held that a Constitution silent upon the subject was ineffective to do. In *Atchison v. Lucas*, 83 Ky. 465, it is declared that "at common law a woman could not hold any public office," and that, with three Constitutions adopted for the state silent upon the subject, it could not be said that the right to hold office had been thereby conferred. Mechem, Pub. Off., at page 73, says that by the law of England no woman under the degree of queen, married or unmarried, 47 L. R. A.

could take part in the government of the state; citing Bouvier, Law Dict. title, *Women*, and other authorities. See also *Lockwood v. United States*, 9 Ct. Cl. 346; *Opinion of the Justices*, 107 Mass. 604, 115 Mass. 602; *Chorlton v. Lings*, L. R. 4 C. P. 374.

As has been foreshadowed, I am of the opinion that, if the common law in force in Michigan as it was in 1850 prohibited women from holding office, that prohibition was not removed by the adoption of a constitution which contained no express or implied repeal of such prohibition, but, on the contrary, reaffirmed it by expressly providing that the laws asserting such prohibition should continue in force. There is but one legitimate method of removing the disability, and that is legislative, not judicial. Some of the cases cited have intimated as much. That the legislature, and it only, has power to do this, is obvious. Certainly the courts are not authorized to do so, and a growing public sentiment favoring an enlargement of the rights of women should not have such effect. Laws are not repealed by a neglect to enforce them, and the legal status of woman rests on a more stable foundation than a varying or advancing public opinion of what that status should be.

It is argued that, inasmuch as the Constitution is silent upon the subject of the qualifications requisite to this office, we must recognize the right of anyone to hold it. Aside from the fact that we find few authorities supporting this claim, we think that it is fallacious. The Constitution does not say that aliens may not hold many of the highest public offices. Neither does it say that infants may not, nor that persons *non compos mentis* may not. Nor does it say that a man shall be compelled to support his wife, nor that she may pledge his credit for necessities, nor that she cannot make a valid contract, nor that the presumption of coercion by her husband shall not attach when she is charged with crime. Nor did the earlier Constitution declare that only attorneys at law could be prosecuting attorneys. Yet the court so held in the case of *People ex rel. Hughes v. May*, 3 Mich. 610, and all of the other legal principles mentioned were unchanged by the adoption of the Constitution. It must be evident that when a new constitution is adopted the legislative blackboard is not washed clean. On the contrary, existing laws and rights under them remain, except as clearly inconsistent with the terms of the Constitution. There are many cases which hold that aliens are ineligible to public office. *State ex rel. Off v. Smith*, 14 Wis. 498; *State ex rel. Schuet v. Murray*, 28 Wis. 96, 9 Am. Rep. 480. Others hold that a minor is incapable of holding office. *Tyler v. Tyler*, 2 Root, 519; *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 60; *Barrett v. Seward*, 22 Vt. 176; *New Albany & S. R. Co. v. Grooms*, 9 Ind. 243; *People ex rel. Dobbs v. Dean*, 3 Wend. 438.

We are confronted by the fact that women have held offices, and by cases which sustain some of their claims upon them. Some of

the cases cited hold that minors may be deputies under certain officers, and that they are capable of discharging ministerial duties, while they deny the right of holding public offices generally. See *Jamesville & W. R. Co. v. Fisher* (N. C.) 13 L. R. A. 721, and note. Authorities are not wanting in England that decide that women may hold offices which they inherit (but can get in no other way), and may perform the duties through deputies. There are also instances where it has been held that they could hold local offices of little importance, where the duties were wholly ministerial. But, while these cases support the claim that women might hold some offices, they reinforce the authorities which deny the general right contended for here. It is undeniable that many women have held office under state and Federal governments, such as postmasters, pension agents, notaries public, deputy clerks, school officers, attorneys at law, etc. Many of them have held their offices only by sufferance, their right having not been questioned. This proves nothing. Others have held under statutes which the legislature had power to enact. *Bloomer v. Todd* (Wash.) 1 L. R. A. 113, note. The case of *Re Hall*, 50 Conn. 131, 47 Am. Rep. 625, does no more than construe a very liberal statute, which provided that the court might admit as attorneys "such persons as are qualified therefor agreeably to the rules established" by the courts. Such cases are not decisive of the question before us. In other cases their right has depended upon the varying views of courts concerning the nature of the offices. Some courts hold that the office of notary public is not within the right of a woman to hold. See *Women as Notaries Public* (*Opinion of the Justices*) 150 Mass. 586, 6 L. R. A. 842, 23 N. E. 850; *State ex rel. Peters v. Davidson*, 92 Tenn. 531, 20 L. R. A. 311, 22 S. W. 203. Others hold that it is. *United States v. Biaby*, 9 Fed. Rep. 78. In this state the right is given by statute. Comp. Laws 1897, § 2629; Laws 1887, p. 133. A number of cases hold that women may be deputy clerks, though not clerks. *Warwick v. State*, 25 Ohio St. 21; *Jeffries v. Harrington*, 11 Colo. 191, 17 Pac. 505; *Wilson v. Newton*, 87 Mich. 493, 49 N. W. 869. It is said that this case is concluded by the case last cited, and that the cases cited from Massachusetts and Illinois cannot apply, because they deny the right of women to hold the offices of notary public and attorney at law,—especially the latter, which we are said to have recognized their eligibility to. The recognition that has been accorded to women as attorneys is plainly authorized by statute. Comp. Laws 1897, § 1121, provides that no one shall be excluded from that office on account of sex, while under authorities relied upon in this case there is room for the claim that they have been eligible under existing statutes since 1838, at least. As early as 1846 any citizen of this state was eligible (see Rev. Stat. 1846, p. 423, § 27), while under Rev. Stat. 1838, p. 411, § 13, any citizen of the United States might be licensed. In the Michigan case the learned writer of the opinion

stated that a woman could not hold the office of clerk. What is the inference, if not that it was his opinion that she might perform the ministerial duties of a deputy, the office being one that permitted of a deputy? It does not follow that he would have held that she could succeed the clerk under the statute in case of his death. So in the Massachusetts case we should not be asked to hold that the determination concerning the common law was any the less authoritative because we might disagree with the court as to the character of the office of attorney at law. That case excludes the offices of attorney at law and notary public from the list of ministerial offices that a woman may hold. Others do not. Thus, the case of *United States v. Biaby*, 9 Fed. Rep. 78, holds the office of notary purely ministerial. In short, all of these cases agree that a woman could not hold other than ministerial offices, but they differ as to what are the ministerial offices that they may hold.

I do not forget that there are other cases which are said to go the full length contended for in this case,—notably, the Kansas and Missouri cases cited. *State ex rel. Crow v. Hostetter*, 137 Mo. 636, 39 S. W. 270; *Wright v. Noell*, 16 Kan. 601. The Missouri case is distinguishable from the case before us and the Kansas case. The Constitution of Missouri was adopted in 1875. That instrument prescribed the qualifications of some officers; e. g., the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of schools, and members of the general assembly, were required to be male citizens. Circuit judges were required to be qualified voters who were male citizens. It was further provided that "no person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment." Const. art. 8, § 12. According to this respondent's contention, this last provision, which was a new enactment in the organic law of Missouri, had the effect of removing the disability of women to such offices, but the Missouri court did not so hold. What it said was that "the Constitution, we think, remits to the legislature the subject of proper qualifications to be possessed by the holders of such an office as is here in question." At the time this Constitution was adopted there was, and for many years had been, in force a statute providing that "no person shall be appointed or elected clerk of any court, unless he be a free white male citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected, three months, before the election; and every clerk shall, after his election, reside in the county for which he is clerk." Rev. Stat. 1855, p. 336, § 10. In 1879, four years after the adoption of the Constitution, the legislature amended this law by dropping the words "free white male." Commenting upon this, the court said: "The dropping of

the word 'male,' in describing the qualifications for such offices, has value as a guide to the legislative purpose in enacting the present law on this subject. Can there be any doubt as to the intended effect of such a change of the statute on the particular question before us? "The office of clerk of a court is a ministerial office. It admits of the use of a deputy, and its duties are certainly not of such a nature as to be incompatible of discharge by a woman. In view of the condition of the positive law of Missouri above described, we do not consider it necessary to enter into a discussion of the eligibility of women to office at the common law or in other states of the Union." It is apparent, therefore, that this case, like the Connecticut case, goes no further than to construe a statute, and does not reach the question before us.

The principle of the Kansas case admits of no middle ground, and establishes woman's right to the highest executive and judicial office, and to govern a state where she cannot vote. It seems on all fours with our own, and is entitled to great weight, from the eminence of the writer of the opinion. It appears to be based largely upon the proposition that, as the Constitution required legislative officers to be electors, there was an implication from the failure to prescribe the qualifications of other officers that all persons were eligible. The court distinguished the case from that of an alien, from which we infer that it was of the opinion that an alien was ineligible. It did not indicate what it would say were the claimant an infant citizen. We can hardly suppose that it would hold an infant eligible to the higher executive and judicial offices, or that any other than a lawyer could hold the latter, yet the Constitution has not precluded either, under the interpretation given. It may be said that a distinction might be made between the incapacity of minors, as was done in the case of aliens. No doubt there might be. As already said, a distinction was made as to aliens, and it may be said that the law looks upon a minor as mentally incompetent, as it does upon an idiot or lunatic, while this is not true of women. The incompetency in each case is a legal and necessarily an arbitrary one. Adult aliens and women and many minors are mentally competent, yet this does not make them legally so. It is an arbitrary rule of law in each case which denies the privilege, and these rules of law all antedate and survive the adoption of the Constitution. Their survival cannot be said to depend upon the character of the legal disability. The requirement that members of the legislature should be electors had the effect of preventing any legislative change of the law in that respect, and was a necessary provision to accomplish it. The absence of any provision in relation to other officers leaves the requisites within legislative control, and the omission was probably intended to have that effect. This sufficiently accounts for the omission, without concluding that it was designed to make everyone eligible to all ex-

cept the legislative offices, without legislative intervention.

Again, it may be said that the reason for the common-law rule no longer exists, and that the rule should fall with the reason for it; that Michigan by legislation has in recent years recognized the capacity of women to do many things that she was not permitted to do at common law, one of which is to hold the position of attorney at law, and therefore there is no longer any reason for denying her eligibility to any office, and consequently there is no law prohibiting it. This, in short, amounts to saying that, when the legislature made a change in the status of woman by making her eligible to one office, it removed all of her political disabilities, except that relating to the ballot, which was beyond legislative power. If this is so, why did it not have the effect of removing all other disabilities? Why is she not now free to contract, and sign notes with others as surety? Why is she not drawn as juror and talesman in our courts of justice? It must be remembered that the proposition is not that the legislature might make all of these changes by proper enactment, which I do not question, but that by the simple enactment that she may be permitted to practice law and to hold school offices all disabilities were at once removed. It is hardly supposable that the legislature so understood it, or that it was designed even to make her eligible to any offices except those mentioned. Had the title to the act been "to make women eligible to the position of prosecuting attorney," it would hardly have supported a provision in the act itself making her eligible to the office of prosecuting attorney and all other offices, because the object of the act would not have been expressed in the title. Yet exactly this, if not a great deal more, has been accomplished, if we are to hold that the reason of woman's disability has failed through the recognition of her ability to discharge the duties of one office, and that all of her disabilities have been removed with the reason. I do not mean to be understood as admitting that laws fall with the reason upon which they are based. It is sometimes said that "he who knoweth not the reason of the law knoweth not the law," but it does not follow that courts may disregard a law when the reason for the rule is not apparent or is disapproved. It is the province of the legislature to apply the remedy in such cases.

Other states are mentioned where, under statutes or decisions, a somewhat different view from that entertained by me is taken, and it must be admitted that there is some conflict in the authorities; but I think the weight of authority, and the logic of the case, support me in the conclusion that the privilege of holding general public office has not been acquired by woman, and that only a constitutional provision or an act of the legislature can give it to her.

It remains to inquire whether the office of prosecuting attorney is such a ministerial office as to render a woman eligible. That, I think, is settled by one of our own decisions,—the case of *Engle v. Chipman*, 51

Mich. 524, 16 N. W. 886. It was there held that a prosecuting attorney could not delegate his powers; that he was vested with a personal discretion as a minister of justice. He might perhaps employ assistants when authorized by law, but could not delegate his official discretion. It seems clear that this judicial discretion takes the office out of the class recognized by the common law, and the cases, both English and American, as within the right of woman to hold.

We have attempted to discuss this from a purely legal standpoint. An endeavor has been made to show that in adhering to the doctrine here enunciated, "courts are not putting prohibitions into Constitutions, upon some supposed understanding of the people at the time of their adoption." They are refusing to assert the implication of a repeal of laws which the Constitution expressly says shall continue in force. Taking that view of the question, we have no occasion to discuss the progress of the age, or the injustice of law to women. As we have said, the legislative branch of government is the proper one to consider the advisability of a change. I concur in the conclusion reached by Mr. Justice Long.

Grant, Ch. J., and Montgomery, J., concurred.

Moore, J., dissenting:

I do not reach the same conclusion in this case as Mr. Justice Long. It is doubtless true the authorities cited by him tend to sustain the conclusion reached by him, but a careful examination of them shows that the question involved here was not directly involved in the cases cited, while reason, as it seems to me, sustained by a very respectable weight of authority, reaches a conclusion more in keeping with the trend of modern thought. The citation made from Cushing is taken from a chapter headed "Legislative Assemblies," and the learned author is discussing only the question of who may be elected as members of legislative assemblies. As we shall see later, in this state that question is settled by a constitutional provision that the members of the legislature must be electors. Justice Cooley, in his *Principles of Constitutional Law*, uses the language cited. He does not discuss the question at all, but contents himself with citing the case of *State ex rel. Off v. Smith*, 14 Wis. 497. A reference to the case cited shows that the only question was whether one who was an alien could be elected to the office of sheriff, and it was held that no one but a citizen could be elected to that office, and that the powers and functions of government could be exercised only through the agency of persons who were citizens of the government. The same question was involved in *State ex rel. Schuet v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, but in the latter case it was held that, though the person elected was an alien when the election was held, as he was naturalized before his term of office began the election was not void, and he could hold the office. These cases should be regarded as au-

thority only upon the question which is decided, especially in view of the fact that the same court held in *Re Goodell*, 39 Wis. 232, 20 Am. Rep. 42, that women could not be admitted to the bar of that court, while in the case of *Re Leach*, 134 Ind. 667, 34 N. E. 641, it is said: "If the right [to be admitted to practice law] is not denied by the Constitution and laws of the state, we should next inquire if it is denied by that part of the common law made by the Constitution a part of the law of the state. We have searched in vain for any expression from the common law excluding women from the profession of the law." We shall see later that the practice in this state has been in unison with the Indiana case. In *Wilson v. Newton*, 87 Mich. 495, 49 N. W. 869, the only question involved was whether a woman could be appointed deputy county clerk. It was not necessary to the decision of that question that the court should express its opinion of another question which was not before it, and that portion of the opinion may be regarded as *dictum*. The court unanimously held that women were not disqualified from holding the office of deputy county clerk. Inasmuch as the deputy county clerk in the absence of the clerk may act for and in his place, we do not think it can be assumed what the court would have decided if the other question had been before it. In *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239, the question was whether an unmarried woman was entitled to be examined for admission as an attorney at law, and the question was answered in the negative. This court held later that a woman could not be appointed to the office of notary public. *Women as Notaries Public (Opinion of the Justices)* 150 Mass. 586, 6 L. R. A. 842, 23 N. E. 850. Both of the Massachusetts cases are contrary to the well-settled practice in this state, as will appear later, as well as the holding in many other states.

The disqualification imposed upon women at the common law was incident to the prevailing order of society, whose theory it was that the functions of womanhood were limited to the domestic sphere, and that she could have no legal existence apart from her husband. She could not engage in business on her own account, nor make a binding contract without his consent. Her time and her earnings belonged to him, and it was said, because of the delicacy of her nature, she was unfitted for the activities pursued by men. Under the common law an unmarried woman had no redress for wrongs against her purity. She could be slandered without a right to bring an action for slander. Upon marriage her person as well as her property was given over to her husband. He might beat her, and she could not complain. She was the victim of his will, and had such rights only as he chose to give her. Under the chapter headed "Legislative Assemblies," Cushing, *Law & Practice of Legislative Assemblies*, p. 24, it is said: "The same descriptions of persons, namely, minors, idiots and lunatics, women, and aliens, who have already been mentioned as excluded from the

right of suffrage by the common political law, are also prohibited, and for the same reasons, from being elected to any political office whatever. Such persons consequently cannot be members of a legislative assembly." The reasons assigned for these disqualifications are, in the case of infants, the same general ground on which they are prohibited from doing any other legal act, namely, their presumed want of capacity. When they attain their majority the incapacity ceases and the disqualification ends. Idiots and lunatics are also excluded for the same reason,—want of capacity. As to the former the disability is perpetual, because the want of capacity is perpetual. As to lunatics, the disqualification ceases during lucid intervals. Aliens are disqualified because they are not supposed to have knowledge of our institutions. But when they become naturalized the disqualification ends. But it is now said that though woman is no longer disqualified, for want of intelligence or ability, to make contracts or to intelligently perform all the duties of citizenship, they, "being destined by the law of their sex for a state of existence purely domestic, are therefore incapable of deciding upon those interests which are involved in questions of political suffrage" (Cushing, *Law & Practice of Legislative Assemblies*, p. 15); and so she is to continue to be classed with children, idiots, lunatics, and aliens. As the reason stated is so contrary to what we see daily in our contact with pure, refined, intelligent, and capable womanhood, the rule of the disqualification ought to pass with the reason of the rule, unless the law is so firmly established that it remains for the people to act by an expression of their will in the written organic law. As we shall see later, they have so expressed themselves upon the question of suffrage, but, as I shall endeavor to show, they have not precluded woman from holding certain of the offices at their bestowal.

In writing of the common law, Justice Cooley, in his *Constitutional Limitations* (p. 33), says: "Many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism. The feudal system, which was essentially a system of violence, disorder, and rapine, gave birth to many of the maxims of the common law; and some of these, long after that system had passed away, may still be traced in our law, especially in the rules which govern the acquisition, control, and enjoyment of real estate. The Criminal Code was also marked by cruel and absurd features, some of which have clung to it with wonderful tenacity, even after the most stupid could perceive their inconsistency with justice and civilization." With all its harshness towards woman, it is doubtful if the common law ever went to the extent of saying that when an office, the duties of which she was fitted to perform, was offered to a woman, she could not hold it, simply because she was a woman. England has had many rulers who were women. All 47 L. R. A.

history does not record a more brilliant reign of any sovereign than the intelligent and capable Queen Victoria. Women have held almost all the offices of the Kingdom. 3 Campbell, Chief Justices, 108. Anne, countess of Pembroke, held the office of sheriff of Westmoreland, and exercised the duties thereof in person, at a time when the sheriffs held court and exercised judicial power. Co. Litt. 326; 8 Bacon, Abr. 661; 41 Alb. L. J. 244. Eleanor was appointed lord keeper of England, and performed the duties of lord chancellor in person. She sat as judge, performing the duties of lord chancellor, judicial as well as ministerial, for nearly a year. 1 Campbell, Lives Ld. Ch. 134; 41 Alb. L. J. 244; *Schuchardt v. People ex rel. Hall*, 39 Am. Rep. 36, note, 99 Ill. 501. Woman was allowed to be the keeper of a castle. *Lady Russell's Case*, Cro. Jac. 18. So, an overseer of the poor (*King v. Stubbs*, 2 T. R. 395); governor of a workhouse (2 Ld. Raym. 1014); keeper of a prison (*Lady Braughton's Case*, 3 Keb. 32, 151); commissioner of sewers (*Countess of Warwick's Case*, Callis, Sewers, 4th ed. *250); and marshal of a court (41 Alb. L. J. 245). Women have been appointed to, and successfully filled, the positions of postmasters, pension agents, and other positions under the Federal government, though the Constitution and statutes did not in express terms authorize her appointment to any of these positions. No one has suggested that because of the common law she was disqualified. The validity of these appointments, so far as we know, has never been questioned. In some of the states it is held that a woman cannot, because of the common-law disability, hold any office,—not even the office of notary public,—unless the right to do so is expressly conferred upon her. *State ex rel. Peters v. Davidson*, 92 Tenn. 531, 20 L. R. A. 311, 22 S. W. 203; *Women as Notaries Public* (*Opinion of the Justices*) 150 Mass. 586, 6 L. R. A. 842, 23 N. E. 850. In this state the governor is not authorized in express terms to appoint women to the office of notary public, though the right to do so was given by implication in 1887; and yet it is a matter of common knowledge that for years prior to 1887 many of them were appointed notaries public, and discharged the duties of that office, without their right to do so having been questioned. See *United States v. Bixby*, 10 Biss. 520, 9 Fed. Rep. 78. The office of school inspector is named in the Constitution, and though for that reason, as she is not an elector, it has been held that in townships women cannot vote for the candidate for that office (*Belles v. Burr*, 76 Mich. 1, 4 L. R. A. 734, 43 N. W. 24), the office itself has been held by women without question for years. She has also held the office of school examiner and school commissioner, while in many counties of the state there are women deputy county clerks and deputy registers of deeds. Prior to 1895 in this state the sex of the persons who might be admitted to practise law was not referred to in the statute which provided for the admission of persons to practise law, but long prior to that time women

were admitted to the practice of the law, through having obtained the requisite degree from the Michigan University, and also upon examination in open court.

Up to this point the discussion does not directly determine the question involved in this case, to wit, May the people elect to a constitutional office one who possesses all the requisite qualifications (when no qualifications for the office named are mentioned either in the Constitution or the statutes), except that she is a woman? To dispose of this question, it becomes necessary to inquire what limitations the people have imposed upon themselves by the adoption of a written Constitution. In discussing the formation and amendment of state Constitutions, Justice Cooley makes use of this language (Cooley, Const. Lim. 48): "Many other things are commonly found in these charters of government; but since, while they continue in force, they are to remain absolute and unchangeable rules of action and decision, it is obvious that they should not be made to embrace within their iron grasp those subjects in regard to which the policy or interest of the state or of its people may vary from time to time, and which are therefore more properly left to the control of the legislature, which can more easily and speedily make the required changes. In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it. It is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." Another very able writer says: "This, then, is the office of a written constitution: To delegate to various public functionaries such of the powers

of government as the people do not intend to exercise for themselves; to classify these powers according to their nature, and to commit them to separate agents; to provide for the choice of these agents by the people; to ascertain, limit, and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives." Hulbert, Human Rights; Cooley, Const. Lim. 48, note.

The people of this commonwealth, in framing and adopting their Constitution (art. 7, § 1), provided that male persons over the age of twenty-one years, possessing the other qualifications mentioned, should be electors; thereby establishing what the qualification of an elector should be. The Constitution is silent as to what the qualifications shall be of some of the officers, provision for whose election is made in the Constitution, while it provides what the qualifications of certain other officers should be. Applying the reasonable rule of construction to this situation, does it not clearly appear that, where the people have not put into the Constitution the qualifications required to make one eligible to a given office, they have reserved the right to the people, speaking through those whom they have designated as electors, to elect those persons whom they will, subject only to the rule that the person so elected shall be competent to discharge the duties of the office? The Constitution provides that senators and representatives in the state legislature must be electors (art. 4, § 5), and that the governor and lieutenant governor must be citizens (art. 5, § 2). Township officers, including school inspectors, are named in the Constitution (art. 11, § 1). Prior to 1879 the statute provided in relation to township officers that "no person except an elector as aforesaid shall be eligible to any elective office contemplated in this chapter." Rev. Stat. 1846, p. 95, § 103. Neither the Constitution nor the statute requires that the person elected prosecuting attorney shall be an elector. Daniel Goodwin was elected judge of a circuit in which he did not reside. It was claimed that because of his nonresidence in the circuit he was disqualified from holding the office, and an action was brought to determine his right to exercise the functions of circuit judge. In deciding the case, Justice Campbell, among other things, said: "The words of the Constitution not expressly requiring residence, it becomes necessary to determine whether such a requirement is to be drawn from the context, or from any recognized principles of law or usage. . . . Senators and representatives are required to be 'qualified electors in the respective counties and districts they represent. . . . We have here, then, proof that in such cases as were doubtful it was deemed necessary to declare distinctly that incumbents should be residents. There being no such declaration in regard to circuit judges, we must find the restriction, if it exists, in the necessary incidents of the office, or in some binding usage." It was held that Judge Goodwin was not disqualified.

People ex rel. Royce v. Goodwin, 22 Mich. 496. In *Barker v. People*, 3 Cow. 703, 15 Am. Dec. 322, the following language is used: "Eligibility to public trusts is claimed as a constitutional right which cannot be abridged or impaired. The Constitution establishes and defines the right of suffrage, and gives to the electors and to various authorities the power to confer public trusts. It declares that ministers of religion shall be ineligible to any office; it prescribes in respect to certain offices particular circumstances, without which a person is not eligible to those stations; and it provides that persons holding certain offices shall hold no other public trust. Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution, wholly free to confer public stations upon any person according to their pleasure. The Constitution giving the right of election and the right of appointment,—these rights consisting essentially in the freedom of choice, and the Constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle by any express terms of the Constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution. Eligibility to office therefore belongs not exclusively or especially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever, not excluded by the Constitution." In *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356, it is said: "The theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone; and that in the protection of these rights all are equal before the law." In *Re Leach*, 134 Ind. 671, 21 L. R. A. 701, 34 N. E. 642, it is said: "We are not to forget that all statutes are to be construed as far as possible in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law."

It is urged that at the time the Constitution of the state was adopted no one supposed woman would want to hold an office, and the constitutional provision must be construed in the light of that supposition. A like proposition in relation to the construction to be given to a statute is discussed in *Re Hall*, 50 Conn. 131, 47 Am. Rep. 625. This was an application by a woman to be admitted to practice law. The language used by the court is also pertinent to other propo-

sitions involved in this case. It is as follows: "It is not contended, in opposition to the application, that the language of this statute is not comprehensive enough to include women, but the claim is that at the time it was passed its application to women was not thought of, while the fact that women have never been admitted as attorneys, either by the English courts or by any of the courts of this country, had established a common-law disability, which could be removed only by a statute intended to have that effect. It is hardly necessary to consider how far the fact that women have never pursued a particular profession or occupied a particular official position, to the pursuit or occupancy of which some governmental license or authority was necessary, constitutes a common-law disability for receiving such license or authority, because here the statute is ample for removing that disability if we can construe it as applying to women; so that we come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it. And upon this point we remark, in the first place, that an inquiry of this sort involves very serious difficulties. No one would doubt that a statute passed at this time in the same words would be sufficient to authorize the admission of women to the bar, because it is now a common fact, and presumably in the minds of legislators, that women in different parts of the country are, and for some time have been, following the profession of law. But, if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute we are now considering was passed, it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men? We know of no distinction in respect to this rule between the case of a statute and that of a constitutional provision. When our state Constitution was adopted (1818), it was provided in it that every elector should be 'eligible to any office in the state,' except where otherwise provided in the Constitution. It is clear that the convention that framed, and probably all the people who voted to adopt, the Constitution, had no idea that black men would ever be electors, and contemplated only white men as within any possible application of the provision, for the same Constitution provided that only white men should be electors. But, now that black men are made electors, will it do to say that

they are not entitled to the full rights of electors in respect to holding office because an application of the provision to them was never thought of when it was adopted? Events that gave rise to enactments may always be considered in construing them. This is little more than the familiar rule that in construing a statute we always inquire what particular mischief it was designed to remedy. Thus, the Supreme Court of the United States has held that in construing the recent amendments of the Federal Constitution, although they are general in their terms, it is to be considered that they were passed with reference to the exigencies growing out of the emancipation of the slaves, and for the purpose of benefiting the blacks; citing the *Slaughter-House Cases*, 16 Wall. 67, 21 L. ed. 405; *Strauder v. West Virginia*, 100 U. S. 306, 25 L. ed. 665. But this statute was not passed for the purpose of benefiting men, as distinguished from women. It grew out of no exigency caused by the relations of the sexes. Its object was wholly to secure the orderly trial of causes, and the better administration of justice. Indeed, the preamble to the first statute providing for the admission of attorneys states its object to be 'for the well ordering of proceedings and pleas at the bar.' . . . We are not to forget that all statutes are to be construed, as far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law. We have some noteworthy illustrations of the recognition of women as eligible or appointable to office under statutes of which the language is merely general. Thus, women are appointed in all parts of the country as postmasters. The act of Congress of 1825 was the first one conferring upon the postmaster general the power of appointing postmasters, and it has remained essentially unchanged to the present time. The language of the act is that 'the postmaster general shall establish postoffices and appoint postmasters.' Here women are not included, except in the general term 'postmasters,' a term which seems to imply a male person; and no legislation from 1825 down to the present time authorizes the appointment of women, nor is there any reference in terms to women until the revision of 1874, which recognizes the fact that women had already been appointed, in providing that 'the bond of any married woman who may be appointed postmaster shall be binding on her and her sureties.' Some of the higher grades of postmasters are appointed by the President, subject to confirmation by the Senate, and such appointments and confirmations have repeatedly been made. The same may be said of pension agents. The acts of Congress on the subject have simply authorized 'the President, by and with the advice and consent of the Senate, to appoint all pension agents, who shall hold their offices for the

term of four years, and shall give bond,' etc. At the last session of Congress a married woman in Chicago was appointed, for a third term, pension agent for the state of Illinois, and the public papers stated that there was not a single vote against her confirmation in the senate. Public opinion is everywhere approving of such appointments. They promote the public interest, which is benefited by every legitimate use of individual ability, while mere justice, which is of interest to all, requires that all have the fullest opportunity for the exercise of their abilities. These cases are the more noteworthy as being cases of public offices to which the incumbent is appointed for a term of years upon a compensation provided by law, and in which he is required to give bond."

A case which is in point is that of *State ex rel. Crow v. Hostetter*, 137 Mo. 636, 38 L. R. A. 208, 39 S. W. 270. The office of county clerk is named in the Constitution of that state. The Constitution limits the right to vote to males. It also provides that certain officers must be male citizens, and others electors. The Constitution was silent as to the qualifications of the office of county clerk. At a general election held in 1896, Mrs. Wheeler was elected to the office of county clerk. It was claimed there, as here, "that, in the absence of some constitutional or statutory provisions on the subject, a woman is eligible to hold a public office." Many of the authorities cited in this case were cited in that case. The court held that Mrs. Wheeler was not disqualified, and that her election was valid. In *Wright v. Noell*, 16 Kan. 601, the question involved was whether a woman was eligible to the office of county superintendent of public instruction. In a very able opinion by Justice Brewer, it is said: "Is a woman eligible to the office of county superintendent? In favor of it is the fact that the Constitution contains no express disqualification of her, and no affirmative statement of the qualifications therefor; leaving, as is claimed, the people free to choose whomsoever they will. Against it is the fact that the right to vote is limited to males, implying, as is said, that a *fortiori* the right to hold office is likewise so restricted, and also the fact that at the time of the adoption of the Constitution there was no serious thought of woman's holding the office, so that the framers thereof could not have intended by that instrument to authorize it. As between these two lines of argument, we yield our assent to the former. 'All political power is inherent in the people,' and all powers not delegated by the Constitution remain with them. These truths, which lie at the foundation of all republican governments, are distinctly asserted in our own bill of rights, §§ 2, 20. By the Constitution the people have granted certain powers, and to that extent have restricted and limited their own action. But beyond those restrictions, and except as to matters guarded by absolute justice and the inherent rights of the individual, the power of the people is unlimited. There is clearly no question of absolute jus-

tice or individual rights involved, so that we must look alone to the Constitution to ascertain what restrictions the people have placed upon their power of choice of this officer. These restrictions may be as to the persons to make the choice, or as to the persons who may be chosen. Both of these restrictions were presented to the attention of the framers of the Constitution in reference to the various offices created by that instrument, and both imposed as to some offices. Thus, generally, the power to choose officers was committed to the male adults,—at first to the white male adults. And as to some officers the power to choose was still further restricted. Thus, as to some, such as district judges, locality was an added restriction. (Art. 3, § 5.) The reporter and clerk of this court are chosen by the justices. (Art. 3, § 4.) The state printer is chosen by the legislature. (Art. 15, § 4, as amended in 1868.) And in all these cases, where the people have restricted their power by prescribing the qualifications of those to make the choice of officers, they cannot, except by an amendment of the same instrument, add to or take from those restrictions. They have also prescribed certain qualifications for, and imposed certain restrictions as to, those who may be chosen. Thus, one who gives or accepts a challenge to fight a duel, or who knowingly carries a challenge, is ineligible to any office. (Art. 5, § 5.) Any one who bribes an elector to procure his election may not hold the office to which he was elected. (Art. 5, § 6.) An essential to the holding of a judicial office is residence in the county, township, or district for which the officer was elected. (Art. 3, § 11.) To be a member of the legislature, one must be at the time of his election a qualified voter of, and resident in, the county or district for which he is chosen. (Art. 2, § 4.) Hence, by this, only male adults can be elected to the legislature. None of these qualifications prescribed by the Constitution may be disregarded. They are restrictions self-imposed by the people upon their otherwise unlimited freedom of choice. If they have, as to certain offices, seen fit to restrict their freedom of choice by express words, is it not a fair inference that where the Constitution is silent they intended no restriction? In the discussion, the learned justice refers to the Wisconsin cases referred to in the opinion of Justice Long, which quote approvingly from the Massachusetts court, and says, as we have before attempted to show: "The cases and questions are not alike. It may well be said that the idea of an independent popular government implies that all its functions are to be exercised by citizens, and that it needs no express words to exclude aliens, because the inclinations, interests, and duties of the latter are presumptively with the nation of which they are citizens, and antagonistic anywhere else. But in the case at bar the inclinations, interests, and duties of both the sexes are in the same direction. Both are alike citizens. There is no antagonism. Whether females shall vote or hold office is merely a question of internal public

policy, and not a matter affecting the life and integrity of the nation or its relation with other states. It is a very common thing for offices to be filled outside of the electoral body." The justice then refers to the argument that at the time of the adoption of the Constitution there was no serious thought of women holding the office, and therefore the framers of the Constitution could not have intended they should, and concludes that such a doctrine is dangerous, "and the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted and none omitted without a design for so doing." It was held that women were eligible to the office. In *Von Dorn v. Mengedohi*, 41 Neb. 535, 59 N. W. 800, it was held that a woman might hold the office of notary public; the holding being contrary to that of the Massachusetts court. In *State ex rel. Hahn v. Gorton*, 33 Minn. 345, 23 N. W. 529, it was held that a woman might be elected to the office of county superintendent of schools, though she could not vote for a candidate for that office. In *Re Thomas*, 16 Colo. 441, 13 L. R. A. 538, 27 Pac. 707, on the application of a woman to be admitted to practice law, the court cites the cases from Wisconsin and Massachusetts, and declines to follow them.

The statutes of this state confer upon woman the right to practice law. She may represent her client in the most important litigation in all the courts of the state, and no one can dispute her right. She may defend a person charged with murder. Can she not prosecute one charged with the larceny of a whip? To say she cannot seems illogical. The state, by granting her a certificate to practice law, has held her out to all individuals as a person competent to do so. Individuals may employ her, and the courts must recognize her employment. If the people see fit, by electing her to an office the duties of which almost wholly pertain to the practice of the law, to employ her to represent them in their litigation, why should not the courts recognize the employment? I confess I can see no reason why they should not. It is conceded that, as there is no constitutional inhibition which would bar a woman from holding the office, the legislature could authorize her to do so. If this is so, have not the legislature, by a fair implication, authorized women to fill the office of prosecuting attorney? We have already seen the statutes of the state allow women to be admitted to practice law. Comp. Laws 1897, § 1121. When a person is admitted to practice, that person is "authorized to practice in every court of law in this state." Id. § 1127. Does this statute put any limitation upon the kind of cases the person so admitted may try, based upon a question of sex? Does it say the lawyer may represent individuals, but cannot represent municipalities, and must not repre-

sent the people of the state? I think these questions must be answered in the negative. The legislature has provided that woman may practice law, and avail herself of the honor and profit of accepting all legitimate legal business which is offered her, criminal as well as civil. By so doing has not the legislature said she may have the people of the state as her client, if they see fit to employ her? It is not necessary, however, to decide the case by an affirmative answer to this question. I think I have shown by the great weight of authority that, where the Constitution and the statutes are silent as to the qualifications for a given office, the people may elect whom they will, if the person so elected is competent to discharge the duties of the office. The duties of the office of prosecuting attorney are prescribed by statute. Those duties are such as can, in the main, be performed only by a person learned in the law. None of them are of such a character as to preclude one from their performance simply because of sex. Mrs. Abbott is a citizen of the state, upward of twenty-one years of age. She is a graduate of the law department of the University of Michigan. She is duly authorized to practice law in all the courts of this state. There can be no question in the minds of anyone who heard the very able oral argument made by her in this case about the entire competency of Mrs. Abbott to discharge the duties of this office. I think the respondent is eligible to hold the office, and that the information in the nature of a quo warranto of the attorney general should be dismissed.

MICHIGAN TELEPHONE COMPANY,
Appt.,
v.

City of BENTON HARBOR.

(.....Mich.....)

1. The right of a telephone company to place its lines in the streets under Acts 1888, p. 131, § 4, is not subject to the consent of the municipality, but the sole authority of the latter is the proper exercise of the police power to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner the company may erect its poles and stretch its wires, so as to accomplish this result.

NOTE.—As to right to place telephone poles in a street, see *Marshfield v. Wisconsin Teleph. Co.* (Wis.) 44 L. R. A. 565.

As to police power over telegraph and telephone lines, see *American Rapid Telegr. Co. v. Heas* (N. Y.) 13 L. R. A. 454, and note.

As to telegraph or telephone poles as an additional burden on street, see *People v. Eaton* (Mich.) 24 L. R. A. 721, and note.

For municipal regulation of poles and wires as a nuisance, see note to *State v. New Orleans City & L. R. Co.* (La.) 89 L. R. A. on page 619.

For burden by state authorities on interstate telephone and telegraph companies, see *Postal Telegr. Cable Co. v. Baltimore* (Md.) 24 L. R. A. 161, and note. (This case was affirmed in 156 U. S. 210, 39 L. ed. 399.)
47 L. R. A.

2. No repeal of the provision of the telephone act of 1883, giving permission to use the streets without consent of the municipality, is made by Pub. Acts 1895, No. 215, chap. 22, § 14, which in general terms gives the common council authority to regulate or prohibit the use of signs, awning posts, and telegraph and other poles in or over the streets.

(October 17, 1899.)

A PPEAL by complainant from a decree of the Circuit Court for Berrien County in favor of defendant in a suit to enjoin defendant from interfering with the erection of telephone lines in the defendant city. *Reversed.*

The facts are stated in the opinion.

Mr. N. A. Hamilton, with Messrs. Wells, Angell, Boynton, & McMillan, for appellant:

The evidence shows a grant of permission by the village in 1881 to use the streets for telephone purposes.

The permission, the establishment of a telephone plant in reliance thereon, the maintenance for sixteen years of service, the accepted offer of the use of the poles for city purposes, the furnishing of the telephones to the city at reduced rates, constitute a contract which the city is estopped to question, whose obligation it is forbidden to impair by the state and Federal Constitutions.

Acceptance of such permission and action in reliance upon it give rise to a contract within the contract clause of the Constitutions.

Detroit v. Mutual Gas Co. 43 Mich. 594, 5 N. W. 1039; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 615, 33 N. W. 749; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Saginaw v. Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. Rep. 159; *Africa v. Knoxville*, 70 Fed. Rep. 729; *Arcata v. Arcata & M. River R. Co.* 92 Cal. 639, 28 Pac. 676; *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526, 15 So. 157; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *Quincy v. Bull*, 106 Ill. 337; *State, Hudson Teleph. Co. Prosecutor, v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123.

The rights given to the grantee under the contract are assignable, and have passed to the complainant.

Joy v. Jackson & M. Pl. Road Co. 11 Mich. 155; *People ex rel. Maybury v. Mutual Gaslight Co.* 38 Mich. 154; *Detroit v. Mutual Gas Co.* 43 Mich. 597, 5 N. W. 1039; 3 How. Stat. § 4904e.

Impairment of the obligation of a contract, whether by a state law or by a city ordinance, is repugnant to the contract clause of the Constitutions.

Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed. Rep. 159; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. Rep. 218; *Central Trust Co. v. Citizens' Street R. Co.* 82 Fed. Rep. 1; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup.

Ct. Rep. 653; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 694, 42 L. ed. 630, 18 Sup. Ct. Rep. 223.

After a lapse of years, the expenditure of large amounts of money by the companies, the dealings between the city and the companies, the city is now estopped to deny the rights claimed by complainant.

Atlanta v. Gate City Gaslight Co. 71 Ga. 106; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 566, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653.

The act under which complainant is organized gives it the right to extend its lines in Benton Harbor, as it proposed to do when stopped by the city.

Communication by telegraph is commerce. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Communication by telephone is likewise commerce, but commerce on a much more extended scale.

Southern Bell Teleph. & Teleg. Co. v. Richmond, 78 Fed. Rep. 588.

By the act under which it is incorporated it is endowed with power to enter upon all the streets, highways, and public places of the state for the purpose of erecting the poles necessary for the proper discharge of its business.

Municipalities are powerless to prevent such occupation, although such bodies have the right to provide, by reasonable rules and regulations, in what way its lines of poles and the fixtures attached thereto shall be erected.

People v. Eaton, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145; *Atlantic City Waterworks Co. v. Consumers' Water Co.* 44 N. J. Eq. 427, 15 Atl. 581; *State ex rel. Bell Teleph. Co. v. Flad*, 23 Mo. App. 185; *Citizens' Street R. Co. v. Memphis*, 53 Fed. Rep. 715; *Clinton v. Cedar Rapids & M. River R. Co.* 24 Iowa, 455.

The power thus granted to the companies organized under the act of 1883 comes from the state. It is competent for the state to grant such rights irrespective of any action taken on the part of a city, even though the general control of its streets is possessed by the city.

Grand Rapids v. Grand Rapids Hydraulic Co. 66 Mich. 615, 33 N. W. 749; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157.

The city of Benton Harbor has no power to override the statute of 1883. The law under which it is organized does not repeal the law under which complainant is organized.

Re Bushey, 105 Mich. 64, 62 N. W. 1036; *Taggart v. Detroit*, 71 Mich. 92, 38 N. W. 714; *Merrill v. Kalamazoo*, 35 Mich. 215; *Brown v. McCormick*, 28 Mich. 215; *Connors v. Carp River Iron Co.* 54 Mich. 168, 19 N. W. 938; *Thompson v. Alameda County Supers.* 111 Cal. 553, 44 Pac. 230; *Cooley*, Const. Lim. 6th ed. p. 182; *Dill. Mun. Corp.* 4th ed. §§ 86, 87.

Mr. G. M. Valentine, with *Mr. F. H. Ellsworth*, for appellee:

No contract relation exists between Benton Harbor and the complainant.
47 L. R. A.

The laws of this state in regard to cities and villages uniformly require that a record shall be made of all official action. When the law requires such records to be kept they are the only lawful evidence of the acts of the council to which they refer.

Moser v. White, 29 Mich. 59; *Powers' Appeal*, 29 Mich. 504; *Steckert v. East Saginaw*, 22 Mich. 104; *Stevenson v. Bay City*, 26 Mich. 44.

Conjecture is inadmissible where the statute requires a record.

Yelverton v. Steele, 36 Mich. 62; *Farrington v. Turner*, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544.

A grant of a franchise, public in nature, like that of the Telephone & Telegraph Construction Company, is personal to the grantee, and cannot be alienated except by the consent of the granting power.

25 Am. & Eng. Enc. Law, p. 751; *Croswell*, Electricity, § 158; *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 1; *Atlantic & P. Teleg. Co. v. Union P. R. Co.* 1 Fed. Rep. 745; *United States v. Western U. Teleg. Co.* 50 Fed. Rep. 28.

Defendant is not estopped from preventing complainant from extending its lines by having suffered complainant to use the streets.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Doyle v. Misher*, 42 Mich. 332, 3 N. W. 968; *Atty. Gen. v. Hanchett*, 42 Mich. 436, 4 N. W. 182; *Eaton v. Walker*, 76 Mich. 579, 6 L. R. A. 102, 43 N. W. 638.

The defendant city has the right to control its streets.

The right to construct a telegraph and telephone line in and upon the streets or highways must be derived from express grant of authority. It cannot exist from implication merely.

25 Am. & Eng. Enc. Law, p. 752, title *Telegraphs & Telephones*.

If two inconsistent acts be passed at different times the last is to be obeyed; and if obedience cannot be observed without derogation from the first, it is the first which must give way.

Devine v. Cook County Comrs. 84 Ill. 590; *People v. Bussell*, 59 Mich. 109, 26 N. W. 306.

A charter or special act passed subsequent to the general law and plainly irreconcilable with it will, to the extent of the conflict, operate as a repeal of the law by implication.

Dill. Mun. Corp. § 88; *People v. Hanrahan*, 75 Mich. 612, 4 L. R. A. 751, 42 N. W. 1124; *Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56; *Sherlock v. Stuart*, 96 Mich. 201, 21 L. R. A. 580, 55 N. W. 845.

If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases; and such provision is not a seizure of property, nor a deprivation of property.

Robison v. Haug, 71 Mich. 42, 38 N. W. 668; *Sherlock v. Stuart*, 96 Mich. 197, 21 L. R. A. 580, 55 N. W. 845; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Crowley v.*

Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

The telephone statute above referred to contains the proviso: "That the same shall not injuriously interfere with other public uses of the said streets, etc." The city authorities are the ones to decide that question.

4 *Thomp. Corp.* § 5480.

The complainant's rights, if any, are subject to valid exercise of the police power by the city.

Cooley, Const. Lim. 708; 8 Am. & Eng. Enc. Law, title *Franchises*, p. 621; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Boston Beer Co. v. Massachusetts*, 97 U. S. 32, 24 L. ed. 991; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *New Orleans Gaslight Co. v. Louisiana, Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

Acts of Congress relating to interstate commerce, and the congressional acts relating to post roads, are subject to the general police powers of the state or municipality exercised for the public safety.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Patterson v. Kentucky*, 97 U. S. 507, 24 L. ed. 1117.

A telegraph company engaged in domestic and interstate business is subject to such reasonable police regulations as the state may impose for securing convenience to the place.

American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454, 26 N. E. 919; *Electrio Improv. Co. v. San Francisco*, 45 Fed. Rep. 593, 13 L. R. A. 131; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Police power cannot be bargained away or legislated away.

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; *Com. v. Alger*, 7 Cush. 84; *Brick Presby. Church v. New York*, 5 Cow. 540.

Where the legislature has given a company a general grant along the streets of the city, still the city, in the exercise of its police powers, can supervise and control the erection and maintenance of its poles, and it has been held that it may require a license for maintaining the poles upon the streets.

Monongahela City v. Monongahela Electric Light Co. 12 Pa. Co. Ct. 529; *Dill. Mun. Corp.* 698; *Philadelphia v. Western U. Teleg. Co.* 11 Phila. 321; *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 10 L. R. 497, 26 N. E. 447.

Grant, Ch. J., delivered the opinion of the court:

This case in its facts differs in only one particular from that of the same complainant against the city of St. Joseph, 80 N. W. 383, the opinion in which is filed simultaneously 47 L. R. A.

ously with this. In that case the records of the common council showed a resolution adopted granting permission to the Telephone & Telegraph Construction Company, while in this case the records of the common council do not show that such permission was granted. These two cities are contiguous to each other,—separated only by a river. The work of the construction company in each was begun and carried on at the same time, and the construction company and its assignee, the complainant, have ever since been in the enjoyment of the same rights in Benton Harbor as in St. Joseph. The complainant presented a petition to the common council of Benton Harbor couched substantially in the same language, and asking for the same privileges as it presented to the common council of the city of St. Joseph. The council denied the prayer of the petition. The court denied relief in this case while granting it in the other, because the records of the council did not show the grant of permission which it held was essential to the creation of a contract. The complainant, at the request of the council, furnished for the use of the city one telephone free of charge, and two other telephones at rates less than those charged to other subscribers for like service, which rates have been paid by the city. In the year 1893 complainant, on application of the city, granted permission to the city to carry its fire-alarm wires on the company's poles, which permission was accepted by resolution adopted by the council. The complainant gave evidence tending to show that the construction company in February, 1881, presented a petition to the common council, and that it was notified by the clerk that permission had been granted. The city clerk testified that he could find no papers of any kind in his office, presented to the council from 1881 to 1887.

Complainant contends that a contract exists between it and the city, arising out of the establishment of its system by the permission of the municipality, and the maintenance thereof for many years, and that the defendant is now estopped to deny such contract. In the view we take of the case, it is unnecessary to determine this question. Section 4 of the act (Acts 1883, p. 131) providing for telephone and messenger service companies reads as follows: "Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets, and highways, and across or under any of the waters in this state, with all necessary erections and fixtures therefor: provided, that the same shall not injuriously interfere with other public uses of the said places, streets, and highway, and the navigation of said waters; to construct, provide, and furnish instruments, devices, and facilities for use in the transmission of such messages, and to construct, maintain, and operate telephone exchanges and stations, and generally to conduct and carry on the business of providing and supervising com-

munication by telephone, and also the business of furnishing messenger service in cities and towns." 3 How. Anno. Stat. § 3718d. The statute also requires every such company to supply the public with telephones and telephonic service, to operate a telephone exchange, and to receive and transmit messages without discrimination, upon payment or tender of the usual or customary charges. Id. § 3718i. The complainant is engaged in interstate commerce, as its business extends into other states. The state has control over its public streets and highways, and may authorize their use for the purposes of travel and commerce without the permission of the municipalities. The state does not surrender to municipalities entire control over its streets and highways. They are under legislative control. Cooley, Const. Lim. 588. "They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon their use are only such as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods." *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145, and authorities there cited. "No city or village has the power, by ordinance or by-law, to make the general laws of the state inoperative." *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157. Where a water company is authorized by its charter to lay pipes and distribute water, it has a right of access to the streets for that purpose, to be exercised in harmony with the public convenience. The city may regulate its exercise so as to prevent injury to other interests, but cannot interfere with the reasonable exercise of such right. *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749; *Atlantic City Waterworks Co. v. Consumers' Water Co.* 44 N. J. Eq. 427, 15 Atl. 581. Held, that an electric telegraph "is indispensable as a means of intercommunication, but especially is it so in commercial transactions. . . . Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed." *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708. The same statement now applies to the use of the telephone. It is as indispensable to commerce as is the telegraph. Telephone companies are subject to the same rules as common carriers. *Delaware & A. Teleg. & Teleg. Co. v. Delaware Postal Teleg.-Cable Co.* 3 U. S. App. 30, 50 Fed. Rep. 677, 2 C. C. A. 1. The same rule is held in *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Intern. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, holding that telegraphic communications are commerce, and that the state cannot impose a tax upon the occupation or business, or exact a license. The same rules apply to telephone companies. *Southern Bell Teleg. & Teleg. Co. v. Richmond*, 78 Fed. Rep. 858. Where the statute provided that "telephone companies 47 L. R. A.

organized under its provisions for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along and across any of the public roads, streets, and waters of this state, in such manner as not to inconvenience the public in the use of such roads, streets, and waters" (Rev. Stat. 1879, § 879), held, that the municipal authorities could regulate by ordinance the location, kind of posts, piers, and abutments, and height of wires, but that no other restrictions could be imposed than those provided by the law. *State ex rel. Bell Teleg. Co. v. Flad*, 23 Mo. App. 185. It will be observed that the act under which complainant is organized does not require the consent of the municipality to the construction of its lines. The reason of this is apparent. The business carried on by these corporations is not local, but extends over and outside the state. Where the business is purely local, the legislature, in authorizing the formation of these corporations, usually provides that it must be with the consent of the municipality. Such is the requirement in the case of tramways. 1 How. Anno. Stat. § 3527. So of street railways. Id. § 3548. So of water companies. Id. § 3115. So of electric-light companies. Id. § 4191.

Evidently it was not the intention of the legislature to permit municipalities to prevent telegraph and telephone companies from extending their business along the public highways and streets of the state. This rule seems practically to be conceded by the learned counsel for the defendant, for they say that the complainant's rights, if it has any, are subject to the valid exercise of the police power of the city. Complainant concedes this to be the law. The learned circuit judge who tried the case also conceded it, but said that the city "was not confined merely to the exercise of its ordinary police powers." Evidently the city desired to impose other conditions, and in furtherance of this desire its council arbitrarily refused to permit complainant to erect its poles and stretch its wires. Such refusal was not based on the inconvenience of the public or the obstruction of its streets. Under this statute the sole authority of the municipality is the proper exercise of the police power, inherent in it, to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner complainant may erect its poles and stretch its wires so as to accomplish this result. It has no authority to impose other conditions. That authority rests in the legislature,—the charter-making power.

It is, however, insisted that act No. 215, Pub. Acts 1895, under which the defendant was incorporated, repeals the telephone act, in so far as it may be held to authorize the use of highways and streets for the erection of poles without the consent of the municipality. Section 14, chap. 22, of that act provides: "They [the council] shall have authority to regulate or prohibit the display,

use, or placing of signs, advertisements, and banners, awning posts, and telegraph, telephone, or light poles in or over the streets." The title of this chapter is, "Streets and Public Grounds," and the above language is found near the middle of the section, which specifies various subjects upon which the council may legislate. Repeals by implications are not favored. To this proposition it is unnecessary to cite authorities. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary. *Merrill v. Kalamazoo*, 35 Mich. 214; *Connors v. Carp River Iron Co.* 54 Mich. 168, 19 N. W. 938. This case forcibly illustrates the danger in holding general laws repealed by implication in granting charters to municipal corporations. Did the legislature intend by the above law for the organization of cities to confer upon those municipalities the power to annul the law in regard to telegraph and telephone companies, and to entirely prohibit the use of the telegraph and the telephone, which have become essential in commercial transactions? Clearly such an intention should not be attributed to the legislature unless the language of the law leads to no other conclusion. We see no difficulty in giving effect to both laws by holding that the later act confers this authority upon municipalities, subject to the general laws of the state in regard to the use of its streets and highways for telegraph and telephone purposes. These municipalities may, under this law, prohibit the erection of these poles in places and in a manner which will injure or incommode the public. This was the view taken by the supreme court of Wisconsin under a similar provision. *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 40, 21 N. W. 828.

The decrees of the court below will be reversed, and decree entered in this court, in accordance with this opinion, directing the common council of the defendant to provide, by ordinance or otherwise, reasonable regulations for the erection of the poles and stretching the wires of the complainant. Complainant will recover the costs of both courts.

The other Justices concur.

PEOPLE of the State of Michigan
v.

Clarence YOUNGS, *Plff. in Err.*

(.....Mich.....)

1. The common-law rule as to what constitutes an attempt to commit an offense is not changed by Comp. Laws 1897, § 11,784, providing for the punishment of every person who shall attempt to commit a crime and do any act towards its commission, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same.

NOTE.—On the question, What constitutes an attempt to commit a crime?—see also *Com. v. Tolman* (Mass.) 3 L. R. A. 747, and *note*; *State* 47 L. R. A.

2. An attempt to break and enter a dwelling house was not made by the fact that a person left his home with revolver and slippers, and traveled 9 miles towards the place where he intended to commit the crime, where he met a person with whom he had planned to commit the crime, and then provided himself with chloroform and loaded his revolver, but was prevented from committing the crime by being arrested.

(*Grant, Ch. J., dissents.*)

(December 12, 1899.)

ERROR to the Circuit Court for Hillsdale County to review a judgment convicting defendant of attempting to break and enter a dwelling. *Reversed.*

The facts are stated in the opinions.

Mr. William C. Chadwick, for plaintiff in error:

Neither the facts charged in the information nor those proved at the trial constitute the offense charged, *viz.*, attempt to commit burglary.

Burglary at common law "is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein."

2 Bishop, *Crim. Law*, § 90; 2 Wharton, *Crim. Law*, § 1531; 2 Am. & Eng. Enc. Law, p. 659.

Hence the gist of the offense at common law is (1) the breaking, (2) the entering, (3) in the night-time, and (4) with intent to commit a felony.

2 Am. & Eng. Enc. Law, pp. 660-669, 686-688.

Under the statute of this state there must be (1) breaking, (2) entering, and (3) intent.

Cole v. People, 37 Mich. 544; *People v. Stewart*, 44 Mich. 484; *Tiffany, Crim. Law*, 588; *Harris v. People*, 44 Mich. 305.

The crime of burglary is not an offense against the person or property of another, but against the domicile, and to constitute an "attempt to commit burglary" there must be some overt, approximate act towards the consummation of the substantive offense.

Attempt is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by causes outside of the actor's will, in a deliberate crime.

2 Wharton, *Crim. Law*, § 2686; 3 Am. & Eng. Enc. Law, p. 250, and *notes*; Bishop, *Crim. Law*, 8th ed. §§ 737-739.

The mere preparations looking to the intended crime, but too far removed from it, are not indictable.

3 Am. & Eng. Enc. Law, p. 266.

To procure a gun with intent to unlawfully shoot another is not an attempt to commit murder.

3 Am. & Eng. Enc. Law, p. 266; *Reg. v. Cheeseman*, 9 Cox, C. C. 100; *People v. Murray*, 14 Cal. 159.

v. Bowers (S. C.) 15 L. R. A. 199; *State v. Butler* (Wash.) 25 L. R. A. 484, and *note*; also *Foster v. Com.* (Va.) 42 L. R. A. 589.

Aiming a gun is not enough to authorize a conviction under a statute making it criminal to attempt to discharge firearms by drawing a trigger or in any other manner.

3 Am. & Eng. Enc. Law, p. 266, note 5; *Reg. v. St. George*, 9 Car. & P. 483; *Reg. v. Brown*, 48 L. T. N. S. 270.

One who elopes with a relative with intent to commit an incestuous marriage, and sends for a magistrate to perform the ceremony, has committed an act which is merely in the nature of preparation, and is not guilty of an attempt.

3 Am. & Eng. Enc. Law, p. 267; *People v. Murray*, 14 Cal. 160.

Between preparation for an attempt and the attempt itself there is a wide difference.

People v. Murray, 14 Cal. 160; *Reg. v. Taylor*, 1 Fost. & F. 511; *Feister v. People*, 125 Ill. 348, 17 N. E. 748; *Kelly v. State* (Tex. Crim. App.) 22 S. W. 598; *Queen v. McCann*, 28 U. C. Q. B. 514.

Until an overt act is committed the law will not detect and punish criminal intent.

Smith v. Com. 54 Pa. 209, 93 Am. Dec. 687; *Stabler v. Com.* 95 Pa. 318, 40 Am. Rep. 653; *Hicks v. Com.* 86 Va. 223, 9 N. E. 1024; *People v. Moran*, 123 N. Y. 254, 10 L. R. A. 109, 25 N. E. 412; *State v. Lung*, 21 Nev. 209, 28 Pac. 235; *People v. Gardner*, 144 N. Y. 119, 28 L. R. A. 699, 38 N. E. 1003; *People v. Murray*, 14 Cal. 160; *Griffin v. State*, 26 Ga. 493; *Com. v. McDonald*, 5 Cush. 367; *Clark's Case*, 6 Gratt. 681; *Kelly v. Com.* 1 Grant, Cas. 484; *Cox v. People*, 82 Ill. 191; *Thompson v. People*, 96 Ill. 161; *People v. Machen*, 73 Mich. 27, 40 N. W. 925; *Harris v. People*, 44 Mich. 305; *McDade v. People*, 29 Mich. 60; *Uhl v. Com.* 6 Gratt. 706.

The statute is only intended to provide a punishment for what was already a crime at common law.

McDade v. People, 29 Mich. 50; *Harris v. People*, 44 Mich. 305; *Brooks v. Cook*, 44 Mich. 619, 38 Am. Rep. 282; *Roberts v. Detroit*, 102 Mich. 68, 27 L. R. A. 572, 60 N. W. 450.

Messrs. W. H. Frankhauser and Horace M. Oren, Attorney General, for defendant in error:

The statute, § 11,784, Miller's Comp. Laws, sets forth a state of facts creating an offense, or, rather, changes the older rule as to what makes up an attempt to commit a crime prohibited by law.

The language is "every person who shall attempt to commit a crime prohibited by law, and in such attempt shall do any act towards the commission of such offense, etc."

Cox v. People, 82 Ill. 191 *Thompson v. People*, 96 Ill. 158.

Montgomery, J., delivered the opinion of the court:

Two questions present themselves: (1) Does the statute in question change the common-law rule as to what constitutes an attempt to commit an offense? (2) If not, whether the facts stated show an attempt, 47 L. R. A.

as defined at the common law. In my opinion, both these questions should be answered in the negative. The statute, in terms, relates to attempts to commit a crime, and, to make the intent still more certain, provides that, before the offense shall be complete, the accused shall do some act towards the commission of such offense. This does not eliminate any of the elements of the common-law offense of attempt to commit crime. On the contrary, it enumerates them. To constitute an attempt, at the common law, something more than an intention or purpose to commit crime is necessary. As was said by Field, Ch. J., in *People v. Murray*, 14 Cal. 159: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made." In *Reg. v. Taylor*, 1 Fost. & F. 512, the chief baron said: "The act [to constitute a criminal attempt] must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." See also *McDade v. People*, 29 Mich. 49; *Hicks v. Com.* 86 Va. 223, 9 S. E. 1024; *Queen v. McCann*, 28 U. C. Q. B. 514; *Stabler v. Com.* 95 Pa. 318, 40 Am. Rep. 653; *Com. v. McDonald*, 5 Cush. 367; *Griffin v. State*, 26 Ga. 493; *People v. Machen*, 73 Mich. 27, 40 N. W. 925; 3 Am. & Eng. Enc. Law, 2d ed. p. 266.

The sentence should be set aside, and the prisoner discharged.

Hooker, Moore, and Long, JJ., concurred.

Grant, Ch. J., dissenting:

The respondent was convicted under the following statute: "Every person who shall attempt to commit a crime prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows," etc. Comp. Laws 1897, § 11,784. The information charges an attempt to break and enter the dwelling house of one Ralph Walker on May 27, 1899. The acts charged are that "he, the said Clarence Youngs, came to Hillsdale, Michigan, said Hillsdale being towards the dwelling house of the said Ralph Walker from the home of the said Clarence Youngs, at which place, Hillsdale, he loaded a revolver, secured other cartridges therefor, and

purchased a drug known as 'chloroform,' to be used in the commission of said offense, but that he failed in the perpetration of said offense, and was intercepted and prevented in the execution of the same by being arrested." The facts shown by the prosecution are these: Respondent lived about 9 miles southeast of Hillsdale. Had worked husking corn in the fall of 1898 for Mr. Walker, who lived about 10 miles northeast of Hillsdale. On May 22 one Munson Foughty met respondent in a saloon in Hillsdale. He proposed to Foughty to go over to Walker's and get his money. He stated to Foughty that Walker was possessed of a considerable sum of money; that he knew where Walker kept it,—in the bureau drawer; and that he would get a pair of carpet slippers and a little chloroform. He fixed the following Saturday night as the time for the commission of the crime, telling Foughty that he would be in Hillsdale on Saturday for that purpose, and requested Foughty to meet him at the saloon. Foughty met him on that day at the appointed place. Respondent had a revolver, went out and purchased some cartridges, and returned to the saloon, and the two went down in the basement of the saloon. Respondent then loaded his revolver, saying: "That came pretty near killing one man the other night, and I am going to have that money to-night, or it will kill another man." He asked Foughty if he had a revolver, and Foughty replied that he had. Respondent then went into a drug store and purchased some chloroform, to be used in the commission of the crime. He had the slippers upon his person, to be used in entering the house. On emerging from the drug store he was arrested, and the slippers, chloroform, revolver, and cartridges were found upon his person. He further stated to Foughty that he knew where Walker lived; that he would get in through the window and chloroform him. When arrested, he denied having any chloroform, and, when it was found, said that his mother had sent him for it. These facts were not controverted, as respondent introduced no testimony.

It is contended that these acts do not constitute an attempt to commit the crime, but only a preparation which the statute does not cover. Two things are essential to constitute an attempt, under the statute: (1) The intent to commit the crime; (2) some act or acts which are necessary towards its perpetration. Hochheimer, in his recent work on the Law of Crimes and Criminal Procedure (§ 516), thus defines a common-law attempt: "Any act in the nature of a direct movement towards the commission of an offense is an attempt to commit the offense. It is sufficient that one step be taken towards the actual commission of the crime, but mere preparation or planning is insufficient." Wharton says: "An attempt . . . is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hin-

dered by extraneous causes in the commission of a deliberate crime." 1 Wharton, Crim. Law, § 170. See also 3 Am. & Eng. Enc. Law, 2d ed. p. 250. The authorities generally recognize the difficulty in determining what constitutes an attempt under this and similar statutes. How remote the act, coupled with the felonious intent, must be from the consummation of the crime, depends upon the various circumstances of each case. There is no simple and infallible test. 3 Am. & Eng. Enc. Law, 2d ed. p. 265. The act need not be the last proximate one prior to the consummation. The felonious intent in this case is clearly established. The acts done were clearly in furtherance of that intent. Whether they were too remote is the sole question. In the early case of *Rea v. Sutton*, 2 Strange, 1074, the prisoner was held properly convicted for having in his custody and possession two iron stamps, with the intent to impress the scepters on sixpences and to pass them off for half guineas. The prisoner was held properly convicted of an attempt to commit burglary where he was intercepted while going up the steps of a house, in the night-time, where he had no legitimate business, and had burglarious tools in his possession. *Com. v. Clark*, 10 Pa. Co. Ct. 444. The statute in that case authorized conviction for an attempt to commit the crime. It contained no language like that in the statute before us. The court commented upon the fact that the prisoner had left the public street, to go upon private property. If he had been arrested in the highway, why would not the attempt have been as complete? In an attempt to commit arson, it was held that those who were absent, knowing with what intent the others went, and assenting to it, are principals. *Uhl v. Com.*, 6 Gratt. 706. Where one procured dies for stamping and imitating coin, but was apprehended before he obtained the metal and the chemical preparations necessary for making them, he was held properly convicted of an attempt. *Reg. v. Roberts*, 33 Eng. L. & Eq. 553. The chief justice in that case stated that he would not attempt to lay down any rule as to what act done in furtherance of criminal intent will warrant an indictment, saying that he did not see the line precisely himself, but said: "No one can doubt that the procuring the dies and machinery was necessarily connected with the offense, and was for the express purpose of the offense." Procuring indecent prints, with the intent to publish them, was held an indictable offense, while preserving and keeping them with a like intent would not be. *Dugdale v. Queen*, 1 El. & Bl. 435. The principle of that case is that procuring is an overt act, while possession alone is not. Where one procured camphene and other combustibles, placed them in his room, solicited another to use them in burning a barn, and promised to give him a deed to land if he would do so, he was held properly convicted of an attempt to commit arson. *McDermott v. People*, 5 Park. Crim. Rep. 102. It is there stated: "The two

important and essential facts to be established to convict a person of an offense are: First, an intent to commit the offense; and, second, some overt act, consequent upon that intent, towards its commission. So long as the act rests in bare intention, it is not punishable; *cogitationis poenam nemo patitur*. It is only when the thought manifests itself by an outward act in or towards the commission of an offense, that the law intervenes to punish. As we cannot look into the mind to see the intent, it must, of necessity, be inferred from the nature of the act done; and, if that be unlawful, a wicked intent will be presumed. These are fundamental legal principles. Now, applied to the facts of this case, what do we find? We find that the defendant intended to commit the crime of arson. Indeed, he had committed the offense 'already in his heart.' What were the overt acts towards the commission? He had prepared camphene and other combustibles, and had them in his room, and then he went a step further, and solicited McDonnell to use those combustibles to burn the building, promising him, if he would do so, to 'give him the deeds of the place, and assign to him his right in the same. We have, then, the fixed design of the defendant to burn this barn, and overt acts towards the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out; for the intent to do the wrongful act, coupled with the overt acts towards its commission, constitutes the attempt spoken of by the statute." Where the prisoner entered into conspiracy with others to place a dangerous explosive upon the track of a railroad company, so that it would be exploded by a passing train, had met the other conspirators at the house of one of them, where the bomb was prepared and committed to the prisoner, and the conspirators agreed to meet at half past 4 o'clock in the morning, at the junction of two streets for the purpose of immediately proceeding to put their project into execution, and the prisoner had left his dwelling to join his confederates pursuant to the appointment made on the preceding day, approached the place of rendezvous with the bomb in his possession, and was intercepted by the police, he was held properly convicted. The statute in that case provided that "any person who maliciously places an obstruction upon the track of any railroad," etc. *People v. Stites*, 75 Cal. 570, 17 Pac. 693. See also *People v. Mann*, 113 Cal. 76, 45 Pac. 182. Where one had taken an impression of a key to a warehouse, and prepared a false key, which he had in his possession, with the intent to break and enter, he was properly convicted under a statute identical with this. *Griffin v. State*, 26 Ga. 493.

The cases upon this subject are very numerous, and undoubtedly many might be cited from which it might fairly be inferred that the courts which decided them might hold that the acts in this case were too remote, and constituted merely a preparation 47 L. R. A.

which the law does not recognize and punish as criminal. One of the strongest cases cited is *People v. Murray*, 14 Cal. 159, where it was held that an attempt to commit an incestuous marriage was not established by an elopement for the avowed purpose, and the request to another to go for a magistrate to perform the ceremony. It was also said that the attempt could only be consummated by engaging the officer to perform the ceremony, with the parties standing before him to take the vows preparatory to the contract of marriage. The statute in that case is not stated in the opinion. Bishop, in speaking of this case, says, "We cannot safely assume that it will be followed by all courts." 1 Bishop, New Crim. Law, § 764. I cannot yield it my assent. In *Queen v. McCann*, 28 U. C. Q. B. 514, three entered into conspiracy to commit burglary. One was kept away by his father, who had discovered their design. The other two (the prisoners) went to within about 14 feet of the house, stood outside of the fence awhile, and then went away. It might well be held in that case that there was no attempt, on the ground that they had abandoned their intent to commit the crime. The court said: "The bare fact that the prisoners were seen looking at the house at the distance of 13 or 14 feet is not of itself a crime, and, although it may be said they were near the premises upon the understanding previously entered into, yet there is no evidence of the fact. For all that appears, they may have changed their minds, and, in the absence of their comrade, went there with some other object, or for some other purpose, and not with the intent charged." We are also cited to *Hicks v. Com.* 86 Va. 223, 9 S. E. 1024. In that case the prisoner was charged with an attempt to administer poison, by soliciting one Laura Long, for a promised reward, to administer the same, and that the poison was delivered to her. The court said: "It was not charged, however, that she agreed to administer the poison, or that she did any act towards the commission of the crime." On the contrary, she testified that she never did agree to administer it, and never intended to; that she wanted to fool Hicks, because she wanted to catch him, and to let other people know it. One justice dissented. Under a statute identical with ours, in a charge of an attempt to commit incest, mere solicitation was held insufficient; and the court says: "The statute must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step towards the actual commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense." *Cox v. People*, 32 Ill. 191. Counsel say that though one may intend to commit a crime, and do many things towards its commission, yet he may repent, and the law gives to him a *locus poenitentiae*. But where is this *locus*? Is it at the window which he proposes to enter? or at the gate to the

inclosure of the dwelling? or at the dividing line between the public highway and private property? How much distance and time does the law give him to repent? Conversions like that of Paul are rare, especially among criminals. The law will not "o'erleap itself" to find a time and place for repentance, when the criminal has started forth, armed and equipped to carry out his felonious intent. It may refuse conviction when repentance and abandonment are shown, but not till then. The only reasonable and just rule, in my judgment, is that when one has prepared himself with weapons and tools for the purpose of accomplishing a crime, and has started out to accomplish it, the offense is complete, unless it is shown, as was the case in *Queen v. McCann*, that he had abandoned his purpose. It would be difficult, if not impossible, to harmonize all the cases. No two are alike in their facts. In the case before us, the plan was perfected. All the preparations were made for carrying it out. The respondent left his home, with the revolver and slippers; had traveled nine miles towards the place; had then provided himself with chloroform, and loaded his revolver; had met his supposed co-conspirator at the place of rendezvous. All these acts were done for the express purpose of committing the crime, and he was prevented from the commission by his arrest. I think that the steps taken constitute something more than a bare preparation, and were acts towards the commission of the crime, within the meaning of the statute. The conviction should be affirmed.

David TURNER

v.

ST. CLAIR TUNNEL COMPANY, *Plff. in Err.*

(.....Mich.....)

The use of compressed air in the construction of a tunnel does not, under the law of Canada, create a liability to employees as an absolute insurer of the machinery and appliances and system adopted, but the duty of the employer in this respect is discharged by appointing competent superintendents and workmen, and authorizing them to procure all necessary machinery and appliances.

(November 7, 1899.)

ERROR to the Circuit Court for St. Clair County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion and in the report of the case on former appeal, 36 L. R. A. 134.

NOTE.—For former decision in this case, establishing the rule that the law of Canada governs the case, see *Turner v. St. Clair Tunnel Co.* (Mich.) 36 L. R. A. 134.
47 L. R. A.

See also 47 L. R. A. 597.

Messrs. Geer & Williams, with *Mr. E. W. Meddaugh*, for plaintiff in error:

The circuit judge erred in his statement of the law of Canada.

Wilson v. Merry, L. R. 1 H. L. Sc. App. Cas. 326; *Tarrant v. Webb*, 18 C. B. 797; *Hedley v. Pinkney & Sons S. S. Co.* [1894] A. C. 222; *Lovegrove v. London, B. & S. C. R. Co.* 16 C. B. N. S. 669; *Gallagher v. Piper*, 16 C. B. N. S. 669; *Feltham v. England*, L. R. 2 Q. B. 33; *Smith v. Howard*, 22 L. T. N. S. 130; *Howells v. Landore Siemens Steel Co.* L. R. 10 Q. B. 62; *Hall v. Johnson*, 3 Hurlst. & C. 589; *Balleny v. Oree*, 12 Sess. Cas. 3d Ser. p. 626; *McFarlane v. Gilmour*, 5 Ont. Rep. 302; *Matthews v. Hamilton Powder Co.* 14 Ont. App. Rep. 261; *Wilson v. Hume*, 30 U. C. C. P. 542.

Messrs. Chadwick & McIlwain for defendant in error.

Grant, Ch. J., delivered the opinion of the court:

The facts and circumstances of plaintiff's claim are sufficiently stated in the former opinion. 111 Mich. 578, 36 L. R. A. 134, 70 N. W. 146. The case was retried, submitted to the jury upon the theory that the law of Canada sustained the plaintiff's claim, and the jury rendered a verdict in his favor. The sole question now submitted for our determination is, What is the law of Canada, as found in the decisions of the courts of Canada and England? The learned circuit judge summed up his instructions to the jury as follows: "Now, there are certain things which I have referred to before, which I want to repeat here, in connection with that rule: That, before this plaintiff can recover, he must satisfy you, by a fair preponderance of evidence: First, that the use of compressed air, as used on the Canadian side of this tunnel, was a dangerous agency; second, that the dangers connected with its use and with working in it were concealed and hidden, and were not open to the observation of ordinary men; third, that the plaintiff, Turner, did not know of that concealed and hidden danger at the time he went to work in it; and, fourth, that the defendant did not afford, either by the system which it adopted there or the valve which it used on that lock, or by adopting proper rules and giving proper warnings,—had not given him any knowledge or warning of the danger he was about to encounter." The first three propositions are not involved in the question before us. The fourth proposition is the one whose correctness is challenged according to the law of England.

Questions were submitted to the jury, and answers thereto made, as follows:

(1) Did the defendant negligently provide unsuitable appliances for regulating and controlling the air in the locks?

A. Yes.

(2) Did the defendant negligently maintain or sanction a defective or dangerous system for workmen remaining in and lock-

ing out from the compressed air chamber for inexperienced men?

A. Yes.

(3) In the absence of Mr. Hobson, did the defendant provide for such actual superintendence of its use of compressed air as part of its system as its character and peculiar danger to workmen reasonably required?

A. No.

(4) Were the plaintiff's injuries solely the result of the defendant's negligence?

A. Yes.

The court instructed the jury that there was no evidence to show that Hobson, the general manager, or Eames and Murphy, were incompetent. Upon this point the court instructed the jury as follows: "Now, it is a matter of common knowledge and common sense that a man may be a competent man in a work, and yet he may not use good judgment in adopting the system. There is nothing to impeach the competency of these men, even though you may be of the opinion that the system that they adopted was not the best system that could have been adopted. So far, then, as the competency of Mr. Hobson, Mr. Eames, or Mr. Murphy is concerned, I must ask you to accept that as a question of law from me, that there is no evidence here that would warrant you in finding that either one of those men was incompetent for the position which he held during the construction of that tunnel." The third special finding is of no consequence. Mr. Hobson was not present to superintend the work all the time. He received daily reports from those in charge. His only knowledge of the use of compressed air was obtained from study, reading, and consultation with others of experience. He had had no actual experience in its use. He was a civil engineer of forty years' experience. The tunnel was planned and constructed under his supervision. Mr. Murphy, a thoroughly competent man, was selected because of his skill, knowledge, and experience of many years in the use of compressed air. He had the entire charge of its use in the construction of the tunnel. Under this record, therefore, the defendant company had performed its full duty in the employment of competent men. Mr. Hobson purchased the machinery for the air locks, and "the primary consideration was to get the best." The sole defect alleged in the machinery is that the valves used in letting out the compressed air were too large, allowing it to escape too fast. The defects claimed in the system are the failure to provide a competent person in charge of the locks, and in permitting the inexperienced workmen to lock themselves in and out. The question may be stated thus: Did the defendant, under the law of England, discharge its duty towards its employees by appointing competent superintendents and workmen, and authorizing them to procure all necessary machinery and appliances, or was it the absolute insurer of the safety of its machinery and appliances and of the system adopted? The use of compressed air for the

purpose of construction is not attacked. It had been in use for similar purposes many years. The defendant, through its directors and president, had intrusted the entire work, including the purchase of machinery, to competent and experienced men. The directors presumably were not men of experience in these matters. It is not claimed that they were. They did as men must always do under the like circumstances. Having no practical experience or knowledge themselves, they did all that could be done if the work was to be performed at all, *viz.*, they selected men of experience to perform it. It would be great negligence for inexperienced men to attempt to supervise such work, and determine what system and what machinery should be used. It has always been, and always must be, that those who build buildings, large and small, construct machinery, or engage in the construction of extensive works like the present, are unskilled themselves in the strength of materials, the soundness of machinery, the proper methods of construction, or the proper system for conducting the construction. Of necessity, therefore, they must act through others, and rely upon the judgment of others. All intelligent men, workmen as well as others, are familiar with this fact. I have examined all the authorities cited by counsel, and also some others. I have found some difficulty in reaching a conclusion. Both in England and America are many decisions whose facts bring them so near the dividing line that it is often difficult to determine exactly when they are within and when without the rule, or, stated differently, when the rule applies to the facts of the case. It is also true that courts in England as well as America sometimes use language not necessary to the decision of the case, and this has enhanced the difficulty. I have found no case exactly in point, and no one the parallel of this in its facts. We must therefore determine what the law is by analogy from a careful analysis of the reported cases relied upon.

In *Tarrant v. Webb*, 18 C. B. 797, decided in 1856, defendant was the contractor to decorate a club house. He erected a scaffold 80 feet high. It was insecurely constructed, and broke, precipitating plaintiff to the pavement. The negligence charged was the erection of an improper scaffold by which plaintiff was exposed to unreasonable risk. Two theories were submitted to the jury: (1) That the scaffold was erected under the personal direction of the defendant; and (2) that the person employed to erect it was incompetent. No *scienter* was alleged. Plaintiff recovered. In reversing the case the court says: "The master certainly is not responsible where he does his best to get competent persons. He is not bound to warrant their competency. The master may be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons. 'The jury might have been of opinion that the defendant used every possible care to employ a competent person, . . . and yet that he

was liable, because it turned out that Martin was incompetent." A similar case to this was *Wigmore v. Jay*, 5 Exch. 354, decided in 1850. In *Gallagher v. Piper*, 16 C. B. N. S. 669, decided in 1864, the negligence charged was the failure to supply sufficient material for the erection of a scaffold. Defendant had selected a general agent, whose duty it was to supply these materials. The agent was notified of the insufficiency of the supply, in consequence of which plaintiff was injured. Held, that the company had performed its legal duty in providing sufficient materials and a competent man. That case cited with approval *Wigmore v. Jay*. What difference in principle is there between constructing a scaffold and constructing a tunnel? If Webb, in *Tarrant v. Webb*, was relieved from liability by employing a competent person to erect a scaffold, how can defendant, under the same rule, be liable when it has employed competent men to construct a tunnel? If Piper, in *Gallagher v. Piper*, was relieved from liability by the selection and appointment of a general manager, whose duty it was to supply these materials, why is not the defendant relieved? In *Feltham v. England*, L. R. 2 Q. B. 33, decided in 1866, a traveling crane was moving on a tramway resting on beams of wood supported by piers of brick. While plaintiff was at work upon a locomotive, which was being hoisted, the piers gave way, and he was injured. Two grounds of liability were claimed: (1) That the manager was the *alter ego* of the master, and guilty of negligence in not ascertaining the sufficiency of the piers; and (2) that defendant might or ought to have known that the piers were not sufficient. Both contentions were decided against the plaintiff, the court saying: "There was nothing to show that he [defendant] had employed unskilful or incompetent persons to build the piers, or that he did know, or ought to have known, that they were insufficient for the use to which they were applied. He was a maker of engines, and therefore, in that sense, an engineer, but not in the sense that he possessed special knowledge as to the strength or sufficiency of brickwork. We cannot, in the absence of such evidence, say there was any case fit to be submitted to the jury as to this ground of liability." What difference in principle between the construction of these piers and the defendant's tunnel? The piers had just been completed when the accident occurred. If some workman engaged in the construction of the piers had been injured, would not the rule be the same? In *Lovegrove v. London, B. & S. O. R. Co.* 16 C. B. N. S. 669, decided in 1864, the negligence charged consisted in the improper laying of temporary rails, which were laid for the purpose of conveying trucks loaded with ballast. Sufficient sleepers were not placed under the rails. The company had no knowledge of the defective manner in which they were laid, and had used due care in the selection of persons to perform that duty. Held, that the company was not liable. In *Smith v. Howard*, 22 L. T. N. S. 130, decided in 1870, the acci-

dent arose through the incompetency of a boy employed to assist the plaintiff. Defendant had delegated to one M., his foreman, the authority to engage and discharge employees. Plaintiff complained to M. of the incompetency of the boy. Held, that defendant was not liable, because he had lawfully delegated this authority, and had received no actual notice of the boy's incompetency. What difference in principle between delegating the authority to employ workmen and delegating the authority to employ or purchase machinery and appliances? In *Howells v. Landore Siemens Steel Co.* L. R. 10 Q. B. 62, decided in 1874, the accident arose through the negligence of defendant's manager, appointed in accordance with an act of Parliament. Held, that the authority of the manager was the same as though he had been appointed outside the act. Judge Blackburn said: "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has been established by a series of decisions: That with regard to a fellow servant the master is held not so responsible, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment. When the master personally interferes, he is liable for his personal negligence, just as the individual servant would be." In *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 326, decided in 1868, plaintiff's son was killed by the explosion of fire damp, which was the result of the faulty construction of a platform which interrupted the free current or circulation of air in the pit. In disposing of the case, Lord Cairns, the chancellor, said: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he (the master) has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous, to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do; and, if the persons so selected are guilty of negligence, this is not the negligence of the master. . . . Negligence cannot exist if the master does his best to employ competent persons. He cannot warrant the competency of his servants." While it is true in that

case that the defect was not one of original construction, and the chancellor said, "The system of ventilation in the pit before the scaffold was placed there was of the usual kind, by downcast and upcast, and it is not suggested that before the platform was erected the system of ventilation was defective in any particular," yet the platform was erected in carrying on the work of the defendants, whose servant to whom they intrusted the responsibility of building it had, in his judgment, made proper arrangements for the escape of the fire damp. What difference in principle between delegating the authority to construct platforms, scaffolds, etc., necessary in carrying on mining operations after the construction of the plant, and delegating the authority to build, purchase, and use those things essential to the original construction? The lord chancellor not only states the rule, but gives the reasons on which it is founded. The same principle was involved in *Balleny v. Ores*, 11 Sess. Cas. 3d Ser. p. 626, decided in 1873. It is true that the defect arose after the machine was furnished, but the rule seems to cover all cases. Lord Cowan said: "As he [defendant] himself was unacquainted with the machine, he intrusted the charge of his work to a properly qualified and skilled mechanic, and to a superintendent and manager." Lord Benholme said: "He [defendant] himself was not a skilled machinist, and he cannot be held responsible for the defect in the machinery." See also *McFarlane v. Gilmour* (1884) 5 Ont. Rep. 302; *Wilson v. Hume* (1880) 30 U. C. C. P. 542. *Matthews v. Hamilton Powder Co.* 14 Ont. App. Rep. 261, decided in 1887, is similar to *McFarlane v. Gilmour*. The language of Lord Cairns in *Wilson v. Merry*, and of Huddleston, B., in *Allen v. New Gas Co.* L. R. 1 Exch. Div. 251, is cited with approval. Hagarty, Ch. J. [14 Ont. App. Rep. 261], said: "If the principal be aware of defects in machinery, and with that knowledge permit, or passively allow, the work to proceed, I can understand holding him liable. But that is very different from, at once, on acquiring the knowledge, directing the necessary repairs, and the cessation of work until that be completed. If there be no interference whatever, and no knowledge of defects, trusting to a competent manager, it would seem from the cases that the principal is not liable for injury to a workman, the result of the negligence of his fellow servant, the manager." In speaking of the liability of the master for personal interference, he says: "I have not found any authority specially defining the measure of permitted interference." He then cites several authorities, and remarks that "there is a marked difference between English and American laws on the fellow workman question." These cases, in my judgment, logically lead to the conclusion that under the law of England the master is not liable where he does not personally superintend the work, and has intrusted to competent, skilled, and experienced agents the adoption of a system and the purchase of machinery.

47 L. R. A.

The learned counsel for plaintiff cite, as supporting their contention, the following authorities: *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Sword v. Cameron*, 1 Dunlop, B. & M. Sc. Sess. Cas. 493; *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300; *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215; *Smith v. Baker* [1891] A. C. 325; *Allen v. New Gas Co.* L. R. 1 Exch. Div. 251; *Cook v. Stark*, 14 Sess. Cas. 4th Ser. 1; *Webster v. Foley*, 21 Can. S. C. 580; *Fairweather v. Owen Sound Stone Quarry Co.* 26 Ont. Rep. 604; *O'Connor v. Hamilton Bridge Co.* 25 Ont. Rep. 12; 1 Beven, Neg. 738, 740; *Smith, Mast. & S.* p. 229. In *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748, decided in 1854, the negligence charged was the careless leaving of a stone in the roof of a mine. The question now before us was not discussed. The lord chancellor used this language: "It is very true that if a master employ several servants in the same operation,—as in building a house, or in working a mine,—the persons engaged being competent persons, should an accident happen to one of them owing to a neglect of another the master is not, by the law of England, responsible." He states the question as follows: "Now, the plaintiffs were to make out—First, that the stone had been negligently suffered to remain too long without being removed, and, second, they were to make out that Paterson lost his life, not by his own rashness in passing under that stone before its removal, but by reason of the negligence of the master, or the negligence of Snedden, his underground manager." If that case is to be construed as holding that the negligence of Snedden, the underground manager, was attributable to the master, it has since been overruled by repeated decisions of the same court. The same statement applies to *Brydon v. Stewart* (1855) 2 Macq. H. L. Cas. 30. The question in that case was this: "Was the deceased at the time fairly and really engaged in the work of the respondent?" In *Sword v. Cameron*, 1 Dunlop, B. & M. Sc. Sess. Cas. 493, decided in 1839, in blasting, sufficient notice was not given to enable defendant's employee to reach a place of safety. The liability in this case was based upon the fact that the system or custom of doing the work was known to, and sanctioned by, the defendant. Lord Cranworth, in *Barton's Hill Coal Co. v. Reid*, *infra*, thus interprets the decision. In *Barton's Hill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, and in *Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300, it was held that plaintiffs could not recover for the neglect of the engineer in the management of the machine. In *Smith v. Baker*, [1891] A. C. 325, it appears to be conceded that the effect of the delegation of authority by a master was not involved. The sole question there was the application of the maxim, *Volenti non fit injuria*. Counsel seem to rely largely upon this case, and quote from Lord Watson, who said: "It does not appear to me to admit of dispute

that at common law a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this house by Lord Cranworth and other noble and learned lords that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this house, long before the passing of the employer's liability act [43 & 44 Vict. chap. 42] that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." What is said by the learned lords was *obiter dicta*, but, assuming it to be intended as an authoritative statement, it does not touch the point here in controversy. It does not determine what the reasonable precautions are which the employer must take in securing the safety of his workmen by providing against a defective system of using machinery, and defects in the machinery itself. That case was founded upon the employer's liability act, of which Lord Watson said: "The main, though not the sole, object of the act of 1880, was to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence as if it were their own." See criticism of this case by Mr. Beven in 8 Law Quart. Rev. 202. In *Webster v. Foley*, 21 Can. S. C. 580, decided in 1892, one of the defendants was the manager of the work. Of course, his knowledge was the knowledge of his partner. In *Fairweather v. Owen Sound Stone Quarry Co.* (1895) 26 Ont. Rep. 604, the plant and machinery were bought and furnished by the directors themselves. Sabiston, the manager, was also a director. It was there said: "So far as this action rests upon liability to the company through their manager or superintendent, Sabiston, I think the point must be considered as settled by the case of *Howells v. Landore Steamers Steel Co.* L. R. 10 Q. B. 62. That is to say, in cases where the action is at common law for negligence, and not under the employer's liability act, the doctrine of manager or vice principal, which was put forward in *Murphy v. Smith*, 19 C. B. N. S. 361, is now exploded, and the negligent directions or conduct of a fellow servant, however much he may be higher in grade or responsibility than the one injured, cannot be reckoned as negligence of the common master. That branch of this case which rests upon negligence of the company because proper appliances were not furnished for the quarrying operations does not seem to have been fully tried out or submitted to the jury." In discussing the duty of the master in regard to machinery and appliances, the court said: "The employer may be made liable who is blameworthy in respect of not having provided proper machinery and appliances for the work; or, as put in *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 47 L. R. A.

where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risks." This case goes no further than to hold the master to the exercise of due care in providing machinery and appliances. It does not discuss the liability of the master where, from the very necessity of the case, he must, as in the present case, delegate authority, and where he has done all that he could do to adopt a proper system and proper machinery. That case cites, as sustaining its text, *Rea v. Medley*, 6 Car. & P. 292. That was a criminal case, in which the respondents, the directors of the Equitable Gas Company, and persons employed by them, were indicted for carrying on their works as a nuisance, the charge being the pollution of the river and destruction of the fish. The question of the delegation of authority as affecting employees was not in the case. I fail to see that *Rea v. Medley* has any bearing upon the question involved in *Fairweather v. Owen Sound Stone Quarry Co.* or in the case now before us. In *Allen v. New Gas Co.* (1876) L. R. 1 Exch. Div. 251, certain gates were safe when open and wedged up, but liable to fall when closed. One fell upon the plaintiff, and injured him. It was there said: "The authorities referred to establish the principle that, in the event of the master not personally superintending and directing the work, his sole duty is to select proper and competent persons to do so, and to furnish them with adequate materials and suitable means and resources for accomplishing the work." The question of the delegation of authority in a case of construction was not involved. The text in Beven on Negligence and Smith on Master and Servant is based upon the same authorities which counsel have cited and to which I have referred, and goes no further than to hold the master to the exercise of due care in furnishing machinery and appliances, and in adopting a system,—a rule the soundness of which is not disputed, and which prevails in both England and the United States. I cannot concur in the conclusion that these authorities cited by the plaintiff's counsel settle the law of Canada in accordance with their contention. They go no further than to say, even in the cases where the question was not involved, that it is the duty of the employer to take reasonable precautions to establish a proper system and to furnish proper machinery; but they do not hold, as must be held in this case if the liability of the defendant is sustained, that an employer is the absolute insurer of the safety and soundness of his machinery and his system.

I am of the opinion that the learned circuit judge erred in instructing the jury as to the law of Canada, and that *the judgment should be reversed*, and a new trial ordered.

The other Justices concur.

Rehearing denied.

Thomas ALLEN
v.

BOARD OF STATE AUDITORS.

(.....Mich.....)

1. An attempt by the legislature to make the board of state auditors an appellate court to determine the guilt or innocence of a pardoned convict, and allow him damages for wrongful conviction and imprisonment if they find him innocent, is in violation of the constitutional provisions establishing courts and conferring upon them exclusive jurisdiction to try civil and criminal cases.
2. The use of public moneys of the state to pay a convict for wrongful conviction and imprisonment is a mere gratuity, subject to Const. art. 4, § 45, requiring the assent of two thirds of the legislature for an appropriation for private purposes.
3. A joint resolution of the legislature is within Const. art. 4, § 45, requiring the assent of two thirds of the members to "every bill appropriating the public money or property for local or private purposes."
4. The claims which the state auditors are authorized to adjust under Const. art. 8, § 4, do not include requests, petitions, or claims for appropriations which are merely gratuitous, or which may be based upon sentimental or moral grounds which have not the semblance of any legal claim.

(December 12, 1899.)

PETITION for mandamus to compel the board of state auditors to consider a claim of relator under a statute awarding him compensation for wrongful imprisonment in the state prison. *Denied.*

The facts are stated in the opinion.

Messrs. Edward S. Grece and Lewis M. Miller, for relator:

No greater vote than a majority of all the members elect in each house can be required for the passage of the joint resolution in question.

Cushing, Law & Practice of Legislative Assemblies, §§ 115, 412, 1826; Cooley, Const. Lim. 6th ed. p. 168.

The payment of money from the state treasury to an individual, in settlement of a claim audited and allowed, cannot be considered an appropriation of public money to private purposes.

Such joint resolutions as these are in the nature of consent by the state to be sued.

It is a common thing for legislatures to grant such consent either by general or special act.

Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 226, 41 Am. Dec. 549; *Rose v. The Governor*, 24 Tex. 406; *Raymond v. State*, 54 Miss. 562, 23 Am. Rep. 382; *State v. Stout*, 7 Neb. 89; *State v. Curran*, 12 Ark. 321; *Ex parte Greene*, 29 Ala. 52; *Bonner v.*

United States, 9 Wall. 156, 19 L. ed. 666; *Belknap v. Schild*, 161 U. S. 17, 40 L. ed. 602, 16 Sup. Ct. Rep. 443.

Even though this joint resolution made an appropriation, it would be in settlement of a moral obligation, and not a gratuity.

Public funds, raised by taxation, may be appropriated for the payment of the moral obligations of the state.

Cooley, Taxn. 2d ed. p. 127; *Desty*, Taxn. p. 21; *Guilford v. Chenango County Supers.* 13 N. Y. 149; *Curtis v. Whipple*, 24 Wis. 355, 1 Am. Rep. 187; *Brewster v. Syracuse*, 19 N. Y. 116.

Where a moral obligation exists, the legislature may give it legal effect.

Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575; *Beale v. Amador County*, 35 Cal. 624.

It can provide for the payment of claims invalid in the forum of the law, but equitable and just in themselves.

Desty, Taxn. p. 21; *People ex rel. Blanding v. Burr*, 13 Cal. 347.

Mr. Horace M. Orem, Attorney General, for respondents:

The legislature cannot evade the mandatory provisions of the Constitution in the enactment of laws by entitling the bill a joint resolution and passing it as such.

Burritt v. State Contract Comrs. 120 Ill. 322, 11 N. E. 180.

The appropriation authorizes the expenditure of public money for purely a private purpose, and the joint resolution is void, unconstitutional, and of no legal effect, not having received the assent of two thirds of the members elected to both branches of the legislature.

Sparrow v. State Land Office Comrs. 56 Mich. 578, 23 N. W. 315; *Fenn v. Kinsey*, 45 Mich. 446, 8 N. W. 64; *Bourn v. Hart*, 93 Cal. 321, 15 L. R. A. 431, 28 Pac. 951; *Conlin v. San Francisco City & County Supers.* 99 Cal. 17, 21 L. R. A. 477, 33 Pac. 753; *Patty v. Colgan*, 97 Cal. 251, 18 L. R. A. 744, 31 Pac. 1133; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Curtis v. Whipple*, 24 Wis. 350; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440.

The board of state auditors not only have the right to question the constitutionality of such an act, but it would be their duty to refuse to act in the premises until the question had been determined by the proper tribunal, when it is so apparent that the provisions of the Constitution have been violated by the legislature.

Norman v. Kentucky Bd. of Managers of World's Columbian Exposition, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901.

The state is not liable for torts for the negligence of its officers.

Story, Agency, 9th ed. 390, § 319; *Shearm. & Redf. Neg.* § 249; *Cooley*, Torts, 2d ed.

NOTE.—On the question, What constitutes a valid claim against a state, see *note* to *Northwestern & P. H. Bank v. State* (Wash.) 42 L. R. A. 33.

On the question for what purposes public money may be used, see *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474. See also *Balti-*

more & E. Shore R. Co. v. Spring (Md.) 27 L. R. A. 72; *Baltimore v. Keeley Institute* (Md.) 27 L. R. A. 646; *Re House* (Colo.) 33 L. R. A. 832; *Wisconsin Keeley Institute Co. v. Milwaukee County* (Wis.) 36 L. R. A. 55; *State ex rel. Garth v. Switzler* (Mo.) 40 L. R. A. 280.

141; *Cooley*, Const. Lim. 6th ed. 301; *Alamango v. Albany County Supers.* 25 Hun, 551; *Lewis v. State*, 96 N. Y. 74, 48 Am. Rep. 607; *Supple v. State*, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; *Wiles Laundering Co. v. Hahlo*, 105 N. Y. 234, 59 Am. Rep. 496, 11 N. E. 500; *Clodfelter v. State*, 86 N. C. 52, 41 Am. Rep. 440; *Cunningham v. Moore*, 65 Tex. 373, 40 Am. Rep. 812; *Galveston v. Posnainsky*, 62 Tex. 119, 50 Am. Rep. 517; *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Navasota v. Pearce*, 46 Tex. 525, 26 Am. Rep. 279; *Hill v. Boston*, 23 Am. Rep. 332, 122 Mass. 355; *Hafford v. New Bedford*, 16 Gray, 297; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 187, 5 Am. Dec. 35; *Holman v. Townsend*, 13 Met. 297; *Brady v. Lowell*, 3 Cush. 121; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Bigelow v. Randolph*, 14 Gray, 543; *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. 789; *Prince v. Lynn*, 149 Mass. 193, 21 N. E. 296.

The legislature cannot grant a pardon or commute a sentence except in cases of treason, nor can the legislature abridge a pardon or commutation. The pardoning power is vested exclusively in the governor of the state.

People v. Brown, 54 Mich. 15, 19 N. W. 571; *People v. Moore*, 62 Mich. 496, 29 N. W. 80; *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285, 50 N. W. 310; *Rich v. Chamberlain*, 104 Mich. 441, 27 L. R. A. 573, 62 N. W. 584.

The question of the guilt or innocence of relator is a judicial question; it belongs to the judicial branch of the government, and that branch of the government has judicially determined that relator was guilty of the crime charged, and the legislature has no authority in the premises.

Cooley, Const. Lim. 208.

The legislature has no power to authorize and direct the application of the public money of the state to the payment of gratuities.

Cooley, Const. Lim. p. 155; *French v. Tschemaker*, 24 Cal. 518; *Jones v. Jones*, 12 Pa. 354; *Cronise v. Cronise*, 54 Pa. 255; *Fowler v. Pierce*, 2 Cal. 168; *People ex rel. McCauley v. Brooks*, 16 Cal. 43; *Springer v. Green*, 46 Cal. 73; *State ex rel. James v. Babcock*, 22 Neb. 47, 33 N. W. 711; *State ex rel. Squires v. Wallich*, 14 Neb. 444; *State ex rel. Douglas County v. Cornell*, 53 Neb. 556, 39 L. R. A. 514, 74 N. W. 59; *State ex rel. Griffith v. Osawkee County*, 14 Kan. 418; *Hooper v. Emery*, 14 Me. 375; *People ex rel. Detroit & H. R. Co. v. Salem Twp. Board*, 20 Mich. 495, 4 Am. Rep. 400.

The right to tax does not exist except for public purposes.

People ex rel. Detroit & H. R. Co. v. Salem Twp. Board, 20 Mich. 452, 4 Am. Rep. 400; *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499; *Ryerson v. Utley*, 16 Mich. 269; *Anderson v. Hill*, 54 Mich. 477; *Davis v. Ononagon County Supers.* 64 Mich. 404, 31 N. W. 405; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; *United* 47 L. R. A.

States ex rel. Miles Planting & Mfg. Co. v. Carlisle, 5 App. D. C. 155.

Grant, Ch. J., delivered the opinion of the court:

The following joint resolution was passed by the legislature of 1899: "Joint Resolution to Provide for the Relief of Thomas Allen. Whereas, it satisfactorily appears that Thomas Allen, now of the city of Detroit, was, on or about the twentieth day of August, eighteen hundred and ninety, arrested at the city of Grand Rapids upon the charge of 'assault with the intent to do great bodily harm,' and taken a prisoner to the county jail of Mecosta county and there confined until the fourteenth day of November following, and then tried and convicted upon said charge, of which he was entirely innocent, he being at the time of the commission of the crime in the city of San Francisco, California, and was sentenced upon such conviction to imprisonment in the state prison at Jackson for the term of five and one-half years; and whereas, he served upon such sentence over a year and one month before it was demonstrated that he was innocent of such offense, and received a full and unconditional pardon by the late Governor Winans; and whereas, great injustice was done said Allen by reason of such arrest and imprisonment in the county jail of Mecosta county, trial, sentence and imprisonment in the state prison, for which he should receive compensation: Therefore, be it resolved by the senate and house of representatives of the state of Michigan, that the board of state auditors shall investigate the claim of said Thomas Allen as set forth in the above preamble, and if in the judgment of the board the facts set forth are true, the board of state auditors are hereby authorized and empowered to audit and allow the said Thomas Allen, his heirs or assigns, a sum not to exceed ten dollars per month for a period not to exceed ten years from and after the passage of this joint resolution; and the board of state auditors are hereby authorized to draw their warrant on the state treasurer for the payment of the same. This joint resolution is ordered to take immediate effect. Approved May 10, 1899."

On June 21st the above resolution was presented to the board of state auditors, and the board refused to consider the claim. Petitioner then presented to this court his petition for the writ of mandamus to compel action on the part of the board.

This resolution is a most remarkable one. Nine years after conviction and sentence, the legislature, without an investigation, asserts in the preamble that the petitioner was entirely innocent of the crime for which he was convicted; that, instead of being in Michigan at the time of the commission of the crime, he was in California; that it was demonstrated, after serving a year and one month, that he was innocent; and then authorizes the board to allow him \$10 per month for a period not exceeding ten years.

1. The first and most important question presented is, Has the legislature the power

and authority to establish a court of appeals, aside from constitutional courts to determine the guilt or innocence of a convicted criminal? Petitioner had his day in court, was defended by counsel, was given an opportunity to introduce testimony, and, in brief, was furnished all the safeguards which the Constitution throws around one charged with crime. He was convicted. He did not appeal. Presumably, there was no error upon the trial. Nine years afterwards the legislature makes the board of state auditors an appellate court to determine whether he was guilty or innocent, and, if they should find him innocent, to allow him damages for the wrongful conviction and imprisonment. The preamble recites that his innocence was demonstrated, but to whom or how it was demonstrated is not stated. It is not stated that the governor pardoned him because he believed him innocent. The executive of the state is not made an appellate tribunal to determine that question. When one has been convicted and sentenced by a court of competent jurisdiction, from which he takes no appeal, and has not been granted a new trial, the only method provided by our Constitution by which he can be relieved from the penalty imposed is by a pardon by the governor. The governor may pardon with or without good reason, with or without investigation. He is not limited by the Constitution to any reason for exercising the pardoning power. Consequently his act in pardoning and his reasons therefor have no bearing whatever upon his guilt or innocence. The legislature possesses no authority to organize any tribunal for the trial of persons charged with crime other than the judicial ones authorized by the Constitution. The payment by the board is conditioned upon the establishment of his innocence, which means nothing less than a determination by this board that the court which tried him erred in its judgment, and that twelve men found him guilty upon false testimony, or for some reason erred in their conclusion. It is a violation of the plain provisions of the Constitution,—establishing courts, and conferring the exclusive jurisdiction upon them to try civil and criminal cases. Few criminals confess their guilt. The result of sustaining the validity of this resolution would be an open door for raids upon the public funds.

As already shown, the pardon is not essential to the maintenance of such claims, for the executive is not vested with power to review the judgment of courts. It would, therefore, result that, after a convict has served his sentence, five, ten, fifteen, or twenty years after his conviction, he may go to the legislature, assert that he was innocent, that he can prove it, and it may be referred to the board of state auditors, or any other number of men, public officers or private citizens, to determine whether he had a fair trial, and was properly convicted. Nor is this all, but every person who is arrested and acquitted may also make his claim against the state for the wrongful arrest and detention. If such persons, when the testi-

mony in behalf of the people is gone, will pass upon and believe the testimony which an ex-convict can introduce, he may be awarded such a sum out of the state treasury as the legislature may see fit to allow, or the persons to whom such power is delegated may allow. The bare statement of the proposition is enough to condemn it as unconstitutional, and bad in law, morals, and equity. It is unnecessary to hunt for authorities which condemn it.

2. The resolution authorizes the expenditure of the public moneys of the state for a purely private purpose. It is a mere gratuity, for which the state received nothing, but, on the contrary, incurred expense, by reason of his arrest, trial, and imprisonment. *Bourn v. Hart*, 93 Cal. 321, 15 L. R. A. 431, 28 Pac. 951; *Conlin v. San Francisco City & County Supers.* 99 Cal. 17, 21 L. R. A. 474, 33 Pac. 753. Section 45, art. 4, of the Constitution is as follows: "The assent of two thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money, or property, for local or private purposes." The resolution did not receive a two-thirds vote of the members of the senate. This provision is mandatory, and cannot be evaded by calling a bill a "joint resolution." The above provision of the Constitution is too clear and too valuable to be thus frittered away. *Burrill v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180; *Cushing, Law & Practice of Legislative Assemblies*, 930.

3. Section 4, art. 8, of the Constitution provides that "the secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors to examine and adjust all claims against the state, not otherwise provided for by general law." The jurisdiction conferred upon this board by this provision of the Constitution clearly means claims resting upon some legal basis. "Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services." *Century Dict.* The legislature can only authorize this board to pass upon claims such as are contemplated by the Constitution. It cannot authorize the board to consider requests, petitions, or claims for appropriations which are merely gratuities, or which may be based upon sentimental or moral grounds. It is conceded by counsel for petitioner that he has not the semblance of any legal claim. The sole apology offered for such resolution is that it is based upon sentimental or moral grounds. Fortunately, the people, through their Constitution, have closed the door to such sentimental and unjust claims. The people, through their Constitution, have committed to the courts the sole jurisdiction to try persons charged with crime, and have made their judgments final, and have also prohibited their public funds to be squandered in mere gratuities of this character.

The writ is denied.

The other Justices concur.

MARYLAND COURT OF APPEALS.

Henry P. TALL, *Appt.*,

v.

BALTIMORE STEAM PACKET COMPANY.

(.....Md.....)

1. The rule that a carrier is charged with the highest degree of care consistent with the nature of his undertaking as between him and his passenger, in respect to the acts or omissions of the carrier and his servants, does not extend to the matter of the carrier's liability for injuries to passengers by acts of fellow passengers or strangers.
2. A carrier's liability for the misconduct of a passenger because of injury to another passenger arises only when the carrier or his servants could have prevented the injury but failed to interfere to avert it, with knowledge, or upon facts which ought to have imparted knowledge, that the injury was threatened.
3. The opinion of a witness to the effect that an injury by one passenger to another would have been averted if the captain had acted with appropriate promptness is not competent evidence.
4. Allowing passengers to play cards in the smoking room of a steamboat, in violation of a rule of the carrier, does not make the carrier liable for the injury to another passenger who is shot during a quarrel which occurs during the game.

(December 6, 1899.)

APPPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in favor of defendant in an action brought to recover damages for the negligence of defendant in permitting a shooting affray to take place on one of its boats on which plaintiff was a passenger which resulted in plaintiff's receiving a gun-shot wound. *Affirmed.*

The facts are stated in the opinion.

Measrs. Fielder C. Slingluff, William T. Donaldson, and R. Lee Slingluff, for appellant:

The court should have admitted the evidence of the violation of the rule against card playing, as the plaintiff was unquestionably entitled to the benefit of the failure on the part of the company and its servants to enforce this rule, as evidence before the jury.

Baltimore & O. R. Co. v. State use of Chambers, 81 Md. 384, 32 Atl. 201.

Where a witness has adequate means of observing a transaction, but where it is im-

NOTE.—For duty of carrier to protect passenger from assault by fellow passenger, see *Illinois C. R. Co. v. Minor* (Miss.) 16 L. R. A. 627, and *note*; also *Richmond & D. R. Co. v. Jefferson* (Ga.) 17 L. R. A. 571; and *West Memphis Packet Co. v. White* (Tenn.) 38 L. R. A. 427.

For liability of carrier on account of negligence of passenger injuring other passenger, see *Sullivan v. Jefferson Ave. R. Co.* (Mo.) 82 L. R. A. 167.
47 L. R. A.

possible for them to so reproduce it as to enable anyone hearing his description to form an intelligent conclusion from what he is able to relate, the witness may, after stating the facts, be allowed to state his own opinion or the conclusion he has formed from the facts within his knowledge.

Underhill, Ev. pp. 268, 269.

The law requires the highest degree of care, which is consistent with the nature of the carriers' undertaking.

Baltimore & O. R. Co. v. State use of Hauer, 60 Md. 449.

Towards a passenger there is the super-added obligation arising from contract and confidence, and the utmost vigilance and care is to be observed.

Baltimore & O. R. Co. v. State use of Miller, 29 Md. 252, 96 Am. Dec. 528; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 367, 93 Am. Dec. 99.

Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law.

Cooke v. Baltimore Traction Co. 80 Md. 558, 31 Atl. 327; *Baker v. Maryland Coal Co.* 84 Md. 19, 35 Atl. 10; *Baltimore & O. R. Co. v. Keedy*, 75 Md. 329, 23 Atl. 643; *Central R. Co. v. Coleman*, 80 Md. 337, 30 Atl. 918.

The carrier is always liable for the assaults on a passenger by a fellow passenger or crew, when such assault could have been prevented by the carrier or its servants, by the exercise of proper care.

5 Am. & Eng. Enc. Law, 2d ed. pp. 555, 556; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583.

The presumption of negligence always arises when the relation of carrier and passenger exists, and the passenger is injured by some defect or abnormal condition in transportation.

Baltimore & P. R. Co. v. Swan, 81 Md. 400, 31 L. R. A. 313, 32 Atl. 175.

An accident which furnishes no cause of action is an inevitable occurrence not to be foreseen and prevented by vigilance, care, and attention, and not occasioned or contributed to in any manner by the act or omission of the company, its agents, employees, or servants.

Washington, O. & A. Turnp. Co. v. Case, 80 Md. 46, 30 Atl. 571; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221.

This is a case where the doctrine of *res ipsa loquitur* applies, there being proof, not only of the injury, but also evidence showing how the injury happened.

Howser v. Cumberland & P. R. Co. 80 Md. 148, 27 L. R. A. 154, 30 Atl. 906; *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Bryne v. Boadle*, 2 Hurlst. &

C. 728; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132.

Whether or not there was this proper care exercised by the defendant's servants in this case, was a question of fact for the jury.

Holly v. Atlanta Street R. Co. 61 Ga. 215, 34 Am. Rep. 97.

Messrs. J. S. Lemmon and C. B. Clotworthy for appellee.

McSherry, Ch. J., delivered the opinion of the court:

There are several questions relating to rulings on the admissibility of evidence, and one in regard to the granting of an instruction taking the case from the consideration of the jury, included in the only bill of exceptions which the record contains.

This is an unusual and an erroneous way to present such essentially distinct propositions. The ruling on each question should form the subject of a separate exception. "We . . . are," says this court in *Ellcott v. Martin*, 6 Md. 517, "of opinion that each distinct exception which embraces an independent proposition of law should be signed and sealed by the court below, before it can be regarded as a valid exception. This remark does not apply to a series of consecutive prayers offered by the counsel. In such a case the ruling of the court, in either granting, rejecting, or modifying the prayers, may be regarded as a single act, and one exception, if properly taken and executed, may embrace the whole." Passing by this irregularity, though by no means intending thereby to establish a precedent which will be followed hereafter, we come to the case as we find it.

The defendant below—the appellee here—is a corporation owning a line of steamboats, which ply between Baltimore and Norfolk. The plaintiff below—the appellant here—was in March, 1898, a passenger on the Alabama, one of the appellee's boats. After getting his supper he went into the smoking room of the steamer, where some twenty or more men passengers were smoking and conversing. In the room there were several small tables and a number of chairs for the use of passengers. Shortly after the appellant went into the smoking-room Captain Bohannon, who was in command of the vessel, also entered and remained there in conversation with some of the passengers until the occurrences now to be briefly narrated took place.

At one of the tables in the smoking room a passenger named Batten and another named Merritt were playing a game of cards for money, while others were looking on. A dispute arose between the two players and Batten applied to Merritt a vile epithet. The latter then arose and left the room. In a few minutes he returned, having his hand on his hip pocket, and going up to Batten said something which was heard by only one witness. Instantly Batten struck Merritt a heavy blow, knocking him down, the captain sprang forward simultaneously and intervened, but Merritt drew a revolver from his pocket and fired; the bullet missed Batten

and struck the appellant, who was standing some distance away. It lodged in his elbow and severely wounded him. For the injury thus inflicted the appellant brought this suit against the steamboat company.

The gravamen of the *narr.*—the sole ground upon which a right to recover is based—is the alleged negligence and want of care on the part of the defendant's servants and agents in failing to preserve order and to exercise proper control over its passengers.

Before advertng to the legal principles which lie at the foundation of the case, it will be necessary to state with a little more particularity the facts immediately surrounding and just preceding the shooting; and we then determine, first, whether, as submitted to the jury, the facts created a liability on the part of the defendant; and, secondly, whether the rejected evidence was admissible, and if admissible whether, had it been admitted, it would have furnished any better ground for a recovery than existed after its exclusion.

Going back to the point of time when Merritt returned to the smoking room with his hand on his hip pocket—this being after Batten had applied to him an opprobrious epithet—the events that followed in rapid succession are thus described by Mr. Beacham, one of the plaintiff's witnesses, and his description is not materially varied by the others who testified. Directly Merritt came in the witness looked over to Captain Bohannon and said, "Come here! come here, quick!" and as he looked back at the affair and long enough for him to forget the fact that he had called the captain, and while his attention was entirely fixed upon what was going on, he heard a voice saying, "What is it? What is it?" and he replied, "There is going to be a fight." Just at that very moment Batten reached up with his right hand and knocked Merritt down.

When he, witness, heard a voice saying "What is it?" he turned, and it was Captain Bohannon. The captain had asked him that question, and he immediately pointed over, showing towards Merritt's back, which was turned towards him, and said to the captain, "There is going to be a fight," and that very moment Batten struck up and struck Merritt with his right, and the captain jumped right into it, and Batten then sprang over the chairs towards the bar-room, and Merritt immediately fired into the crowd in the direction of where the lamplighter is.

The witness was then asked: "After you called the captain, did the shooting take place before he came?" and he replied: "Oh, no! the shooting took place after he came, after he responded, after he answered me; at least after he called my attention, at least made the remark, 'What is it? What is it?' and after that the shooting occurred, but it was very quick work; after he answered me, just at that moment, the man Batten raised up and struck Merritt, and I suppose the captain saw that part of the fracas also at the same moment, for he jumped right into the midst of it, but he was a little too late, and the pistol went off."

Now what in these circumstances was the duty which the carrier owed the passenger, and in what, if in any, respect was that duty disregarded? The answer to these inquiries will decide whether the trial court was right in withdrawing the case from the jury, even though it be conceded that all the evidence adduced by the plaintiff was true, and though the legitimate inferences deducible from it be given due weight in connection with that evidence.

A carrier is not an insurer of the absolute safety of his passengers; yet he is bound to use reasonable care, according to the nature of his contract; and as his employment involves the safety of the lives and limbs of his passengers, the law requires the highest degree of care which is consistent with the nature of his undertaking. *Baltimore & O. R. Co. v. State use of Hauer*, 80 Md. 449. This though the measure of the carrier's duty as between him and his passenger in respect to the acts or omissions of the carrier and his servants towards the passenger, is not the standard by which his liability to the passenger is to be gauged or determined when intervening acts of fellow passengers or strangers directly cause the injury sustained, while the relation of passenger and carrier is subsisting.

Such an injury, due in no way to defects in the means of transportation or to the method of transporting, or to an actual trespass by an employee while the relation of passenger continues, and involving, therefore, no issues of negligence concerning the duty to provide safe appliances and competent and careful servants to operate them, but arising wholly from the independent misconduct of a third party, furnishes a ground of action against the carrier only when the carrier, or his servants, could have prevented the injury, but failed to interfere to avert it.

The duty of the carrier in such instances is, consequently, relative and contingent, not absolute and unconditional. It springs from a condition, not of the carrier's but of a third party's creation, coupled with a knowledge by the carrier's servants that the condition exists, and with time enough intervening between the acquisition of the knowledge and the infliction of the injury to enable the servants of the carrier to protect the passenger from the third party's misconduct. The negligence for which in such cases the carrier is responsible is not the tort of the fellow passenger or the stranger, but it is the negligent omission of the carrier's servants to prevent that tort from being committed.

The failure or omission to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or an omission to do something which could have been done by the servant; and, therefore, there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction.

tion to have prevented it with the force at his command.

If this were not so, the mere tort of a fellow passenger or a stranger would constitute of itself the negligence of the carrier, and the carrier would be held answerable for wrongful acts of a third party, though the carrier's servants were without fault, ignorant of the third party's purpose to make an assault, and were consequently unprepared to avert it. Such a rule would make the carrier an absolute insurer of the safety of the passenger against the wrongful conduct of third persons, though, as between the carrier and the passenger in ordinary cases, the carrier's liability is made to depend on his or his servant's negligence.

In *Baltimore & O. R. Co. v. Barger*, 80 Md. 30, 26 L. R. A. 220, 30 Atl. 560, we said: If a conductor "has the opportunity to prevent an assault on a passenger in his charge, it is his duty to do so, and his failure to make a reasonable effort to protect the passenger from such assault would make the company responsible." Or, as differently expressed in *Illinois O. R. Co. v. Minor*, 69 Miss. 710, 11 So. 101: "A common carrier is required to protect a passenger from an unprovoked assault of a fellow passenger if the conductor knew that it was threatened, and could have prevented it with the assistance of employees and willing passengers." 16 L. R. A. 627, and copious notes.

The overwhelming weight of judicial precedent sustains this view of the carrier's liability in such instances as are presented by the record before us. *New Jersey S. B. Co. v. Brockett*, 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1039; *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944; *Gonnell v. Chesapeake & O. R. Co.* 93 Va. 44, sub nom. *Ball v. Chesapeake & O. R. Co.* 32 L. R. A. 792, 24 S. E. 467; *Britton v. Atlanta & O. Air Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749; 5 Am. & Eng. Enc. Law, 2d ed. 553.

The duty to protect the passenger against an assault by a fellow passenger being, then, a qualified duty, and the responsibility for a failure to perform that duty arising only after the servant has neglected to act upon the knowledge, or upon the facts which ought to have imparted knowledge, that the injury was threatened, do the facts in evidence bring this case within that rule? It seems to us quite clear that they do not. The affray was a sudden one. It undoubtedly grew out of the use of abusive language.

But as soon as the attention of the captain of the boat was called to the conduct of the two men, and just as he was notified that there was "going to be a fight" and therefore, before there was a blow struck, he rushed, or, as the witness expressed it, "he jumped in," but too late to prevent either Batten from striking Merritt, or Merritt from firing his pistol. The first intimation he had of a threatened encounter between these two men was the warning given by Beacham, and he responded at once.

Had he been less prompt in interfering he was not bound to assume that the quarrel

would develop into an affray in which a deadly weapon would be used, and the steam-boat company cannot be said to have been negligent because its servants failed to foresee that a pistol would be fired into a crowd of passengers, when the firing of a pistol was, by no means, a necessary, or even a probable, result of the trouble between the two men, who had then ceased to play cards.

It would stretch the liability of a carrier far beyond established limits, if he were accountable for an unexpected injury inflicted by one passenger upon another passenger, and if he were so held accountable solely because the servants in charge of the boat, or the train, or the coach, upon which the injury happened, failed to anticipate or infer from the fact of a quarrel between two persons that one of them would recklessly fire a pistol and injure another passenger who was not concerned or involved in the quarrel at all. And yet that is precisely what must be laid down as the law, if in this case the plaintiff is entitled to recover.

Captain Bohannon obviously had no knowledge that the shooting of a pistol was likely to occur—at least, it was not shown that he had such knowledge—and the witness who called his attention to the hostile attitude of the parties indicated or suggested no such probability. That a deadly weapon would be used was not a thing he was bound to assume. He acted with great and commendable promptness, and interfered before the shot was fired, and there was no evidence to show that he could have done more than he did do to quell the disturbance.

The fact that in spite of what he did do the pistol was fired, does not show that he did not do all that, under the circumstances, it was his duty to do. The carrier's liability does not, in such cases, depend upon the naked fact that an injury happened; if it did, as already remarked, the measure of his duty would be that of an absolute insurer. But it depends on the fact of an injury, and the concomitant fact that the negligence of the carrier's servants in omitting to prevent the doing of the act which produced the injury actually caused the injury.

Proof there must be of both of these constituent elements of the plaintiff's cause of action, but there was a total failure of evidence in the case at bar to support the latter of them. Indeed, the evidence adduced by the plaintiff negatives the idea that the company's servants were negligent.

The case of *West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427, 41 S. W. 583, so much relied on in the appellant's brief, is in strict accord with the doctrine of the cases referred to in an earlier part of this opinion.

It is true a recovery was had in that case, because the facts justified it and brought the defendant within the scope of the rule as to the carrier's qualified liability. One of the general officers of the company, having charge of the excursion boat, permitted a number of passengers, who were armed with guns and pistols, to fire indiscriminately at objects in the water, to the great alarm of

many persons on board. One of the passengers, while handling a repeating gun, accidentally exploded a shell and injured the plaintiff, a fellow passenger. Among the persons standing near the man who had the repeating gun was Couch, the party who advertised the excursion, and was a general officer of the company and was in charge of the excursion. "The evidence" said the court, "shows that not only he had not endeavored to stop the firing, but he had encouraged it by actively participating in it." He had time to stop this perilous and indiscriminate shooting which caused alarm to the passengers, was obviously dangerous and very likely to result in accidents; but instead of interfering to suppress it he actually encouraged it and participated in it. Of course, when an injury did result under these conditions the company became answerable.

This is not a case to which the doctrine of *res ipsa loquitur* applies. We discussed that doctrine in *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067, and need not now repeat what has been so recently said in respect to it. The injury sued for in this case is traceable to an act of a third party, and whether the carrier is responsible for the consequences of that act depends upon whether its agents could have prevented it. There is a difference between the physical act of a third person, and the omission of the company which failed to prevent the doing of the act that caused the injury. The carrier's liability arises only when there is evidence of a fact distinct from and forming no part of the act done by the third person.

In no sense, therefore, can the act of the fellow passenger or of a stranger speak for or characterize the other and different thing; it cannot define the negligent omission, which must be proved as an independent proposition before the carrier's liability begins.

There was, for the reasons we have given, no error in the ruling which took the case from the jury on the evidence in the case. Ought the proffered evidence, which was excluded, to have been admitted, or, if it had been admitted, would it have changed the result?

The witness, Beacham, was asked this question: "How long was it after you called the captain when the captain came?" And he replied: "It is a difficult matter to fix that. I lost sight of the fact almost that I had called the captain's attention at all when I heard this fuss; but if the captain had responded promptly, I don't believe the affair would have occurred." Upon motion, the last clause of the answer, giving the belief of the witness, was stricken out.

The witness, Stiefel, was asked: "Was there a game between Merritt and Batten of sufficient violence and loudness to have attracted the attention of anyone in any part of the room who was not giving attention to what was going on in the room?" and he answered: "If the captain had paid attention to it, it would have prevented the quar-

rel." This answer was, on motion, also stricken out. There was no error in either of these rulings. In both, the opinion of the witness was excluded. The question at issue in the case was for the jury, or for the court dealing with the legal sufficiency of the evidence, to determine, and not for the witnesses to decide.

It was for the jury, if the case went to them, or for the court in dealing with the question as to whether there was legally sufficient evidence to be considered by the jury, to say from the facts in evidence whether the captain acted with appropriate promptness, and it was not the province of the witnesses to determine this matter at all. *Tucker v. State use of Johnson*, 89 Md. 471, 46 L. R. A. 181, 43 Atl. 778, 44 Atl. 1004.

The first and fourth grounds of error are one. They both involve the ruling which excluded from the jury proof of the rules or instructions prohibiting gambling on the boats. These rules or instructions were irrelevant. Had they been introduced they would not have thrown any light on the matters at issue. If the captain really violated any rule in permitting gambling on the steamer, that fact was no evidence of negligence which contributed to the injury unless it can, either universally and invariably, or, at least, with reasonable probability, be predicated of every act of gambling that it will end in such an act of violence.

The argument is this: The shooting followed the blow that was struck; the blow followed the use of the abusive epithet; the epithet followed the quarrel, and the quarrel grew out of the game of cards; therefore the game of cards produced the shooting, and as the game of cards was prohibited by the company's rules, the company's servants were negligent in allowing it to be played. But this is neither sound reasoning nor actual fact.

Until you can predicate of a game of cards as its necessary result an assault, you have nothing but speculation; you may have a sequence of events which are purely accidental in their relation but are not inherently or necessarily the successive results of preceding causes.

As there was no error in entering judgment for the defendant, the steamboat company, that judgment will be affirmed.

Judgment affirmed, with costs above and below.

William L. HOPKINS, Appt.,
v.

John K. COWEN et al., Receivers of Baltimore & Ohio Railroad Company, Respts.

(.....Md.)

A consignment to the consignor's order, where the bill of lading with draft attached is sent to a bank to be delivered when the

draft is paid, and stipulates that it must be surrendered in order to obtain the delivery of the goods, does not pass title to them or entitle the person for whom they were sent to their delivery by the carrier without surrendering the bill of lading, although the bank refuses to surrender it to him, or accept his tender of the amount of the draft.

(December 6, 1899.)

A PPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendants in an action brought to obtain possession of certain flour placed in defendants' possession for transportation to plaintiff, which defendants refused to deliver without bill of lading. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. B. Tippet & Bro. and William S. Bansemer, for appellant:

The defendant in the replevin suit need, by no means, be the party setting up a claim of possession and ownership adverse to the plaintiff.

The party in the possession is the only proper defendant.

Herzberg v. Sachse, 60 Md. 433.

The action is properly brought against the person who is in actual, physical possession of the property involved, although he may be keeping it for another.

Flatner v. Good, 35 Minn. 395; *Rose v. Cash*, 58 Ind. 281; *Stevenson v. Taylor*, 2 Mich. N. P. 95; *Cobbey, Replevin*, p. 432; *Wells, Replevin*, p. 134.

The carrier cannot defeat this action of replevin upon the plea that if the plaintiff prevails it will be liable for a breach of contract in allowing the goods to go out of its possession without the production of the bill of lading.

The common carrier is exonerated from his obligation to his bailor, when the property of the latter is taken by legal process.

Ohio & M. R. Co. v. Yohe, 51 Ind. 184, 19 Am. Rep. 727; *Burton v. Wilkinson*, 18 Vt. 190, 46 Am. Dec. 145; *Kohn v. Richmond & D. R. Co.* 37 S. C. 1, 24 L. R. A. 100, 16 S. E. 376; 4 Elliott, Railroads, pp. 1461, 1537; *Bliven v. Hudson River R. Co.* 35 Barb. 191, *Affirmed* in 36 N. Y. 403.

The duty of the carrier is merely to notify his consignor of the proceedings. He is not bound to defend the suit.

Stiles v. Davis, 1 Black, 101, 17 L. ed. 33; *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 145; *Van Winkle v. United States Mail S. S. Co.* 37 Barb. 122; *Edson v. Weston*, 7 Cow. 280; *Hutchinson, Carr.* pp. 396, 398; *Schouler, Bailm.* p. 428; 5 Am. & Eng. Enc. Law, 2d ed. p. 240.

The carrier cannot object to the proceeding on the ground that the unproduced bill of lading will be negotiated to some bona fide holder, without notice, because in the attempt to negotiate it the bill itself would give actual notice of Hopkins' rights.

NOTE.—As to passing title to property by delivery to carrier for transportation to consignee, see *Ramsey & G. Mfg. Co. v. Kelsea* (N. J.) 22 L. R. A. 415, and note; *A. J. Neimeyer Lumber* 47 L. R. A.

Co. v. Burlington & M. R. Co. (Neb.) 40 L. R. A. 534; and *Kentucky Refining Co. v. Globe Refining Co.* (Ky.) 42 L. R. A. 353.

Jacob Dold Pkg. Co. v. Ober, 71 Md. 164, 18 Atl. 34.

To effect a sale, it is only necessary that the parties fully agree with respect to a thing capable of identification, that for an agreed price the title to the thing shall pass from the vendor to the vendee.

Cheney v. Eastern Transp. Line, 59 Md. 565; *Hall v. Richardson*, 16 Md. 413, 77 Am. Dec. 303; *Farmers' Phosphate Co. v. Gill*, 69 Md. 545, 16 Atl. 214.

Messrs. John T. Mason, R. and Charles S. Hayden, for appellees:

To maintain replevin, right of possession at time of issuing the writ must be in the plaintiff.

Lamotte v. Wisner, 51 Md. 561; *Seldner v. Smith*, 40 Md. 613; *Rogers v. Roberts*, 58 Md. 522; *McGuire v. Benoit*, 33 Md. 186; *Cumberland Coal & I. Co. v. Tilghman*, 13 Md. 83; *Clary v. Frayer*, 8 Gill & J. 421.

And if the right of possession be in the defendant, the action must fail, and judgment be for defendant.

McKinzie v. Baltimore & O. R. Co. 28 Md. 174; *Cumberland Coal & I. Co. v. Tilghman*, 13 Md. 83; *Clary v. Frayer*, 8 Gill & J. 421; *Farmers' Pkg. Co. v. Brown*, 87 Md. 7, 39 Atl. 625.

The replication of plaintiff alleging title in himself threw the whole burden of proof on him.

Lamotte v. Wisner, 51 Md. 561; *Horsey v. Knowles*, 74 Md. 604; *Smith v. Wood*, 31 Md. 297.

The carrier can only deliver on surrender of the bill of lading properly indorsed, when the same is issued in name of the shipper.

Hutchinson, Carr. ¶ 130; *Pennsylvania R. Co. v. Stern*, 119 Pa. 29; *Sohn v. Jervis*, 101 Ind. 582; *Kentucky Refining Co. v. Globe Refining Co.* 20 Ky. L. Rep. 778, 42 L. R. A. 356.

The bill of lading is the symbol of title, and issuing it to the order of the shipper plainly imports an intention on his part to retain the *jus disponendi*.

Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

The carrier is not called upon to know what, if any, contract is binding between the shipper and party to be notified, or whether purchase money is due. The bill of lading announces, in a mandatory way, "the goods belong to the shipper; don't deliver to anyone without bill of lading."

Kentucky Refining Co. v. Globe Refining Co. 20 Ky. L. Rep. 778, 42 L. R. A. 356; *Libby v. Ingalls*, 124 Mass. 505.

The business interests of the community demand that a consignor in a distant part of the country should have the right to ship property to be delivered to the purchaser only upon the condition that the purchaser first actually pay for the same.

The established and well-known method of doing this is by a draft, bill of lading attached, to be surrendered on payment of draft.

Dows v. National Each. Bank, 91 U. S. 618, 23 L. ed. 214; *Kentucky Refining Co. v.* 47 L. R. A.

Globe Refining Co. 20 Ky. L. Rep. 778, 42 L. R. A. 356; *Seal v. Zell*, 63 Md. 360.

Even if the draft be accepted, the property is still wholly under control of shipper.

Hall v. Richardson, 16 Md. 414, 77 Am. Dec. 303.

Shipment subject to order of consignor plainly imports the intention on part of the shipper to retain title, which governs.

Berger v. State, 50 Ark. 23, 6 S. W. 15; *Alabama G. S. R. Co. v. Mt. Vernon Co.* 84 Ala. 177, 4 So. 356; *McCormick v. Joseph*, 77 Ala. 236; Benjamin, Sales, 399.

The title carrying with it the right of possession does not vest under such circumstances until actual delivery of the bill of lading.

Alabama G. S. R. Co. v. Mt. Vernon Co. 84 Ala. 177, 4 So. 356; *Berger v. State*, 50 Ark. 20, 6 S. W. 15.

The sending by the shipper of an invoice of the goods to the consignee is in itself no evidence of title in the consignee in the presence of the overbearing manifestation of a contrary intent by having the bill of lading to order of consignor.

Dows v. National Each. Bank, 91 U. S. 618, 23 L. ed. 214; *Pennsylvania R. Co. v. Stern*, 119 Pa. 29, 12 Atl. 756.

Page, J., delivered the opinion of the court:

The appellant in this case sued the appellees in replevin to recover the possession of 210 sacks of flour. The pleas are property in the appellees and property in the Winnebago City Mill Company.

At the trial, the appellant, to sustain the issues on his part, offered to prove that he had been engaged in purchasing flour from the Winnebago City Mill Company for a number of years; that on January 11, 1898, he ordered from the company the flour in question, "without any agreement as to the terms of payment," and that "the flour was subsequently shipped by the said company to the appellant at Baltimore city;" that the course of dealing at and before that time was as follows, *viz.*, the mill company (whose place of business is in Winnebago city, Minnesota), at the time of shipment, would draft for the value of the shipment and attach thereto the bill of lading and these drafts usually arrived a few days before the goods, and the appellant, as he needed the flour, would call at the banks where the drafts were placed by the company and were payable, and "take them up;" that all of the flour so shipped "was booked by the mill company as an absolute sale."

Included in the appellant's offer was evidence of other sales and shipments by the mill company, showing the general course of dealing between the parties, and also copies of the letters and telegrams of the parties respecting such sales, and of the checks of the appellant in payment of the several drafts of the mill company on the appellant. There also appears in the proceedings the bill of lading and the draft attached thereto, which the parties agree may be considered by this court, as if included in the offer of

the appellant, and incorporated in the bill of exceptions. The court below rejected this offer, and the verdict and judgment being for the appellees the appellant has appealed.

The action being in replevin, the burden is upon the appellant to prove an immediate right to the possession of the goods, and inasmuch as the appellees have pleaded property in the Winnebago City Mill Company they must show a title superior to that of the company. *Lamotte v. Wisner*, 51 Md. 561.

The question therefore, now before the court is, to determine whether the facts contained in the offer would be sufficient, if properly proved, to enable a jury, or the court sitting as a jury, to find that the title or the right of possession has passed from the mill company, and become vested in the appellant.

The flour in dispute was shipped from Winnebago city on January 21, and about the same time the mill company forwarded by mail to the appellant an invoice, with the following words appended thereto, *viz.*: "We have drawn on you at arrival of goods for the proceeds, with railroad receipt attached to the draft." By reference to the "receipt," or bill of lading, it appears that the flour was consigned to the company itself. Over the name of the consignee, the mill company, is written the word "order," and below, the words "Notify W. L. Hopkins;" without any other condition or limitation.

One of the conditions of the shipments, as appears printed on the bill of lading, is that, "if the word 'order' is written thereon before or after the name of the party to whose order the property is consigned without any condition or limitation other than the name of the party to be notified of the arrival of the property, the surrender of this bill of lading, properly indorsed, shall be required before the delivery of the property at destination." The bill of lading, with draft attached, was sent by the mill company to the Western National Bank at Baltimore, whose duty it was to retain possession of it until the appellant had paid the draft.

When such payment was made the appellant was entitled to receive the bill of lading, and, upon proper indorsement, by the terms of the bill itself and according to the usual course of dealings between the parties, the appellant was in a position to demand the possession of the goods. The flour arrived in Baltimore in due time, and the appellant was notified thereof by the railroad company. He made no effort, however, to pay the draft until the 4th of May. On that day he tendered his check, but the bank refused to accept it, and notified him that it had received notice on the previous day from the mill company not to accept payment of the draft from him. It also refused to deliver to him the bill of lading, although both the bill and the draft were then in its possession.

It is contended, on the part of the appellant, that all the facts, as we have stated them, establish the following propositions, *viz.*: (1) That a sale had been effected between the mill company and the appellant, 47 L. R. A.

whereby the title to the property became vested in the appellant; (2) that the agreement necessarily implied amounted to a complete contract of sale, "with the stipulation that delivery of possession is dependent upon payment or tender of purchase price; and (3) that when the appellant tendered his check in payment of the draft (having sufficient funds in bank to meet it) he had the right to the immediate possession of the flour.

The general rule, applicable to the passing of title to personal property, has been well stated in *Dixon v. Yates*, 5 Barn. & Ad. 313. In that case, it was said by Parke, J.: "Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but when, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." The fundamental principle upon which this rule rests is, to carry out the intention of parties who have agreed "with respect to a thing capable of identification, that for an agreed price the title to the thing shall pass from the vendor to vendee." *Cheney v. Eastern Transp. Line*, 59 Md. 565.

When the contract is express, there can be no difficulty; but when the evidence with respect to it is meager, courts must endeavor "to ascertain the intent of the parties and apply that test as a controlling principle." *Hall v. Richardson*, 16 Md. 412. So, also, where the agreement is for a sale of the property, and the performance of other things, it must be ascertained whether the performance of any of those things is meant to precede the vesting of the title in the vendee. *Blackburn, Sales*, 151, cited in 3 Benjamin, Sales, chap. 3. Accordingly, it is held that where a buyer purchases a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specified quantity by delivering them to a carrier, the law presumes that to be equivalent to delivery to the vendee (16 Md. 412, *supra*): and in such case the goods become the property of the vendee, although they are to be paid for on arrival. *Farmers' Phosphate Co. v. Gill*, 69 Md. 545, 1 L. R. A. 767, 16 Atl. 214, the carrier being regarded as the agent of the vendee to receive them.

But if the vendor undertakes to make delivery himself at a distant place, the carrier becomes the agent of the vendor, and the property will not pass until delivery is made. In both such cases, the inference arising from the facts stated may be rebutted by other circumstances which tend to show what the interest of the parties really was. *Dove v.*

National Exch. Bank, 91 U. S. 618-637, 23 L. ed. 214, 220; *Farmers' Phosphate Co. v. Gill*, 69 Md. 545, 16 Atl. 214.

In the case last cited, where the goods had been consigned to the vendee, after stating the general rule that a bill of lading operates as a transfer of the property to the party in whose favor it is drawn and to whom it is delivered, the court remarks that "if the vendors in this case had wished to prevent the property from passing and to retain the right to deal with it after shipment and while *in transitu*, they should by the bill of lading have made the cargo deliverable to their own order, and have forwarded the same to an agent of their own with directions to retain it until the cargo had been finally delivered, weighed, tested, and paid for in Baltimore."

In *Kentucky Refining Co. v. Globe Refining Co.* 20 Ky. L. Rep. 778, 42 L. R. A. 358, the court said, citing from *Alderman v. Eastern R. Co.* 115 Mass. 233, "that when goods are consigned deliverable to the order of the consignor, and the bill of lading, with a draft for the price drawn on the purchaser of the goods attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid, and the bill of lading is indorsed to him."

In *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, it was said that a vendor "may take the bill of lading or the carrier's receipt in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser; and in all cases when he manifests an intention to retain the *jus disponendi* the property will not pass to vendee." *Hardy v. Munroe*, 127 Mass. 64; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Pennsylvania R. Co. v. Stern*, 119 Pa. 29, 12 Atl. 756.

In this case the mill company consigned the goods, deliverable to its own order. It forwarded the bill of lading, with the draft attached. All parties understood that the former was not to be given up by the bank until the latter had been paid; and by the terms of the bill of lading it was provided that the flour was not to be delivered until the bill of lading, properly indorsed, was presented to the carrier. We find nothing in the offer that can be effectual to modify the legal inferences to be drawn from these facts.

It is stated that the appellant ordered the flour "without any agreement as to the terms of payment." But it is plain that it was accepted upon the terms that had characterized their entire dealing, which were that the flour should remain in the possession of the carrier, subject to the order of the mill company, until the draft had been paid. The whole course of these dealings shows that the mill company was to prepay the freight and deliver the flour in the city of Baltimore, and that the appellant was not to be entitled to possession until after the draft had been paid.

The invoice cannot have the effect of modifying the contract, which the facts so clearly imply. The purpose and effect of that was 47 L. R. A.

to give a description and cost of the goods; it was not a bill of sale nor evidence of a sale. *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214; *Sturm v. Boker*, 150 U. S. 328, 37 L. ed. 1100, 14 Sup. Ct. Rep. 99. And even though in some cases it may be useful in connection with other facts to show the intent of the parties, yet in this case no inferences can flow from it tending to alter or change the intent inferable from the circumstances already stated, for the reason that, appended to the invoice, as a part of it, was the explicit statement that the mill company had drawn on the appellant at arrival for the proceeds, "with railroad receipt attached to the draft."

Upon the whole offer, it seems to us clear that it was not the intent of the parties that the title to the flour should pass to the appellant until the draft had been paid.

The judgment must therefore be affirmed.

Peter A. LION, Appt.,

v.

BALTIMORE CITY PASSENGER RAILWAY COMPANY.

(.....Md.....)

1. Changing the accustomed flow of surface water on a street, and concentrating it in underground drains and a vault, where but part of the water formerly had flowed on the surface, is done at the peril of providing adequate means to discharge the water so gathered, and to discharge it in a way that will not be injurious to others.
2. The employment of a competent engineer to direct a work is not the fulfilment of a duty to avoid doing injury to another, when, notwithstanding the engineer's competency, the work as constructed does cause injury.
3. Notice to the original wrongdoer of injury caused by a structure made by him is not necessary to make him liable to the owner of property injured thereby, although the latter became the owner thereof after the construction of the work which did the injury.

(December 6, 1899.)

A PPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendant in an action brought to recover damages for injuries to property by water overflowing from a receptacle constructed by defendant under a street to permit the laying of its tracks. *Reversed.*

The facts are stated in the opinion.

NOTE.—The question as to the necessity of notice of injury to an original wrongdoer in order to make him liable to one who subsequently became the owner of the injured property seems to be somewhat novel.

As to the necessity of notice to a subsequent owner of property on which a nuisance has been created in order to make him liable, see *Philadelphia & R. R. Co. v. Smith* (C. C. App. 8d C.) 27 L. R. A. 181; and *Willits v. Chicago, B. & K. City R. Co.* (Iowa) 21 L. R. A. 608.

Messrs. J. Southgate Lemmon and Robert W. Beach, with **Mr. C. Baker Clotworthy**, for appellant:

Having obstructed the natural flow, and having gathered the water into this vault, for its own purpose, the defendant was bound to provide proper means or drains for its escape without injury to the property of others, and its failure to do so was in itself negligence, for the consequences of which the defendant was liable.

Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 11 Atl. 822; *Baltimore Breweries' Co. v. Ranstead*, 78 Md. 501, 27 L. R. A. 294, 28 Atl. 273; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Gilluly v. Madison*, 63 Wis. 526, 52 Am. Rep. 299, 24 N. W. 137; 2 Dill. Mun. Corp. §§ 1045, 1046, 1051, 1051a; *Gray v. McWilliams* (Cal.) 21 L. R. A. 593, 595, 596, note C; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Hitchins Bros. v. Frostburg*, 68 Md. 110, 11 Atl. 826.

While municipal corporations have been held exempt from liability for bad planning, or from failure to repair, until notified of defects in city sewers, this theory has never been extended to private corporations interfering with the public highway for their own purposes, and has been restricted within proper limits of care and watchfulness even as to public authorities.

Todd v. Troy, 61 N. Y. 509; *McCarthy v. Syracuse*, 46 N. Y. 197; *Rowe v. Portsmouth*, 56 N. H. 299, 22 Am. Rep. 464.

No request was necessary, since the estate of the original creator of the nuisance continued.

Case LVII., *Jenkins Exch. Rep.* p. 260; *Watler v. Wicomico County Comrs.* 35 Md. 385; *Nusquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 9 L. R. A. 737, 20 Atl. 900; *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081; *Scott v. Bay*, 3 Md. 432.

Messrs. Arthur W. Machen and William S. Bryan, Jr., for appellee:

The drains of the defendant having been laid in 1892, long before the plaintiff bought his house, the plaintiff, when he subsequently bought the property, took it "subject to the inconvenience," and could not, of course, recover for any injury that had already been done to the property. The plaintiff, having bought the property "subject to the inconvenience," could not recover for any injury worked by the continuance of the nuisance without first giving notice to the railroad company.

Pickett v. Condon, 18 Md. 412; *Oonhoo-ton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Wood, Nuisances*, § 838; *Woodman v. Tufts*, 9 N. H. 88; *Noyes v. Stillman*, 24 Conn. 15; *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132.

When there is proper legislative sanction for the construction of a cable or other street railway, such railway is not a new servitude, but is an ordinary use of the street for street purposes.

47 L. R. A.

Poole v. Falls Road Electric R. Co. 88 Md. 533, 41 Atl. 1069; *Hodges v. Baltimore Union Pass. R. Co.* 58 Md. 619; *Peddicoord v. Baltimore, O. & E. M. Pass. R. Co.* 34 Md. 363; *Hiss v. Baltimore & H. Pass. R. Co.* 52 Md. 242, 36 Am. Rep. 371; *Booth, Law of Street Railways*, § 127; *Short v. Baltimore City Pass. R. Co.* 50 Md. 73, 33 Am. Rep. 298.

The duty of the defendant was to exercise ordinary care and prudence.

Short v. Baltimore City Pass. R. Co. 50 Md. 84, 33 Am. Rep. 298.

There is a vast difference between showing an error of judgment on the part of a professional man and showing negligence.

McClain v. Brooklyn City R. Co. 116 N. Y. 460, 22 N. E. 1062; *Altwater v. Baltimore*, 31 Md. 462.

A question of engineering or the propriety of an engineering plan adopted by a municipality (or by a quasi-public corporation like a street-railway company, whose plans must be approved by the public officials having charge of the streets) is not a fit question to submit to a jury.

Johnston v. District of Columbia, 118 U. S. 21, 30 L. ed. 76, 6 Sup. Ct. Rep. 923; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Mills v. Brooklyn*, 32 N. Y. 489; 2 Dill. Mun. Corp. § 1046, and notes.

When it appears from the plaintiff's evidence that the injury sued for may have been caused by one of two independent agencies, for one only of which the defendant is responsible, the jury will not be permitted to surmise or conjecture as to which is the cause of the injury.

Harford County Comrs. v. Wise, 75 Md. 42, 23 Atl. 65; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 136.

McSherry, Ch. J., delivered the opinion of the court:

Legislative permission was given to the Baltimore City Passenger Railway Company to use the cable system for the propulsion of its cars. In constructing that system it became necessary for the company to build the cable conduit under open gutters wherever it intersected them. Ensor street and Ashland avenue intersect each other nearly at right angles.

In going from one to the other—that is to say in going north along the former and curving therefrom east into the latter—the open gutter formerly along the east side of Ensor street where it crossed Ashland avenue, had to be passed, and as it was impossible for the conduit with its open slot to be built under the surface gutter, the gutter was changed to a closed sewer and sunk by the railway company under the conduit. To provide for the water carried off by the surface gutter a 20-inch drain pipe was laid by the company some feet below the grade or level of Ashland avenue, from a point north of the northeast corner of Ensor street and Ashland avenue to a point south of the southeast corner of the same street. At this latter point there was a vault built, and

the 20-inch pipe was made to discharge into it.

At the north and south ends of this 20-inch pipe there were 8-inch openings leading from the surface gutter; and at the northeast corner of the two streets there was laid under ground and running eastwardly, a 15-inch pipe connecting with the 20-inch pipe and conveying into it the surface water gathered from the north side of Ashland avenue. At the southeast corner of these same streets there was another 15-inch pipe laid conveying into the vault the surface water gathered from the south side of Ashland avenue, and from Stirling and Aisquith streets farther to the east. Leading from the vault, and running down Ensor to Madison street, was a 15-inch outlet pipe. Water which formerly passed south across Ashland avenue and down Stirling and Aisquith streets was carried west along Ashland avenue to this vault.

The bed of Ashland avenue was raised to accommodate the location of the conduit. It was made the duty of the company to keep in repair, and to remove obstructions from this vault and these underground sewers or pipes. It will be noticed that all the water entering this vault from the two 8-inch openings, and from the two 15-inch pipes, was designed to be discharged through one 15-inch outlet, and that the volume of water brought to the vault by these works of the company was greater than had formerly passed the southeast corner of the two streets—Ensor street and Ashland avenue—upon the surface. All this work was done by the railway company under the direction of the city commissioner.

In 1896 the appellant purchased a house at the southeast corner of Ensor street and Ashland avenue in the immediate vicinity of, or about 12 feet away from, the vault described above. At the time he purchased the house the cellar was dry, and the walls were free from cracks, although these drain pipes had been laid and this vault had been built for some four years. Shortly afterward the vault overflowed and the cellar of the appellant's house was flooded. When the vault was cleaned out by the railroad company the water in the cellar receded. This overflowing and flooding occurred on subsequent occasions and in every instance from an ordinary rainfall. As a result of these overflows the walls of the appellant's house were so damaged and rendered so unsafe that the house was, by direction of the building inspector, taken down.

The appellant then sued the railway company for the damage thus sustained by him. He alleged in his declaration that, "by reason of the careless, unskilful, and negligent manner in which said sewer was constructed, kept in repair, and attended to," water came into the cellar "of his house, and caused the injury just described."

These facts were shown by the evidence, and there was also testimony tending to prove that the plan of this construction of the drain pipes and vault, or receiver, was

bad; and that the works, as built, were insufficient to carry off, except by an overflow that would flood the appellant's cellar, the amount of water which might be expected to enter the vault or receiver in seasons of ordinary rains." At the conclusion of the testimony, the plaintiff presented three prayers and the defendant thirteen.

The court rejected all of those offered by the plaintiff, and granted one at the instance of the defendant, whereupon the defendant withdrew the others which it had presented. The instruction granted is in these words: "It being an admitted fact that the defendant's drain was laid before the plaintiff owned the property in question, and there is no legally sufficient evidence that the plaintiff notified the defendant that the drain caused an injury to the same, the verdict must be for the defendant." Under this imperative instruction the verdict was, of course, rendered for the defendant, and from the judgment entered thereon the plaintiff appealed.

There were several questions discussed in the argument at the bar, but the controlling ones are those raised by the instruction just transcribed, and by the rejection of the prayers of the plaintiff. If the railway company elevated the bed of Ashland avenue, and brought an increased volume of water to the corner of Ensor street and Ashland avenue, and then by the negligent and unskilful construction of, or attention to, the sewers, or drains and vault, designed to carry off the water, failed to convey it away, whereby it overflowed the vault or receiver, and damaged the plaintiff's house, it can scarcely be doubted that the company is liable.

When the company undertook to change the accustomed flow of the surface water and to concentrate it in underground drains and a vault, at a point where but a part of it formerly had harmlessly flowed on the surface, it was bound, at its peril, to provide adequate means to discharge the water so gathered by it, and to discharge it in a way that would not be injurious to others. This was a perfectly plain duty that was incumbent upon it; and it is no answer to say that it relied on the judgment of competent engineers in the construction of its works, if, in fact, the works, as constructed, are inadequate to accomplish the purpose, or were unskilfully built.

The employment of a competent engineer to direct the work is not the fulfillment of a duty to avoid doing injury to another, when, notwithstanding the engineer's competency, the work as constructed does cause injury. The test of liability is not the fitness of the engineer, but the efficacy of the work. *Hitchins Bros. v. Frostburg*, 68 Md. 113, 11 Atl. 826.

Assuming this to be true, the doctrine laid down in the instruction which took the case from the jury is, that a recovery cannot be had against the original wrongdoer by one who, after the construction of the work which did the injury, became the own-

er of the property injured, unless the party sustaining the injury first notifies the wrongdoer to remove the cause of the injury and the latter omits or refuses to do so.

This doctrine is not tenable, and the case of *Pickett v. Condon*, 18 Md. 412, relied on to sustain it, does not do so. Ever since the decision of *Penruddock's Case*, 5 Coke, 101, it has been the settled law that the alienee of land upon which a nuisance existed when the alienee acquired the land is not liable to the owner of other property, subsequently purchased, for an injury done to the latter by the pre-existing nuisance, until the alienee has been first notified to abate the nuisance. This was all that was decided in *Pickett v. Condon*. Condon acquired property in 1855. At that time the land had a dam on it across a stream. Pickett and wife acquired their property in 1856. The dam erected by Condon's grantor caused the water to flow back on Pickett's mill.

Pickett sued Condon, and it was held that as Condon's grantor, and not Condon, had erected the dam, and as Condon had not been notified to remove it, he was not answerable. The reason of the rule is obvious. A person who has not erected a work that may become a nuisance or occasion damage, or who was in no way connected with its construction, is not responsible for the injury it does cause, if he subsequently becomes the owner of the property upon which the nuisance is located, and thus gets control of the injurious thing. Knowledge that it is injurious must be brought home to him, and an opportunity must be afforded him to abate it, before he can be made liable; otherwise he would be held responsible, not for his own, but for his grantor's, wrongful act.

If, with that knowledge, he does not abate the nuisance, he is treated as continuing it. And so all the cases from *Penruddock's Case*, have been held. *Philadelphia & R. R. Co. v. Smith*, 28 U. S. App. 134, 64 Fed. Rep. 679, 12 C. C. A. 384, 27 L. R. A. 131, and cases there cited.

But the bare statement of the proposition that where the party sued was not the original creator of the nuisance he must have notice of it, and a request must be made to remove it, before any action can be brought, carried with it the exclusion of its application to the original wrongdoer. Why should the original wrongdoer have notice before being sued?

It is his negligent act which causes the injury; and for that negligent act, and not for a continuance of it after notice given, he is answerable. Notice to him from anyone injured by his wrongful act is wholly unnecessary. *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90. In *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 144, 82 Am. Dec. 201, it was held that no notice or request to abate the nuisance is necessary before bringing suit against the original wrongdoer; but that the grantee of the nuisance is not liable until 47 L. R. A.

upon request made he refuses to remove the nuisance. Even "when he who erects the nuisance conveys the land he does not transfer the liability to his grantee." *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333.

It is clear, then, upon reason and authority, that no notice was required to be given by the appellant to the railway company, the original erector of the structure which caused the injury, before the pending suit was brought, and there was consequently error committed in granting the instruction which took the case away from the jury on the sole ground that such notice had not been given.

As to plaintiff's rejected prayers, but little need be said. There was evidence tending to support the hypothesis which they set forth.

If the facts alleged in the *narr.* make a good cause of action, as they undoubtedly do, then the prayers submitting the finding of those facts to the jury should have been granted. There was quite enough evidence from which the jury could well have determined that the injury to the house resulted from the negligent or unskilful construction of, or attention to, the sewer and vault. It is true, it was insisted in the argument that there was no evidence before the jury to show any relation between the construction of the sewer and vault and the injury to the house, and it was contended that although these events were contiguous in time and place, there was nothing more than a coincidence in their occurrence, and that, therefore, it was a palpable fallacy to assume that the one was the cause of the other.

It is sheer sophistry to assume that because a given thing is posterior in occurrence to another it is therefore the result of the anterior event. The plaintiff's contention, however, is, not simply that because before the sewer and vault were built there was no injury to the house, and because after they had been constructed there was an injury, that, therefore, the injury was the result of their being built, but the facts tended to show that only when the sewer and vault were choked and overflowed, either by reason of the insufficiency of the outlet, or because of the company's inattention to their condition, did the cellar become flooded.

The cause of the actual damage was traced to the overflowing vault, and the negligence or unskilfulness of the company occasioned those overflows. Between the alleged cause and its asserted result there was a direct connection; in fact, a dependency of the one upon the other as actually traced by one of the witnesses; and this is widely different from that fallacious reasoning in which that which is no cause at all is assumed to produce an alleged effect simply because the two are contiguous in time and place, while having no other relation to each other than sequence in the order of their occurrence.

There was but one cause proved that produced the injury. There is nothing in the record to bring the case within the doctrine followed in *Wise's Case*. That doctrine

briefly stated is: When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong. *Harford County Comrs. v. Wise*, 75 Md. 42, 23 Atl. 65.

For the reasons we have assigned, the prayers of the plaintiff ought to have been granted, and the instruction which was given by the court ought to have been refused.

Because of these errors the judgment must be reversed and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

IOWA SUPREME COURT.

George W. BOWEN
v.
PORT HURON ENGINE & THRESHER
COMPANY, *Appt.*

(.....Iowa.....)

1. A judgment against a solvent garnishee which the plaintiff fails to collect, without any excuse, constitutes a satisfaction of the claim against the original debtor for the amount thereof.
2. A judgment debtor for a part of whose debt judgment has also been taken against a solvent garnishee cannot be required to accept a tender of the latter judgment, which the plaintiff has failed, without excuse, to collect, in lieu of having the amount thereof credited on his own judgment.

(October 12, 1899.)

APPEAL by defendant from a judgment of the District Court for Carroll County refusing to declare satisfied a judgment against defendant upon its tender of the amount remaining due after application of the amount attached in the hands of the solvent garnishee. *Reversed*.

The facts are stated in the opinion.

Messrs. Jamison & Smyth, for appellant:

The legal effect of the judgment against the garnishee is to satisfy to the extent of such judgment the indebtedness between the garnishee and the principal debtor.

Stadler Bros. v. Parmlee, 14 Iowa, 175.

Garnishment is in effect an action against the garnishee by the defendant in the name of and for the benefit of the plaintiff, and the garnishee may be made personally liable.

Moore v. Walker, 46 Iowa, 146; *McConnell*

NOTE.—Effect of judgment against garnishee to merge or satisfy liability of principal debtor.

The question as to the effect of a judgment against a garnishee to merge or satisfy the liability of the principal debtor seems to depend, as a general rule, upon whether or not the judgment against the garnishee has been satisfied, or, at least, upon whether or not it is in such shape that immediate and complete satisfaction could be enforced; and the rule seems to be universal that a satisfied judgment against the garnishee, if it was duly rendered in the exercise of jurisdiction, merges or satisfies the liability of the principal debtor either *pro tanto* or in full, as the case may be.

Thus, the whole effect of a recovery against a garnishee inures to the benefit of the original creditor by having it applied to that creditor's debt to his creditor. *Brown v. Somerville*, 8 Md. 444, *dictum*.

And where a creditor recovers judgment against his debtor, and sues out a writ of garnishment thereon against one indebted to the judgment debtor, and procures judgment against the garnishee on an admission of indebtedness, and the judgment has been paid off in full, such payment is a payment *pro tanto* on the original indebtedness due the plaintiff, and he can only recover the balance in an action against a surety for the judgment debtor. *Parks v. State Nat. Bank* (Tex. Civ. App.) 34 S. W. 1044.

And a plaintiff in an attachment action in which a bond was given for the release of the property attached, who brings action upon the attachment bond, is entitled to recover against the principal and sureties therein where judgment had been obtained against him by a creditor, and the principal in the attachment bond had been charged as trustee, and judgment had 47 L. R. A.

been obtained against him as such, and he had paid the execution in suit in which he was charged as trustee, and caused the fact of such payment to be duly entered of record in the attachment suit according to the law, for costs, and such part of the damages as remained unpaid only. *Wood v. Mann*, 125 Mass. 319.

So, in *Cross v. Brown*, 19 R. I. 220, 33 Atl. 147, it was held that R. I. Pub. Stat. chap. 208, § 15, in so far as it provides that a trustee after final judgment against the defendant may satisfy the same, and that the payment thereof shall discharge him from his debt as against both plaintiff and defendant, is simply declarative of the legal status of the parties to the contract out of which the original indebtedness arose after such change of title to it has been effected by the process of garnishment, and it is not the statute which discharges the debt due from the trustee to the principal debtor, but it is the payment of the debt to the attaching plaintiff in satisfaction of his judgment against the principal defendant that discharges it; and that that statute is not unconstitutional in so far as it affects debts due to nonresidents as depriving the owners of their property in the debt without due process of law, or as impairing the obligations of the contract.

The above case is included because of its bearing upon the question of the discharge of the indebtedness of the principal debtor to his creditor by payment by the garnishee. The subject of the garnishment of debts due to nonresidents, and the validity of judgments with reference thereto, are not treated in this note.

See also *infra*, *Price v. Higgins*, 1 Litt. (Ky.) 274; *Backus v. Denison*, Kirby, 421.

So, there are cases from which it might be inferred that a judgment against a garnishee which had not been discharged, and remained in

v. Denham, 72 Iowa, 494, 34 N. W. 298; *Gilmore v. Cohn*, 102 Iowa, 254, 71 N. W. 244; *Citizens' State Bank v. Council Bluffs Fuel Co.* 89 Iowa, 624, 57 N. W. 444.

The effect of a garnishment is to stop the payment of any debt up to the time of final proceedings.

Victor v. Hartford F. Ins. Co. 33 Iowa, 210.

While garnishment is simply a mode of attachment, when final judgment condemning the property is entered, and the sale of the attached property ordered, the legal effect is to prima facie satisfy the judgment to the extent of the property.

Peck v. Parchen, 52 Iowa, 46, 2 N. W. 597. In case of a garnishment, the entering of judgment in favor of the plaintiff and against the garnishee is the appropriation of the property to the payment of the principal

debt; and where it is shown that the garnishee was good at the time, and that the judgment could have been collected, why should the plaintiff not be bound to answer for the value of the judgment against the garnishee, the same as he would if it were in other form of property?

Lucas v. Cassaday, 2 G. Greene, 208; *McCabe v. Goodwine*, 65 Ind. 288; *Harmon v. State ex rel. Pelton*, 82 Ind. 197; *Doe ex dem. Shelton v. Hamilton*, 23 Miss. 496, 57 Am. Dec. 149; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597; *Citizens' State Bank v. Council Bluffs Fuel Co.* 89 Iowa, 624, 57 N. W. 444.

The execution is satisfied to the extent of the value of the property levied upon, where said property has been lost to the defendant by the neglect of the sheriff.

Walker v. Com. 18 Gratt. 13, 98 Am. Dec. 631; *First Nat. Bank v. Rogers*, 13 Minn.

every way enforceable, might work a merger or satisfaction of the liability of the principal debtor, though it had not been actually satisfied.

Thus, the service of a garnishment upon one indebted to an execution debtor in an amount sufficient to satisfy the judgment, without more, is not such a levy as will amount to a satisfaction of the judgment, upon the principle that the levy of an execution upon personal property of the execution debtor of sufficient value is a satisfaction of the execution. *Beaumont v. Eason*, 12 Heisk. 417.

And by the custom of London the suing out execution against a garnishee by a creditor is in effect an election to take him for the debt of the principal debtor, and operates an extinguishment of the debt. *Cook v. Field*, 3 Ala. 53, 86 Am. Dec. 436, *dictum*.

So, a garnishment of moneys due the principal debtor under a judgment against him in favor of his creditor for a much larger sum is a *pro tanto* defense in an action brought against the original debtor by the original creditor, where the moneys garnished are still held under the process. *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597.

And an admission by the garnishee that a designated amount is due to his creditor, who was the principal debtor in a garnishment suit, entitles the principal debtor to a credit on the judgment against him of the amount thus admitted to be due, where there was no evidence that the garnishee was ever discharged, and the principal debtor denies that the garnishment was released, or that defendant ever received the amount of the indebtedness from the garnishee, though no case was ever docketed against the garnishee, and no judgment rendered, and it does not appear that the garnishee ever made payment to the garnishing creditor. *Doughty v. Meek*, 105 Iowa, 18, 74 N. W. 744.

And a recovery in a garnishee suit brought by a creditor, not against the primary debtor of his debtor, but against a guarantor of the claim, from which no appeal is taken, entitles the primary debtor to a credit for the amount recovered against the guarantor on his indebtedness to the debtor of the plaintiffs, the same as though it had been paid without suit by the guarantor to the plaintiffs. *Coe v. Hinkley*, 109 Mich. 608, 67 N. W. 915.

So, in *Hicks v. Gleason*, 20 Vt. 139, it was said that a trustee suit aims to substitute the creditor in the place of the debtor in respect to any sum due the latter from the persons named in the suit as trustees, and, if successful, it not only establishes a right to such substitu-

tion, but reduces the demand to judgment so that execution may follow against the trustee for the amount due from him, or for so much of it as may be necessary to satisfy the judgment against the principal defendant; but the question in this action was as to the right of the judgment debtor to maintain an action against the trustee on his claim during the pendency of the trustee suit.

And in *Mars v. Virginia Home Ins. Co.* 17 S. C. 514, it was said that a judgment in garnishment is conclusive against parties and privies; but the question in the case was as to whether or not the garnishee could be compelled to pay the debt a second time.

And in *Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410, it was said that ordinarily the creditor of the garnishee is the defendant in the attachment, and has, not only the opportunity to contest the original cause of action, but also the liability of the garnishee, and in such cases, when the garnishee acts in good faith, the judgment is conclusive as to all the parties, the plaintiff, the defendant and the garnishee; but the question in this case was as to whether or not the payment by the garnishee was voluntary, and as to his liability to pay again to his creditor.

But diligence in procuring satisfaction of the judgment against the garnishee is required to render it effectual as a bar to the claim against the principal debtor.

This is in effect the doctrine of the principal case.

So, a judgment creditor, who has through process of garnishment reached the assets of the principal debtor in the hands of a third party, and obtained judgment against the garnishee, is chargeable with diligence in preserving and applying the proceeds of the sale of the property taken under garnishment to the satisfaction of the judgment, and where the judgment debtor was insolvent, and the garnishee was solvent, and he fails to exercise diligence, and the judgment remains unsatisfied through his neglect, a surety of the judgment debtor is relieved. *Parks v. State Nat. Bank* (Tex. Civ. App.) 34 S. W. 1044.

And when the garnishee in such case sought to enjoin such judgment, and the surety requested the creditor, in order to protect himself, to be allowed to appear and contest the injunction, and promised to pay costs and attorney's fees, and the request was denied, the creditor himself promising the surety to appear and contest the injunction, but through collusion with the principal debtor and garnishee for the pur-

407, Gil. 376, 97 Am. Dec. 239; *Reed v. Crosthwait*, 6 Iowa, 219, 71 Am. Dec. 406; *McWilliams v. Myers*, 10 Iowa, 325.

Mr. George W. Bowen, in propria persona:

Garnishment is merely a mode of attachment and execution where money or property of the debtor in the hands of a third person is levied upon, and by subsequent proceedings in the court wherein the action is pending subjected to the payment of the claim or the judgment of the creditor.

8 Am. & Eng. Enc. Law, p. 1097, § 1.

The effect of the judgment against the garnishee is to declare the debt bound, and to make the garnishee liable to execution.

8 Am. & Eng. Enc. Law, p. 1102, § 2; *Chatterton v. Watney*, L. R. 17 Ch. Div. 259.

Subject to such claims, the rights of the defendant for the purpose of making demand

of his debtor or of securing his indebtedness by attachment or otherwise remain unimpaired.

Hicks v. Gleason, 20 Vt. 139.

Until garnishee's liability is discharged by satisfaction of a valid judgment against him in the garnishment proceeding, the rights of the defendant to enforce his claim are suspended only, not extinguished.

8 Am. & Eng. Enc. Law, p. 1201; *Smith v. Clinton Bridge Co.* 13 Ill. App. 572.

Judgment for plaintiff after issue joined is complete as a personal judgment, and may be executed against any property of the defendant not exempt by law.

Waples, Attachment & Garnishment, 506, § 14; *Waynant v. Dodson*, 12 Iowa, 22.

A judgment against a garnishee is rather in favor of the principal defendant than against him. It is really a judgment in fa-

pose of injuring the surety, and making him pay the debt, made no resistance, and let the injunction be perpetuated, it was a violation of duty, and a plea to that effect in an action against him as surety is good, at least against a general demurrer. *Ibid.*

But a judgment debtor cannot maintain assumpsit against his creditor for neglect of the creditor to issue execution against a trustee in the action for twenty years, where it does not appear that issuing execution would have been of any service to the debtor, as where the trustee remains all the time insolvent. *Noble v. Merrill*, 48 Me. 140.

And a judgment against a trustee on a trustee process is not a discharge of a judgment against the original debtor, though by means of the trustee suit payment by the trustee to the debtor was prevented, and the debt was lost by the subsequent insolvency of the trustee. *Ibid.*

But while the rule of the principal case, that a garnishment judgment is prima facie a satisfaction, or *pro tanto* satisfaction, of the plaintiff's claim, is undoubtedly correct, many of the cases have gone on the theory that it is prima facie a satisfaction as a matter of evidence only, and that it is not conclusive; and the rule that nothing but an actual satisfaction of the judgment against the garnishee will absolve the principal debtor from liability when sued for the debt by the original creditor is well supported by authority.

Thus, an attachment without satisfaction does not of itself prevent the plaintiff in the attachment suit from resorting to his original debtor. *Brown v. Somerville*, 8 Md. 444.

Judgment against a garnishee so long as it remains unsatisfied is no bar to the creditor's making his money out of his original debtor on his judgment against him. *Farmer v. Simpson*, 6 Tex. 303. But see *supra*, *Parks v. State Nat. Bank* (Tex. Civ. App.) 34 S. W. 1044.

And if judgment against a third person on a foreign attachment be not executed, the plaintiff may resort back to his principal debtor, and he may also sue a third person for his debt, notwithstanding the judgment in foreign attachment is unexecuted. *Robertson v. Norroy*, 1 Dyer, 83a.

A judgment against the defendant in an attachment is not extinguished by a judgment for the whole amount subsequently rendered in the same suit against garnishees, though if either was satisfied the plaintiff would not be permitted to enforce the collection of the other. *Price v. Higgins*, 1 Litt. (Ky.) 274.

And where a creditor attaches his debtor's

property in the hands of a third person, and after judgment levies an execution upon it, it applies as a payment to the creditor, and exonerates the third person from claim by the debtor; but where it does not appear that the creditor took anything from the third person by his execution, or upon any agreement that the property should be applied thereon, the creditor is entitled to recover against the debtor for the amount of the debt, though property was placed in the hands of the creditor by the third person, where the purpose for which it was so placed does not appear. *Backus v. Denison*, Kirby, 421.

And where judgment is recovered by a creditor against his debtor on an account for goods sold, and a third person is garnished and admits his indebtedness to the principal debtor, and judgment is rendered against him upon his answer, but is never paid, and the principal debtor transfers to the plaintiff a claim against a third person, and the plaintiff brings action thereon, the third person cannot defend upon the ground that the claim thus assigned and sued upon was for the identical goods for which judgment was rendered against the garnishee, and the fact that the judgment had been rendered against the garnishee, but not paid, would not prevent the plaintiff from suing the third person upon the debt thus admitted by the garnishee and afterwards assigned by the defendant to the plaintiff, or from showing that such third person, and not the garnishee, was the real debtor. *Lewis v. Robertson*, 100 Ala. 246, 14 So. 166.

So, in *Brown v. Somerville*, 8 Md. 444, it was held that where a judgment of condemnation is rendered against a garnishee, and before execution is issued he is sued by the holder of a note for a smaller sum which was one of the attached choses, and pending the suit he purchases the judgment for a sum much less than its face value, the purchase is no defense in the action on the note, because the whole debt is not thereby paid, and the defendant in the attachment has an interest in having the whole debt paid, and the garnishee occupies no better position than if any other person had purchased the judgment.

And in *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436, holding that a judgment against a garnishee is not a defense in an action by his original creditor unless it has been satisfied, it was said that where the plaintiff in an attachment suit obtains a judgment against the defendant in attachment, as well as against the garnishee, on both of which he may have execution, it will

vor of the defendant in the attachment suit for the use of the plaintiff therein.

Waples, Attachment & Garnishment, 519; *Webster v. Steele*, 75 Ill. 544; *Chicago, R. I. & P. R. Co. v. Mason*, 11 Ill. App. 525.

Deemer, J., delivered the opinion of the court:

Some time prior to January 13, 1892, plaintiff commenced an action against the defendant. The action was aided by attachments, and several garnishments were effected under the writ. A trial of the main action was had, resulting in a judgment for plaintiff, and at the same time a judgment was taken against one of the garnishees for the larger part of the debt. Thereafter defendant paid into court the difference between the amount of the judgment against the garnishee and the judgment in the main action, and then filed a motion asking for its discharge, claiming that the judgment against it had been fully satisfied, and should be canceled of record. It also claims that the garnishee was solvent when the judgment was obtained against him, and insolvent when defendant made its motion, and that, had plaintiff exercised diligence, he might have collected the judgment against the garnishee. There is no evidence to support the claim that the garnishee is now insolvent. Indeed, it conclusively appears that he has ample property subject to execution to satisfy the judgment against him. The controlling question is, What effect shall

follow that the mere suing out an execution against the garnishee will not, in the state of Alabama, as in England by the custom of London, be evidence of an election to substitute the garnishee as his debtor, instead of the defendant in attachment.

So, though judgment against a garnishee has been paid, it will not constitute a bar or estoppel against the principal debtor which will prevent him from recovering either from the principal creditor or the officer representing him, where the payment was made through the seizure and application of exempt property.

Thus, in *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L. R. A. 210, 58 N. W. 226, and *O'Connor v. Walter*, 37 Neb. 207, 23 L. R. A. 650, 55 N. W. 867, it was held that where a foreign creditor garnishes a debt due to a resident from a railroad company operating a line of railroad through the state and other states, for wages earned within sixty days prior to the commencement of the proceeding, and procures the indebtedness to be applied to the payment of the claim, the amount recovered by the person thus procuring the garnishment may be recovered by the principal debtor under the Nebraska act for the better protection of the earnings of laborers. Laws 1889, chap. 25, exempting wages earned within sixty days prior to the proceeding, and forbidding the institution in the state or elsewhere of any process seeking to seize, attach, or garnish such wages, the judgment in the garnishment case not being *res judicata* and an estoppel as against the principal debtor, as to be so there must have been mutuality between the parties.

So, in *Wilson v. Lowry* (Ariz.) 52 Pac. 777, it was held that where judgment is obtained by a creditor against a debtor, and a third party holding funds of the debtor is garnished, to which proceeding the judgment debtor is not a

party, and the judgment creditor designates the money as exempt according to law, the peremptory refusal of the sheriff, after having obtained possession thereof, to pay the same to the garnishee, and his application thereof to the satisfaction of the creditor's claim, are a violation of his official duty for which he and the sureties upon his official bond are liable.

It thus appears from a review of the cases that they fully establish the doctrine that satisfying a valid judgment against a garnishee operates to merge or satisfy to that extent the liability of the principal debtor.

Another quite distinct, but kindred, question is the effect on the garnishee of a judgment against him and the satisfaction thereof. This matter is, of course, controlled by well-settled principles of the law of judgments, under which he is protected in paying the judgment just so far as the judgment is held to be valid and binding upon him. The question of jurisdiction to render a valid judgment in case of garnishment of a debt due to a nonresident has been much discussed in conflicting decisions. These are considered in a note to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 877. For later cases, see *Louisville & N. R. Co. v. Nash* (Ala.) 41 L. R. A. 381, and *footnote* thereto; also *Balk v. Harris* (N. C.) 45 L. R. A. 257, and *footnote*. But the conflict on this point has been settled by the United States Supreme Court in the case of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, which holds that jurisdiction to render a judgment in case of garnishment of a debt due to a nonresident may be acquired without serving him, except by publication, so as to make the judgment against him in the garnishment case valid, and to entitle it to full faith and credit in other states.

F. H. B.

thereof, the indebtedness between the garnishee and the principal debtor." See also *Peck v. Parohen*, 52 Iowa, 46, 2 N. W. 597, wherein it is held that garnishment under a foreign judgment was a *pro tanto* defense to an action brought by the original creditor against his debtor. These cases hold that, after judgment against the garnishee the judgment defendant is barred of his right of action against the garnishee, and, so long as the parties remain in the situation, there is no method by which he can enforce his claim against him. The legal effect of the garnishment judgment is to sequester or set aside the property or money in the hands of the garnishee to the payment of plaintiff's judgment. From the time of the service of notice the garnishee is liable to plaintiff for the value of all of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to defendant at time of service. *Kesler v. St. John*, 22 Iowa, 568; *Hughes v. Monty*, 24 Iowa, 499; *First Nat. Bank v. Davenport & St. P. R. Co.* 45 Iowa, 126; *Buck-Reiner Co. v. Beatty*, 82 Iowa, 353, 48 N. W. 96. Again, a garnishment proceeding is, in effect, a suit by the defendant against his debtor, by which plaintiff is subrogated to the rights of the original creditor. *Huntington v. Risdon*, 43 Iowa, 517. The effect of the garnishment, as we have seen, is to deprive the defendant of his property or money, and when it proceeds to judgment it should be, at least, held a prima facie satisfaction, or, if the amount of the judgment against the garnishee is not as much as the judgment against the principal defendant, a prima facie *pro tanto* satisfaction of the principal judgment. This is the rule applied to the levy of executions on chattels. *Lucas v. Cassaday*, 2 G. Greene, 208; *Reed v. Crosthwait*, 6 Iowa, 219, 71 Am. Dec. 406; *McWilliams v. Myers*, 10 Iowa, 325; *First Nat. Bank v. Rogers*, 13 Minn. 407, Gil. 376, 97 Am. Dec. 239; and the many cases cited in 2 Am. & Eng. Enc. Law, 2d ed. p. 703. And we see no reason why it should not obtain in garnishment proceedings. In *Peck v. Parohen*, 52 Iowa, 46, 2 N. W. 597, it is said that while proceedings for the satisfaction of a judgment are going on, and property sufficient to satisfy it is held under execution, the judgment cannot be sued on. While none of the cases cited are directly in point, the case at bar seems to call for the application of like rules. There can be no doubt, we think, that the garnishment judgment is prima facie a satisfaction, or *pro tanto* satisfaction, of plaintiff's claim.

47 L. R. A.

Of course, plaintiff may show, if he can, that the defendant in garnishment is not responsible, or that he (plaintiff) obtained no valuable right in virtue of his garnishment, or that he has released the judgment against the garnishee to the defendant in judgment, with his (defendant's) consent. See *Howard v. Bennett*, 72 Ill. 297; *First Nat. Bank v. Rogers*, 15 Minn. 381, Gil. 305; *Duncan v. Harris*, 17 Serg. & R. 436. But this rule, as to release, does not apply if the attempted abandonment of the proceedings was without defendant's consent, if there was no necessity for the abandonment. *Young v. Read*, 3 Yerg. 297; *Molver v. Ballard*, 96 Ind. 76; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

It is clear that the case ought to be governed by these rules. Plaintiff took his judgment against the garnishee, who, so far as the record shows, is perfectly solvent. By so doing, he, in effect, levied on sufficient property of the defendant—after the defendant had paid the balance—to satisfy his (plaintiff's) judgment. He offers no excuse for not levying execution and collecting his claim. Defendant has been prevented from collecting from his debtor, and could take no steps against him to enforce his demand. He was powerless to protect himself by direct action against the garnishee, and was subject to his financial vicissitudes. It will not do to say that he might have paid the main judgment in full, and then proceeded against his debtor. That any execution defendant may do to relieve his property which is being jeopardized while in the hands of an officer on execution, but he is not obliged to take that course. He may not be able to pay that amount, and trust to success against the garnishee. No such burden should be placed upon him.

It is true that plaintiff, at the time of the hearing of the motion, tendered the judgment he held against the garnishee to the defendant, but he did not offer to assign it, nor did he do anything until long after defendant had paid the balance of the main judgment. As we have seen, defendant was not obliged to accept this tender.

Plaintiff should have been diligent in the collection of his judgment against the garnishee, and, if there be any doubts of its collectibility, he, and not the defendant, should suffer the results of delay. *Coburn v. Currens*, 1 Bush, 242, and *Norris v. Hall*, 18 Me. 332, lend support to these conclusions.

The motion should have been sustained, and the judgment is reversed.

MINNESOTA SUPREME COURT.

Edith M. THIBERT
v.
SUPREME LODGE, KNIGHTS OF HONOR.

(.....Minn.....)

- *1. The rights of members in beneficial insurance associations must be made to depend upon the articles of association and the by-laws which have been adopted; and, generally speaking, the body which is authorized to make by-laws may change, amend, or repeal those already in existence. But changes, amendments, and repeals are subject to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and are also subject to the implied condition of being reasonable.
2. By-laws in operation when a member enters an association may be reasonable and valid as to him, on the ground of his having assented thereto when accepting membership, and yet be unreasonable and invalid as to present members when adopted as changes and amendments to existing by-laws, such members not having assented thereto in any manner.
3. When T. became a member of a subordinate lodge, and received a beneficial insurance certificate from defendant corporation, he was entitled, under the by-laws, to written or printed notice from the reporter of such lodge, dated on the 1st day of the month, in case the assessments and levies for such month for the payment of death claims exceeded or were less than two in number. Subsequently the lawmaking body abrogated the provision, and enacted that on or before the last day of each month every member should pay the amount of each assessment levied, and, failing to pay, should stand suspended and not entitled to the benefits of the insurance fund. It was further provided in the amended by-laws that "each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally delivered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice, shall operate to relieve from suspension any member who shall fail to pay the assessments as required by § 7 of this article." It was not shown that T. had any knowledge of the change when he died, November 19, 1893, not having paid any part of three assessments levied and payable on or before the last day of October. *Held*, that, as to him, the change and amendment in the by-law in force when he became a member was unreasonable and of

*Headnotes by COLLINS, J.

NOTE.—The above case makes a notable and important restriction on the right of beneficial insurance associations to change, amend, and repeal provisions which enter into the contracts with their members.

On this question of power of the association in such matters, see also *Supreme Lodge K. of P. v. Knight (Ind.)* 3 L. R. A. 409, and *note*; *Supreme Lodge K. of P. v. La Malta (Tenn.)* 30 L. R. A. 838.
47 L. R. A.

no effect, and that it is immaterial that under the by-law above quoted the subordinate lodge had designated a newspaper for the publication of notices, in which notice of these assessments had been published, and that a copy of such paper had been duly mailed to T.

4. There was testimony from which the jury could have found that about the middle of October the reporter of the subordinate lodge notified T., in person, of these three assessments, and that T. promised to make payment before he went away to work. He did not pay as he promised. *Held*, that if the jury had found that this personal notice was given and the promise made, a reasonable time for making payment having expired before T. died, plaintiff was not entitled to recover on the certificate.

(December 20, 1899.)

CROSS-APPEALS from orders of the District Court for Houston County denying motion for judgment *non obstante veredicto* and ordering a new trial in an action to enforce payment of a mutual benefit certificate in which a verdict had been returned in plaintiff's favor; defendant appealing from so much of the order as refused judgment in its favor, and plaintiff appealing from so much as granted a new trial. *Affirmed on defendant's appeal; plaintiff's appeal dismissed.*

The facts are stated in the opinion.

Mr. Edmund H. Smalley, for plaintiff?

Courts may pass on the reasonableness of a by-law of a corporation.

Niblack, Mut. Ben. Soc. § 23; Ryan v. Cudahy, 157 Ill. 123, 41 N. E. 760; *State ex rel. Cuppel v. Milwaukee Chamber of Commerce*, 47 Wis. 680; *Connelly v. Masonic Mut. Ben. Asso.* 58 Conn. 552, 9 L. R. A. 430, 20 Atl. 671; *Mead v. Stirling*, 62 Conn. 586, 23 L. R. A. 230, 27 Atl. 591.

Evidence of notice of assessment on which to predicate a forfeiture must be clear.

Scheufler v. Grand Lodge A. O. U. W. 45 Minn. 256, 47 N. W. 799.

The defendant must show that such duty has been performed.

Mutual Reserve Fund Life Asso. v. Hamlin, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614; *Bridges v. National Union*, 73 Minn. 486, 76 N. W. 270, 409, 77 N. W. 411; *Ball v. Northwestern Mut. Acci. Asso.* 56 Minn. 414, 57 N. W. 1063; *Baker v. Citizens' Mut. F. Ins. Co.* 51 Mich. 243, 16 N. W. 391.

The notice must comply with the by-laws, or it is void.

Miner v. Michigan Mut. Ben. Asso. 63 Mich. 338, 29 N. W. 862; *Warner v. National Life Asso.* 100 Mich. 157, 58 N. W. 669.

The payment of the \$3.50, to Collector Morris, and its retention by him, were a waiver of the nonpayment by November 1.

Bailey v. Mutual Ben. Asso. 71 Iowa, 689, 27 N. W. 770; *Stylow v. Wisconsin Odd Fellows Mut. L. Asso.* 69 Wis. 224, 34 N. W. 151; *Bacon, Ben. Soc. § 367; Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689, *Approved in Lamberton v. Connecticut*

F. Ins. Co. 39 Minn. 129, 1 L. R. A. 222, 39 N. W. 76; *Philadelphia v. Bickley* (Pa.) 2 Cent. Rep. 819, 3 Atl. 586; *Penn Mut. L. Ins. Co. v. Keach*, 134 Ill. 583, 26 N. E. 106; *Wyman v. Phenix Mut. L. Ins. Co.* 119 N. Y. 274, 23 N. E. 907; *Unsell v. Hartford Life & Annuity Ins. Co.* 32 Fed. Rep. 443; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Erdmann v. Mutual Ins. Co. of O. of H. S.* 44 Wis. 376; *Jackson v. Northwestern Mut. Relief Asso.* 78 Wis. 463, 47 N. W. 735; *Kenyon v. Knights Templars & M. Mut. Aid Asso.* 122 N. Y. 247, 25 N. E. 301; *Rockwell v. Mutual L. Ins. Co.* 20 Wis. 336.

The mere fact that the alleged suspension had not been removed at the time of his death is no defense, since all arrearages had been paid, and he was in good standing.

O'Grady v. Knights of Columbus, 62 Conn. 223, 25 Atl. 111; *Wright v. Supreme Commandery K. of G. R.* 87 Ga. 426, 14 L. R. A. 283, 13 S. E. 564.

The mere offer to pay after death and after due may be sufficient.

Mayer v. Mutual L. Ins. Co. 38 Iowa, 304, 18 Am. Rep. 34; *Erdmann v. Mutual Ins. Co. of O. of H. S.* 44 Wis. 376; *Jackson v. Northwestern Mut. Relief Asso.* 78 Wis. 463, 47 N. W. 733.

The defendant was bound to establish the validity of the assessment.

The contract is unaffected by subsequent by-laws in conflict with the certificate.

Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1066; *Failey v. Fee*, 83 Md. 83, 32 L. R. A. 311, 34 Atl. 840; *Supreme Council A. L. of H. v. Smith*, 45 N. J. Eq. 466, 17 Atl. 771; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159; *Becker v. Berlin Ben. Soc.* 144 Pa. 232, 22 Atl. 699; *Hobbs v. Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L. R. A. 299, 47 N. W. 983.

There was no attempt to show that notice of the change in the rule was ever given to Thibert. This was essential.

Warnebold v. Grand Lodge A. O. U. W. 83 Iowa, 23, 48 N. W. 1069; *Bogardus v. Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 850.

The courts do not permit any change in the fundamentals of the contract by this sort of a blind promise.

Changes of the contract are prohibited except with the express consent of the assured.

Starling v. Supreme Council R. T. of T. 108 Mich. 440, 66 N. W. 340; *Wheeler v. Supreme Sitting O. of I. H.* 110 Mich. 437, 68 N. W. 220; *Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13; *Sieverts v. National Benev. Asso.* 95 Iowa, 710, 64 N. W. 671; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 76 N. W. 683.

The force and effect of these charter provisions becoming a part of the contract cannot be changed without at least the consent of the assured, if at all.

McCoy v. Northwestern Mut. Relief Asso. 92 Wis. 577, 66 N. W. 697; *Mills v. Rebstock*, 29 Minn. 381, 13 N. W. 162; *Davidson v. Old People's Mut. Ben. Soc.* 39 Minn. 303, 147 L. R. A.

L. R. A. 842, 39 N. W. 803; *Farmers' Mut. F. Ins. Co. v. Knight*, 162 Ill. 481, 44 N. E. 834; *Fire Ins. Co. v. Connor*, 17 Pa. 136; *Susquehanna Mut. F. Ins. Co. v. Gackenbach*, 115 Pa. 496, 9 Atl. 90; *York County Mut. F. Ins. Co. v. Bowden*, 57 Me. 286.

Mr. James O. Pierce for defendant.

Collins, J., delivered the opinion of the court:

Jean Louis Thibert was in his lifetime a member of a subordinate lodge of the Knights of Honor. The defendant is incorporated as the supreme lodge of such Knights, its purpose being to collect and disburse what is known as a "Widows' and Orphans' Benefit Fund." The subordinate lodges send delegates to their state lodges annually, and the latter send delegates to the supreme lodge, which also holds annual meetings. The power to alter, amend, and enact by-laws for the collection, control, and disbursement of the fund before mentioned is vested in the supreme lodge, and may be exercised at its annual meetings. Thibert made application in writing in February, 1892, to become a member of the subordinate lodge at Chipewewa Falls, Wisconsin, which was favorably acted upon; and by reason thereof the defendant issued to him a benefit certificate bearing date March 29, 1892, by which defendant agreed to pay out of the fund before referred to the sum of \$2,000, upon being furnished satisfactory evidence of Thibert's death, providing he was a member in good standing when his death occurred, and had not been suspended for failing to pay dues and assessments to the fund. A brother was named as beneficiary. In his application he stipulated that his beneficiary should only be entitled to payment in case he (Thibert) should comply with the laws, rules, and regulations then in force or subsequently enacted; and in the certificate it was provided that payment should be made only upon condition that Thibert complied "with the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government." Thibert died November 19, 1893, and thereupon the brother assigned the certificate to his widow, the plaintiff, and she brought this action. At the conclusion of the trial, defendant's counsel moved the court to direct a verdict for his client upon all of the evidence. The court denied this motion, and instructed the jury to return a verdict in favor of the plaintiff for the full amount of the certificate, which was done. Upon a settled case, defendant's counsel moved for judgment against plaintiff notwithstanding the verdict, and, if that was denied, then for a new trial; and the appeal is from an order denying the motion for judgment, but ordering a new trial.

When Thibert received his certificate, in 1891, what were known as the by-laws of that year were in force. And there was at all times an officer of defendant known as "Supreme Reporter." One of the 1891 by-laws provided (§ 2 of article 7): "On the 20th day of each month the supreme re-

porter shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered during the ensuing month, shall levy the same, and shall immediately mail notice thereof to each lodge. If the number of assessments so determined be greater or less than two in any month, each member shall be notified thereof at once by the reporter of his lodge, by a notice bearing date of the first day of said ensuing month." Another by-law was in the following words (§ 3, art. 7): "Call of Assessments. On the first day of each month, if it be necessary in order to provide additional funds for the payment of death benefits, a call shall be made upon each lodge for the amount of such assessment or assessments as were made on the first day of the preceding month, on all members upon whom the degree had then or previously been conferred." There was another (§ 7 of article 7) as follows: "Payment of Assessments. On or before the last day of each month each member shall pay the amount of two assessments, unless the number of assessments due and to be paid during such month shall have been determined to be greater or less than two, in which event he shall pay the amount of assessment thus determined. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widow and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order." While under the head of "Notice of Assessments" (§ 6, art. 7) was one in this language: "Notice of Assessments. Subordinate lodges may, at their option, notify members of assessments. But neither the giving of such notice, nor the failure to do so, shall affect the standing of the member in case he fails to pay the assessments as required by § 7 of this article."

From these by-laws it will appear that in 1891, when Thibert obtained his certificate, it was the duty of an officer of defendant, called the "Supreme Reporter," to determine on the 20th day of each month the number of assessments which would be needed to provide for and pay death claims duly proved or registered for the coming month, and to levy the assessments so determined, of which levy he was to give immediate official notice to each subordinate lodge. This levy was in anticipation of deaths, and evidently the intention was to thus hasten payment of claims. If the assessment was for more or less than two deaths, it was incumbent upon the reporter of each subordinate lodge to give notice, of date the 1st day of the month in which payment was to be made, to each and every member. It is quite clear, from the fact that this notice was to be dated, that written or printed notice was required. Payment of two assessments on or before the last day of each month was imperatively required of each member, unless the number of assessments had been determined to be greater or less than two. In such case notice was necessary, before the member was in

default. If payment was not made within the month, of any assessment required by the levy, the member so failing to pay stood suspended by operation of law; and from that time, until duly reinstated, his beneficiary was not entitled to participate in the fund we have mentioned. Failure to pay worked the suspension from membership, and suspension, in itself, terminated all claim upon the benefit fund. We have quoted a by-law upon the subject of "Notice of Assessments." This by-law is, as are nearly all we have examined in this case, somewhat awkward in its construction, and a little difficult to harmonize with other laws adopted by the supreme lodge. But, as we construe this particular by-law, it referred solely to some rule of a subordinate lodge concerning other or different or additional notice to members, and not to the notice to be given by the reporter of each lodge in case the assessments levied were more or less than two. It authorized the subordinate lodges, at their option, to provide for the giving of notices of all assessments,—for notice, for instance, of assessments where but two were levied, no notice of any kind in case of two standing assessments being required by any other by-law. A by-law of the defendant corporation of such value and importance to every member as was that which imperatively imposed upon the reporters of the subordinate lodges the duty of notifying each member of the number of assessments, in case they exceeded or were less than two, should not be wiped out of existence by so crude a provision as the one quoted. We are therefore of the opinion that when Thibert received his certificate he was entitled to written or printed notice, unless waived, from the reporter of his lodge, in all cases where the assessment was for a greater or less number than two. If, then, the law of 1891 is to govern the case, he was not in default when he failed to pay the amount due for these assessments made by the supreme reporter September 20, 1893, numbered 381, 382, and 383, and of which the reporter of his lodge was duly advised; said assessments being payable on or before the last day of October. And as a consequence he was not a suspended member when he died, in November. But defendant's counsel insists that, in any event, Thibert was suspended because he failed to pay two of the three assessments during October. The argument is that under the by-laws it was incumbent on him to pay the amount of two assessments at or before the last day of each month, and, if he neglected to do this, he stood suspended under all circumstances. But the by-law does not so read, and should not be so construed. In fact, if it were of doubtful construction, it should not be interpreted in aid of an attempt to work a forfeiture. The by-law is that the member shall pay the amount of two assessments each month, unless the number due and to be paid shall have been determined to be a greater or less number than two, and in such case the member shall be notified in accordance with another by-law. The number of

assessments determined upon for the month of October was three. The notice was not given, and the by-law, in express terms, provided that it should be. The defendant cannot escape liability on the ground that, while notice was positively demanded in case the assessments were more or less than two, Thibert should have done something not required of him. There was no by-law which imposed upon him the duty of paying two assessments, without notice, when three had been determined upon, although it is not unlikely that this would have been his duty, without notice, if the number determined upon had been two.

But the principal question on this appeal arises out of the fact that in 1893 the by-laws were changed and amended; and it is the contention of defendant's counsel that Thibert was brought within the influence and control of these changes and amendments, because of the agreement that he should be, found in his application to defendant corporation, and because it was stipulated in the certificate on which this action is founded that it is issued upon condition that he complies "with the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government." It appears that by changes and amendments in 1893 the requirement as to notice by the reporter of each lodge, to every member, of the number of assessments, in case such assessments were more or less than two, was entirely abrogated, and a new plan adopted; § 2 of article 7 being amended so as to read thus: "On the 20th day of each month the supreme reporter shall determine and levy the number of assessments, if any, necessary to provide for the payment of benefits on the deaths which may be registered during the coming month: provided, however, that the levy of assessments upon members initiated on or after the 1st day of July, 1892, shall not exceed one assessment per month during the first six consecutive months, nor two assessments per month during the next eighteen consecutive months, of membership. The supreme reporter shall immediately mail notice of such levy of assessments to the reporter and financial reporter of each subordinate lodge." And section 3 of the same article was amended so that it read as follows: "Each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally delivered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice, shall operate to relieve from suspension any member who shall fail to pay the assessments as required by § 7 of this article." And at the trial the defendants offered to show that after this amendment Thibert's lodge had, under this section, designated a newspaper published in Boston, Massachusetts, as the one in which official notices of assessment and levy should be given, and that notice of

the October assessments and levy, numbered 381, 382, and 383, was so given, a copy of the paper being mailed to each member of said lodge. The offer was rejected. There was no attempt to prove that Thibert participated in the action of the lodge on this matter, or that he ever knew of it. Section 7 of said article 7, relative to the payment of assessments, was also amended in 1893 so that it read: "On or before the last day of each month each member shall pay the amount of such assessments as shall have been levied. But members initiated after July 1, 1892, shall only pay one assessment per month during the first six consecutive months, and not exceeding two assessments per month during the next eighteen consecutive months, of membership. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widow and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order." As will have been seen, the effect of these amendments was to substitute new methods of assessment, and of giving notice of the same, as a prerequisite to suspension and consequent loss of rights in the benefit fund. Instead of receiving notice, written or printed, from the reporters of the subordinate lodges, of assessments, in case they exceeded or were less than two each month, lodges, at their option, were authorized to provide for notification by either written or printed notice, or through a designated newspaper, to be mailed or personally delivered to the members; and it was expressly provided that no failure on the part of the lodge to give notice, or failure to receive, should relieve members from the operation of another by-law, which prescribed absolute and unqualified suspension if assessments were not paid within the month. This was a radical and very serious departure from the previously existing by-law. It not only authorized the subordinate lodges, at their option, to do away with written or printed notices of assessments, and to substitute an entirely different method, by causing notice to be published in a designated newspaper, but, in terms, it declared that the failure of a lodge to give, and a failure of a member to receive, notice, should not operate to relieve members from the consequences of an omission to pay. They would stand suspended anyhow. If they neglected to pay all assessments, their rights were gone. No notice was required to work forfeitures, and there was no provision under which members could have a hearing. It is possible that, as an original by-law, a provision of this character would be held reasonable and operative on the ground that, if persons chose to become members of an association with such drastic rules, theirs was the right so to do. But this was not the by-law when Thibert united with his lodge. The question is not as to the reasonableness of a by-law in force when he cast his fortunes with the order, but it is as to the reasonableness of a change in a by-law after he became a member, and of which it was not shown

that he had any personal knowledge. In fact, it has been held that provisions for forfeitures in the original by-laws of mutual benefit societies, without providing for notice, or giving an opportunity to be heard, are void because unreasonable. Bacon, Ben. Soc. § 85, and cases cited. But if the proposition that such a sweeping change as that attempted by defendant in 1893 as to notice of assessments can be upheld, and the rights, which have become vested and valuable, of those who have previously become members, be taken away through such a forfeiture, these associations should no longer be called benevolent, for they may easily become oppressive. They may cease to be of pecuniary service to those who, because of the death of the wage earner of the family, need aid and assistance, and become nothing but a trap into which members may pay their assessments for years, and at last have everything confiscated through the action of the lawmaking body. The rights of members in these associations must, of course, depend upon the articles or by-laws, to which all members assent when becoming such; and, generally speaking, the same body which is authorized to make by-laws can change, amend, or repeal those already made; and to this Thibert agreed when he joined. But changes, amendments, and repeals are subject to the restrictions and limitations of the by-laws themselves, as well as those of the charter or articles of association, and are also subject to the implied condition of being reasonable. Bacon, Ben. Soc. § 91a, and citations. The amendments and changes in 1893 took away the right which members had under the laws of 1891, to notice of monthly assessments, should they exceed or be less than two, and imposed upon each member the duty of taking notice himself of the number. He could not even pay two assessments, in the absence of notice, and protect himself. It conferred upon each subordinate lodge the power to provide, at its option, for notice to each member, and then wiped out the effect and benefit of an exercise of this power by declaring that a failure to give the notice agreed upon should not operate to relieve a member from his positive obligation to pay. If a member received the notice, and did not pay, he stood suspended, and had forfeited his rights, unless reinstated. If he did not receive the notice, and failed to pay, he was in the same predicament. The value of the publication of such a notice in a newspaper, except to its publisher, is not strikingly apparent. We are compelled to hold that a change or amendment to the by-law in force when Thibert entered the association, whereby it was incumbent upon the reporter of his lodge to give him notice of assessments, if for a greater or less number than two, which deprived him of all right to any notice, either directly or indirectly, by means of a provision rendering a failure to give notice as determined upon by his lodge wholly immaterial, was a vitally important change, and, as to him, unreasonable and void. Nor is the reasonableness or unreasonableness of this change affected by the fact, if it was a 47 L. R. A.

fact, that his lodge had designated a newspaper in which notices were to be published, and copies mailed to each member. This was a radical and unreasonable change in the method of giving notice, which, according to the previously existing rule, was to be given by the lodge reporter. We are quite confident that no member who had been receiving and relying upon this form of notice would suppose, upon receiving such a paper, that this method of notifying had been substituted for the other.

But it does not follow that Thibert was not in default, and a suspended member, when he died. At the trial the reporter of his lodge testified that he met Thibert at Chippewa Falls about the middle of October, and then and there personally notified him of the assessments and levy in question, and also that the amount thereof must be paid on or before the last day of that month, and further testified that Thibert then promised to pay said amount before he left the town to go into the woods, where he had employment. The lawmaking body of this defendant corporation had wiped out the by-law under which notice had previously been required and had been given, so that it was no longer to be followed. And probably it would have had the power to substitute in place thereof the kind of notice which was given, if the testimony of the reporter was entitled to credit. Such a substituted by-law would, we think, have been reasonable and operative as to all members. So, if the lodge reporter was truthful, Thibert had actual notice of the three assessments. A majority of the court are of the opinion that this notice, if given, and he accepted it as sufficient by promising to pay, was sufficient, and also that he would have a reasonable time thereafter within which to pay. If the notice was actually given, and about the middle of the month, as testified to by the witness, a reasonable time had certainly elapsed before his death on the 19th of November. If this notice was given to Thibert, his widow could not recover upon this certificate for he stood suspended at the time of his death. The writer takes occasion to say that he does not assent to the proposition that the reporter, or any other officer of the subordinate lodge or of the defendant corporation, could put Thibert in default by any other kind of notice than that required by the law of 1891. If the amendments of 1893 were unreasonable, and consequently of no effect as to Thibert, he could not, in the opinion of the writer, be put in default by verbal notice. He continued to be entitled to the notice provided for by the 1891 by-law, for as to him that law continued in force. But, in any event, the question whether the reporter gave the notice testified to was for the jury; taking into consideration, as we must, that Thibert, who alone could deny the conversation, was dead, and could not be heard. We must not be understood as saying that, in all cases where one of the parties to a conversation is deceased, the truthfulness of a version of the living as to what was

said between them is for the jury. But in this case we think it was.

There is nothing whatsoever in the claim of counsel for plaintiff that the effect of the payment by Gregoire, the day before Thibert died, was to reinstate him.

The order stands affirmed.

It is further ordered that *plaintiff's appeal* from that part of the order of July 11, 1899, which set aside the verdict and granted a new trial, be, and hereby is, *dismissed*.

Julius WITTENBERG, *Respt.*,

v.

L. K. ONSGARD, *Appt.*

(.....Minn.....)

*1. A medical expert, having in his evidence in chief diagnosed the injury to the plaintiff as a dislocation of the cervical vertebrae, complicated with a fracture, and having then testified, without qualification or limitation, that the accepted treatment of a dislocation of cervical vertebrae, as laid down by the medical authorities, was a reduction of the dislocation, was asked on cross-examination whether a certain work (admitted by him to be a standard authority) did not lay it down that, where the dislocation was complicated with a fracture, no physician would be justified in attempting to reduce the dislocation. *Held*, that this was proper cross-examination, and that it was error to exclude the question.

2. All hypothetical questions put to an expert witness must be based upon facts admitted or established, or which, if controverted, might be legitimately found by the jury from the evidence. They should also embody all the facts relating to the subject upon which the opinion of the witness is asked. A certain hypothetical question *held* to have been improperly allowed, because not including all the facts bearing upon the subject upon which the opinion of the witness was asked, and also because it was based in part upon a fact not admitted or established, and which there was no evidence tending to prove.

3. The court may disregard a waiver of a jury trial by the parties, and require the issues to be submitted to a jury. The matter is addressed to his sound discretion. The waiver of a jury in this case construed as applying only to the term of court at which it was made.

4. *Held*, also, that an application of the defendant to the court to require the plaintiff to submit his neck to be photographed by the use of the Roentgen or X-rays, in order to ascertain the nature of his injuries, was properly refused, because the application was not seasonably made, and also because it did not sufficiently appear that the person by whom it was proposed that the photograph was to be taken had the requisite skill and experience to properly apply the rays.

*Headnotes by MITCHELL, J.

NOTE.—As to compulsory physical examination of plaintiff in an action for personal injuries, see *note* to *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466; also *Lane 47 L. R. A.*

5. Whether science is yet sufficiently advanced to justify the courts in taking judicial notice, as an established fact, that exposure to X-rays is not injurious to the subject,—*quære*.

(December 15, 1899.)

APPEAL by defendant from an order of the District Court for Houston County denying motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for malpractice. *Reversed*.

The facts are stated in the opinion.

Messrs. Duxbury & Duxbury, for appellant:

The stipulation and order had the same force and effect as a contract, and could only be set aside for the same reasons that would avoid a contract.

Thomp. Trials, § 361; *Bingham v. Winona County Supers.* 6 Minn. 136, Gil. 82; *Bingham v. Winona County Supers.* 8 Minn. 441, Gil. 390; *Rogers v. Greenwood*, 14 Minn. 333, 338, Gil. 256; *Re Heath*, 83 Iowa, 215, 48 N. W. 1037; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Bonney v. Morrill*, 57 Me. 372; *McLeran v. McNamara*, 55 Cal. 509; *Shaw v. Henderson*, 7 Minn. 480, Gil. 386; *Eidam v. Finnegan*, 48 Minn. 53, 16 L. R. A. 507, 50 N. W. 933.

Hypothetical questions must be based upon the facts admitted or established, or which, if controverted, might legitimately be found by the jury.

Re Mason, 60 Hun, 46, 14 N. Y. Supp. 434.

We are often compelled to accept approximate justice in the administration of the law, but this is only where exact justice cannot be obtained. The nearer that we approach to exact justice the nearer the court comes to meeting its ideal.

Schroeder v. Chicago, R. I. & P. R. Co. 47 Iowa, 378; *Hall v. Manson*, 99 Iowa, 698, 34 L. R. A. 207, 68 N. W. 922.

The court may order an examination of plaintiff's person.

Barker v. Perry, 67 Iowa, 147, 25 N. W. 100; *White v. Milwaukee City R. Co.* 61 Wis. 540, 50 Am. Rep. 154, 21 N. W. 524; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176.

Where a paper is offered in evidence the opposite party may have an opportunity to inspect it and put it to any scientific test that would not destroy it, for the purpose of ascertaining its authenticity. We can see no difference in principle where a man puts his neck in evidence and alleges that that neck contains a dislocation of its cervical vertebrae, why in the examination of that piece of evidence the opposite party would not have a right to apply any scientific test to determine that fact which can in no way injure the evidence.

Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659.

v. Spokane Falls & N. R. Co. (Wash.) 46 L. R. A. 153, and other cases cited in footnote thereto.

Mr. Edmund H. Smalley, for respondent:

The court has power to vacate such stipulation.

Gerdtsen v. Cookrell, 52 Minn. 502, 55 N. W. 58.

It had a right to submit the case to the jury on its own motion under § 5361.

Hulett v. Carey, 66 Minn. 332, 34 L. R. A. 384, 69 N. W. 31; *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364.

Such stipulation during the course of the trial is not regarded as a contract.

Cochran v. Stewart, 66 Minn. 152, 68 N. W. 972.

In view of the positive opinion of appellant's experts that there was no serious injury to plaintiff by the accident, the X-ray would either sustain or refute the evidence of his own witnesses. If the former, it was but cumulative; if the latter, it would be contradicting his own witnesses.

There is no power in the court to compel plaintiff to submit to examination.

Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Illinois C. R. Co. v. Griffin*, 53 U. S. App. 22, 80 Fed. Rep. 278, 25 C. C. A. 417; *Peoria D. & E. R. Co. v. Rice*, 144 Ill. 229, 33 N. E. 951; *Joliet Street R. Co. v. Call*, 143 Ill. 177, 32 N. E. 389; *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466, 29 N. E. 235; *O'Brien v. LaCrosse*, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81.

It would have been an abuse of discretion to force the plaintiff to submit to such experiments with instruments.

Shepard v. Missouri P. R. Co. 85 Mo. 629, 55 Am. Rep. 390; *Iowa City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860.

The mere fact that injury is possible, or even alluded to in the public press, is sufficient to deter courts from compelling such examination.

Boelter v. Ross Lumber Co. 103 Wis. 324, 79 N. W. 243.

The physician undertakes to use all known means for a cure.

Haire v. Reese, 7 Phila. 138.

The evidence is conclusive that the defendant wholly failed to understand the case, or to give to it the usual and ordinary skill of the profession in that locality.

Getchell v. Lindley, 24 Minn. 265.

If there was want of ordinary skill in not detecting the nature of the injury for fifteen days, and plaintiff suffered in consequence, he is liable.

Moratzky v. Wirth, 67 Minn. 46, 69 N. W. 480; *Fowler v. Sergeant*, 1 Grant, Cas. 355; *Whitesell v. Hill*, 101 Iowa, 629, 37 L. R. A. 830, 70 N. W. 750; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899.

Mitchell, J., delivered the opinion of the court:

This is an action against the defendant for malpractice as a physician while professionally treating the plaintiff for certain 47 L. R. A.

injuries which he had received by being thrown from a moving hand car. The allegations of the complaint as to the injuries which plaintiff had received were "that by reason of said cause plaintiff was seriously injured in the neck, back, side, shoulders, and spine, and in particular the vertebræ of the spinal column in the vicinity of the neck were dislocated by said injury." The malpractice charged against the defendant was that "he so negligently and unskillfully conducted himself, in attempting to treat said injury and to set such dislocation, that the dislocation of said vertebræ in said spinal column became permanent, and the plaintiff rendered helpless and permanently maimed and crippled for life; that the said defendant wholly failed and neglected, while in charge of plaintiff as his patient, to ascertain by careful examination the said dislocation, and cure the said injury in said spinal column; that the said vertebræ in the spinal column ossified, and it is impossible, without great danger of death ensuing to plaintiff thereby, to cure or set said dislocation of the said vertebræ." In his answer the defendant denied "that the vertebræ of plaintiff's spinal column in the vicinity of the neck, or in any other place, were dislocated, and admitted that he failed to set a dislocation because no such dislocation existed." Upon the trial the principal contentions of the plaintiff, and to which his evidence was mainly directed, were (1) that he had sustained a dislocation of the cervical vertebræ; (2) that defendant ought, in the exercise of ordinary professional skill, to have discovered that fact; and (3) that the proper treatment in such a case would have been to reduce or set the dislocation. On the other hand, the contentions of the defendant, to which his evidence was principally directed, were (1) that the plaintiff had not sustained any dislocation of the cervical vertebræ, but merely a sprain, accompanied with contusion of the spine; and (2) that, even if plaintiff had sustained a dislocation of the cervical vertebræ, what is termed the "expectant" method of treatment is the proper one, and that, because of the great danger of injuring the spinal cord, a reduction of a dislocation should not be attempted, except as a last resort, in cases where it is apparent that death will otherwise ensue.

A medical expert called as a witness by the plaintiff gave in his examination in chief a diagnosis of the injury which in his opinion the plaintiff had sustained, viz., a dislocation of the cervical vertebræ, complicated with a fracture. He was then asked what was the accepted method, as laid down by the medical authorities, of treating a dislocation of the cervical vertebræ, and answered that it consisted of reducing the dislocation, followed by a course of treatment not necessary to be here referred to. On cross-examination the witness was referred to a medical work, admitted by him to be a standard authority, and asked if it was not laid down by that authority that, when the dislocation is complicated with a fracture, no doctor would be justified in attempting to press and reduce

the dislocation. Upon the objection of the plaintiff, the question was excluded. This was manifest error, in view of the witness's previous diagnosis of plaintiff's injury, followed by his testimony, without limitation or qualification, that reduction was the accepted method of treating a dislocation of the cervical vertebrae, as laid down by the medical authorities. From the colloquy on the trial between court and counsel, it is apparent that the former misapprehended the bearing and purpose of the question.

The same witness was asked, and, over defendant's objection, permitted to answer, the following hypothetical question: "Assuming that the plaintiff received a dislocation of a cervical vertebrae September 30, 1894; that the defendant commenced to treat him the following day, and, with the evidence of such dislocation brought to his attention, he continued to treat the plaintiff for ever two months, and no attempt made to reduce the dislocation, or even a suggestion by the doctor that there was a dislocation, he having knowledge of such injury,—would you consider that proper medical treatment?" His answer was, "No." This was also error. All hypothetical questions must be based upon facts admitted or established, or which, if controverted, might legitimately be found by the jury from the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless, and may be misleading, if given on a state of facts that does not exist, or upon an incomplete statement of the facts bearing upon the subject upon which the opinion of the witness is asked. The evidence in this case tended to show that dislocation of cervical vertebrae might be of different degrees, or at least accompanied or unaccompanied by certain complications, such as a fracture, and that the dislocation sustained by plaintiff was complicated with a fracture, and that the treatment of a dislocation might depend on the presence or absence of certain complications. The question propounded was based upon an incomplete hypothetical statement of facts. It was also based in part upon a hypothetical fact which was neither admitted nor sustained by any evidence in the case, to wit, that the defendant knew that the plaintiff had sustained a dislocation of the cervical vertebrae. On the contrary, the evidence is conclusive that the defendant did not know that plaintiff had received any such injury. And plaintiff, both in his pleading and upon the trial, proceeded upon the theory that defendant's failure to discover the dislocation was due to either his lack of skill, or his failure to make a proper examination.

On account of these errors there must be a new trial, but, in view of such trial, there are two other questions which should be considered:

The case was one in which the parties were entitled to a jury trial. On February 23, 1897, when an adjourned or special term of the district court for Houston county was in session, at which it seems to have been ex-

pected that this case would be reached for trial, the attorneys for the respective parties signed and filed a stipulation waiving a jury, and consenting that the case might be tried by the court. The term of court then in session was adjourned until April. The plaintiff applied to the court to set aside this stipulation, and set the case for trial to a jury at the April special term, to be held on the 27th of that month. The ground on which this was asked was, in substance, that the stipulation waiving a jury was entered into solely with reference to the then existing exigencies, arising out of the fact that it was then supposed that, if the case was to be tried to a jury, it would be necessary for the plaintiff to keep a large number of witnesses in attendance at large expense, and also because, if a jury was not waived, he might be compelled to move for a continuance on account of the nonarrival of a certain deposition, and that these exigencies had all been removed by the court's ordering the jury to return at the April special or adjourned term. The April term closed without the case being reached, and it went over to the regular term the following October. The judge never made any formal disposition of plaintiff's motion, but on April 15, he wrote to the attorneys that he thought the case was one which ought to be tried by a jury, and not by the court, and that they had better be prepared accordingly. When the cause was reached for trial at the October term, the court, at the request of the plaintiff, and against the objection of the defendant, ordered the case to be tried to a jury. This is assigned as error. The authorities are generally, if not uniformly, to the effect that the court may disregard the waiver of a jury by the parties, and, on his own motion, require the issues of fact to be submitted to a jury; that this is a matter addressed to his sound discretion. *Burke v. Breazeale*, 1 Rob. (La.) 73; *McCarthy v. Missouri R. Co.* 15 Mo. App. 386; *Bullock v. Consumers' Lumber Co.* (Cal.) 31 Pac. 367. The authorities seem to be also to the effect that a waiver of jury trial, so long as not yet acted on, may be withdrawn, with the consent of the court, and a trial by jury demanded, at least where the withdrawal will not prejudice the opposite party. All that is decided in *State v. Bannock*, 53 Minn. 419, 55 N. W. 558, is that the waiver cannot be recalled at will, or as a matter of right. The law zealously guards the right of trial by jury. Waivers of the right are always strictly construed, and are not to be lightly inferred, or extended by implication. It is reasonably apparent that the waiver of a jury in this case was made only with reference to the exigencies of the then current term of court and should not be extended so as to apply to a subsequent term. The action of the court in ordering the case to be tried to a jury may be sustained on any of these grounds.

During the progress of the trial the defendant introduced the testimony of a medical expert, tending to prove that the nature of the injury to plaintiff's neck could be as-

certained by the application of the Roentgen (commonly called "X") rays, that the witness had some experience in the use of these rays in surgery, and that no evil effects would result from their use, except that, if there was a very long exposure of the parts to the rays, there might be a burning of the skin, but that there would be no necessity for any such prolonged exposure for the purpose of taking a photograph of plaintiff's neck. On this showing, defendant's counsel then requested the court to give him "the privilege of taking an X-ray photograph of plaintiff's neck." Although peculiarly worded, this must be construed as asking the court to require the plaintiff to submit his neck to the X-rays for the purpose of taking a photograph of it. The court's refusal to so order is assigned as error. The discovery of the X-rays is comparatively recent. Its utility and the reliability of its results are already so well established as scientific facts that courts ought to take judicial notice of them. And, if the fact that the exposure of the person to these rays is harmless becomes as well established in science as is the accuracy of photographs taken by them, there is as much reason why, in a proper case, under proper safeguards, and at the reasonable request of the defendant, the plaintiff should be required, in a case like the present, to submit his neck to those rays for the purpose of photographing it, as there is for requiring a party to submit his person to a physical examination, as in *Wanek v. Winona* (Minn.) 46 L. R. A. 448, 80 N. W. 851. Whether science is as yet sufficiently advanced on the subject to so hold may admit of doubt, and a person cannot be required to submit his person to any process which is liable to injure him. It is impracticable to stop the trial in order to ascertain by evidence whether the exposure of a part of the human body to these rays is liable to result in injury. Moreover, if any such practice should obtain, there would be no uniform rule on the subject, as each case would depend on the evidence introduced, and the conclusion which the particular judge would draw from it. Hence a party ought not to be required to submit his person to the X-rays until it is so well established as a fact in science that the process is harmless, that the courts will take judicial notice of it. It may admit of doubt whether that time has yet arrived. But, without passing upon that question, we are of opinion that defendant's request was properly refused for two reasons: (1) That the request was not seasonably made; and (2) that it did not sufficiently appear that the person by whom the defendant desired the photograph to be taken had the necessary skill or experience to properly and safely apply the rays without injury to the plaintiff.

Order reversed, and a new trial granted.
47 L. R. A.

STATE of Minnesota

v.

Alfred BRADFORD, Appt.

(.....Minn.....)

- *1. Section 1, chap. 43, Laws 1899, construed, and held not void for uncertainty.
2. Held, the section should be cut down by construction so as to apply only to cases of injuries to public bicycle paths.
3. Conceding, without deciding, that, prior to the passage of said chapter 43, the county commissioners had no authority to set apart a portion of a public highway for a bicycle path for the exclusive use of bicycles, held, that chapter by implication ratified the act of the commissioners in doing so, or attempting to do so, and also by implication authorized such commissioners thereafter to set apart a portion of a highway for such exclusive use.
4. Held, the indictment is fatally defective in failing to allege that the bicycle path is a part of a public highway, or a public bicycle path. Rule applied that an indictment is not sufficient which merely follows the language of the statute, when the statute does not sufficiently define the crime, or set forth all of the elements necessary to constitute the offense intended to be punished.

(December 13, 1899.)

APPPEAL by defendant from an order of the District Court for Hennepin County denying a new trial after conviction for driving upon a bicycle path contrary to the provisions of a statute. *Reversed.*

The facts are stated in the opinion.

Messrs. A. M. Higgins, L. W. Gammons, and J. A. Peterson, for appellant: The legislature can only make such acts criminal as interfere with the morals, health, and good order of the community.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

There are rights in every free government beyond the control of the state.

Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 188, 3 Am. Rep. 30; *Cooley, Const. Lim.* 129, 175, 487; *Dill. Mun. Corp.* § 587; *St. Paul v. Gillilan*, 36 Minn. 298, 31 N. W. 49; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285; *Coe v. Schultz*, 47 Barb. 64; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 40, 16 Am. Rep. 611; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 197, 22 Am. Rep. 71; *Hutton v. Camden*, 39 N. J. L. 122, 20 Am. Rep. 203; *Evansville v. State ex rel. Blend*, 118 Ind. 447, 4 L. R. A. 93, 20 N. E. 736.

The power to enact criminal statutes was

*Headnotes by CANTY, J.

NOTE.—As to the restriction of the use of part of a street by heavy vehicles, see *State v. Boardman* (Me.) 46 L. R. A. 750.

delegated to the legislature for the protection of society, but not for the purpose of annoying the public.

Dorsey v. State, 38 Tex. Crim. Rep. 527, 40 L. R. A. 203, 44 S. W. 514; *St. Louis v. Edward Heitsberg Pkg. & Provision Co.* 141 Mo. 375, 39 L. R. A. 559, 42 S. W. 954.

It is not enough to charge in the words of the statute unless all that is essential to constitute the offense is stated fully and directly.

State v. Howard, 66 Minn. 312, 34 L. R. A. 178, 68 N. W. 1096; *State v. Comfort*, 22 Minn. 271; *State v. Abrisch*, 41 Minn. 41, 42 N. W. 543.

Public highways belong, from side to side and from end to end, to the public, and the public is entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.

Wood, Nuisances, § 252; Elliott, Roads & Streets, p. 18; Angell, Highways, § 226; 1 Hawk. P. C. chap. 32, § 11; *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117; *Johnson v. Whitefield*, 18 Me. 286, 38 Am. Dec. 721.

Mr. A. B. Choate, with *Messrs. W. B. Douglas*, Attorney General, and *C. W. Semberby*, for respondent:

When the offense is statutory, and is completely defined, an indictment framed in the language of the statute is sufficient.

State v. Comfort, 22 Minn. 271; *State v. Barry* (Minn.) 79 N. W. 650; *State v. Greenwood* (Minn.) 78 N. W. 1042.

The description of the path mentioned in the indictment is manifestly sufficient.

Courts take judicial notice of the general direction of city streets, their beginning and termination.

Skelly v. New York Elev. R. Co. 7 Misc. 88, 27 N. Y. Supp. 304; *Canavan v. Stuyvesant*, 7 Misc. 113, 27 N. Y. Supp. 351; *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462; *Baumann v. Granite Sav. Bank & T. Co.* 66 Minn. 227, 68 N. W. 1074; 12 Am. & Eng. Enc. Law, pp. 173, 174.

The power of county commissioners to construct bicycle paths is necessarily implied.

State v. Eleventh Judicial Dist. Ct. Judges, 51 Minn. 539, 63 N. W. 800, 55 N. W. 122.

The purpose of the law was to keep vehicles within their proper limit, and to protect bicyclists, and the act is properly within the police power of the state. It does not violate any constitutional right or privilege of citizens.

Cooke, Penal Code (N. Y.) §§ 640, 652, note; *Fisher v. Cambridge*, 133 N. Y. 527, 30 N. E. 663; Tiedeman, Pol. Power, § 1, p. 4; *State ex rel. Beck v. Wagener* (Minn.) 46 L. R. A. 442, 80 N. W. 633; *State ex rel. Railroad & Warehouse Commission v. Oargill Co.* (Minn.) 79 N. W. 962; *Emmons v. Minneapolis & St. L. R. Co.* 35 Minn. 503, 29 N. W. 202; *State v. Smith*, 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545; *Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308; *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688; *State v. Mrosinski*, 59 Minn. 465, 27 L. R. A. 76, 61 N. W. 560; *State ex rel. Oorcoran v. Chapel*, 64 Minn. 130, 32 L. R. A. 131, 66 N. W. 47 L. R. A.

W. 205; *Johnson v. Chicago, M. & St. P. R. Co.* 29 Minn. 425, 13 N. W. 673; *Grafty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602.

The purposes and the actual construction of a bicycle path for exclusive use by bicyclists may be shown by parol, in the same manner that a county road may be proved by parol, the records not being conclusive.

State ex rel. Cunningham v. Ramsey County Dist. Ct. 29 Minn. 62, 11 N. W. 133; *State ex rel. Lewis v. Ramsey County Dist. Ct.* 33 Minn. 164, 22 N. W. 295; Gen. Stat. 1894, § 1878; *Benson v. St. Paul, M. & M. R. Co.* 62 Minn. 200, 64 N. W. 393; *Hall v. St. Paul*, 56 Minn. 431, 57 N. W. 928.

A county road is a highway, and the county commissioners have the supervision thereof, with the power to improve the same for travel by ordinary vehicles, horsemen, or footmen, and to appropriate money therefor. The nature and extent of the improvement are not specified, and are left to the judgment and discretion of the board.

Gen. Stat. 1894, §§ 1832, 1838, 1846; *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 539, 63 N. W. 111; *Gillette-Herzog Mfg. Co. v. Aitkin County Comrs.* 69 Minn. 297, 72 N. W. 123; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 10 N. W. 205; Elliott, Roads & Streets, pp. 300-304; 9 Am. & Eng. Enc. Law, p. 363.

A bicycle is a vehicle, may be used on a public highway, and is governed by the law of the road.

State v. Collins, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131; *Thompson v. Dodge*, 58 Minn. 555, 28 L. R. A. 608, 60 N. W. 545; Elliott, Roads & Streets, pp. 331, 636.

Sidewalks can be constructed by municipal authorities, and the limitation of their use to footmen is valid. Parkways can be constructed for designated vehicles and ditches for certain uses.

Elliott, Roads & Streets, pp. 2, 7, 12, 301-305, 636, note; *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 2 N. E. 943; *Mercer v. Corbin*, 117 Ind. 450, 3 L. R. A. 221, 20 N. E. 132; *St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734; Gen. Stat. 1894, §§ 1913, 6780, 7784, 7817.

The public easement is not limited to any particular method of travel, but modern improved methods require a broader use, and the improvement does not unreasonably impair the right of abutting owners.

Holland v. Bartch, 120 Ind. 46, 22 N. E. 83; *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 539, 63 N. W. 111; *Thompson v. Dodge*, 58 Minn. 555, 28 L. R. A. 608, 60 N. W. 545; *Magee v. Overshiner*, 150 Ind. 127, 40 L. R. A. 370, 49 N. E. 951; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 10 N. W. 205.

The legislature has power to regulate highways and prescribe what vehicles may be used on them with a view to the safety and preservation of the road, unless the restriction is too unjust or unreasonable. This power extends to the regulation of the use

of highways by omnibuses, street cars, bicycles, hacks, etc., and is usually conferred upon local authority.

State v. Yopp, 97 N. C. 477, 2 S. E. 458; *State v. Collins*, 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 131; *Re Wright*, 29 Hun, 357; *Alberge v. Baltimore* (Md.) 20 Atl. 988; *Mercoer v. Corbin*, 117 Ind. 456, 3 L. R. A. 221, 20 N. E. 132; *Elliott, Roads & Streets*, pp. 327, 331, 614, 635; 2 Dill. Mun. Corp. 656; *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Bohen v. Waseca*, 32 Minn. 176, 19 N. W. 730; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839.

Mr. Louis A. Reed also for respondent.

Canty, J., delivered the opinion of the court:

Section 1, chap. 43, Laws 1899, reads as follows: "Any person who wilfully injures, obstructs, or destroys, or drives any cattle, sheep, horse, swine, or other animals, team or vehicle, except a bicycle, or wilfully allows his cattle, sheep, horse, swine, or other animal to be led or driven upon, or to stray along, a bicycle path constructed exclusively for the use of bicyclists, except for the purpose of crossing such paths at street intersections, and at private driveways leading from the street to adjoining premises, and for the purpose of crossing such paths to and from the street and adjoining premises where necessary, shall be guilty of a misdemeanor, and on conviction thereof, be fined not less than (5) dollars or more than fifty (50) dollars, or by imprisonment for not more than thirty (30) days, or both." Under this section an indictment was found against the defendant by the grand jury of Hennepin county, the charging part of which indictment reads as follows: "The said Alfred Bradford, on the 31st day of March, A. D. 1899, at the village of St. Louis Park, in said Hennepin county, then and there being, did wilfully, unlawfully, wrongfully, knowingly, and feloniously drive a team of horses attached to a sled, commonly so called, upon, over, and along that certain bicycle path constructed exclusively for the use of bicycles, said bicycle path being then and there commonly known, designated, and described as the 'Lake Street Boulevard Bicycle Path,' which said bicycle path runs from the city of Minneapolis to Lake Minnetonka, in said county of Hennepin, at a point and place upon said bicycle path where said bicycle path runs along the northern boundary of section 17 in township 117, and range 21 west, in said county of Hennepin and state of Minnesota, said point and place upon said bicycle path not being a street intersection nor a private driveway leading from the street to the adjoining premises, and it not being then and there necessary for the said Alfred Bradford to drive said team of horses and sled upon, over, and along said bicycle path, at said point and place, for the purpose of crossing said bicycle path to or from the street and adjoining premises, contrary to the statute," etc. The defendant was convicted.

victed, and appeals from an order denying a new trial.

1. It will be observed that said § 1 consists wholly of one sentence, and appellant contends that the first clause in the sentence ending with the words "except a bicycle" is wholly disconnected from what follows, does not make sense, or express anything, and that, therefore, this section does not make the driving of "a team or vehicle" upon such a path a crime. We cannot so hold. While the section is not very well worded, it means that "any person who wilfully . . . drives any . . . team or vehicle except a bicycle . . . upon or . . . along a bicycle path . . . shall be guilty of a misdemeanor."

2. But the section is not expressly confined in its operation to cases of public bicycle paths, or bicycle paths constructed in public streets or highways, and bicycle paths constructed on private grounds for the use of the public, or to any of them; and according to the strict letter of the statute a person would be liable for injuring, destroying, or driving upon a private bicycle path constructed by himself upon his own land. Clearly, the legislature never intended to give the section so broad an effect, and the act must be cut down by construction so that it will apply only to cases of public bicycle paths. In our opinion, it is the duty of the court so to cut down the section by construction, and, as so construed, it is valid.

3. It appears by the evidence in this case that the bicycle path here in question was constructed by the county commissioners of Hennepin county in the summer of 1898, extends from Lake street, in Minneapolis, westward towards Lake Minnetonka, a distance of 12 miles, and was built on the south side of the traveled roadway, and within the boundaries of the public highway, in that county. The path is about 8 feet wide, is separated from the ordinary traveled roadway by a shallow ditch, and the evidence shows that when the county commissioners were constructing the path they intended it for the exclusive use of bicyclists, and the manner of its construction and the use to which it has been put tend to show that it was intended for their exclusive use. But appellant contends that the board of county commissioners had no power to set apart a portion of the public highway for the exclusive use of bicyclists. Whether the county commissioners had such power prior to the passage of said chapter 43 we will not consider. That act was approved March 6, 1899, and, in our opinion, § 1 by implication ratified the act of the county commissioners in setting apart, or attempting to set apart, a portion of the public highway for the exclusive use of bicyclists. The section also by implication authorized the county commissioners thereafter to set apart a portion of a public highway for such exclusive use.

4. But, in our opinion, the indictment is fatally defective because it does not allege that the bicycle path was constructed in, or is a part of, a public highway situated and being in Hennepin county. It is not alleged

that the bicycle path is a public path, and for all that appears by the indictment the path might have been the private property of defendant, and a part of his own land. Where the statute does not sufficiently define the crime, or set forth all the elements necessary to constitute the offense intended to be punished, an indictment is not sufficient which merely follows the language of the statute. *State v. Howard*, 66 Minn. 309, 34 L. R. A. 178, 68 N. W. 1096; *State v. Abriesch*, 41 Minn. 41, 42 N. W. 543.

The order appealed from is reversed, and the case remanded, with directions to the court below to dismiss the action, and either submit the case to another grand jury, or discharge the defendant, as that court shall deem proper.

Brown, J., concurring:

I concur in the result, but withhold my assent to the proposition that chapter 43, Gen. Laws 1899, is a valid law, and to the proposition, in effect, that the law should be "cut down by construction" to make it valid. The law confers no power upon the board of

county commissioners to locate or establish a bicycle path, but proceeds on the theory that such a path is already known and has a legal existence, and I object to judicially reading into the body of the law a provision giving the county commissioners such authority. The legislature of this state has never seen fit to provide for or authorize the location of bicycle paths, and, in my judgment, until such authority is given to the proper municipal authorities, or until expressly provided for in some other way, such paths can have no legal existence. The serious objection to this law is that it makes it a criminal offense for a person to trespass upon that which is not known to the law. What is a bicycle path? And when may it be said that one has been lawfully established and laid out, so as to be entitled to the protection of this law? What officer or tribunal has authority to act in that behalf? The opinion of the majority members of this court confers such authority upon the board of county commissioners, but the law itself does not so read, or contain a suggestion or inference of the kind.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Cornelius COYLE, *Plff. in Err.*,

v.

A. A. GRIFFING IRON COMPANY.

(.....N. J.....)

*A person who enters into the employ of another assumes all the risks and perils usually incident to the employment, and included in such risks and perils are those which it is a part of his duty to take knowledge of by observation.

(November 20, 1899.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Queen & Tennant, for plaintiff in error:

The absence of the bolt was not an obvious defect, or such a defect that plaintiff could or should have seen. And if he did see it, the law imposed upon him no duty to con-

clude what its absence meant—what results might ensue if the remaining bolt became loose.

The law cannot impose upon a mere laborer the mental effort to figure out what will happen in certain contingencies. The servant does not take upon himself risks incident to the use of unsafe machinery by continuing to use it without objection, after knowledge of its defective character or condition, unless he also understands, or by the exercise of ordinary observation ought to understand, the risks to which he is exposed by its use.

Bailey, Master's Liability for Injuries to Servant, chap. 9, 170, ed. 1894, and cases there cited; *Russell v. Minneapolis & St. L. R. Co.* 32 Minn. 230, 20 N. W. 147; *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311; *Wuotilla v. Duluth Lumber Co.* 37 Minn. 153, 33 N. W. 551.

Whether the defendant was guilty of negligence in not exercising reasonable care in supplying safe machinery and appliances, and in keeping them in safe condition, was a question for the jury, depending upon the facts in the case.

Comben v. Belleville Stone Co. 59 N. J. L. 231, 36 Atl. 473, and cases cited; *Western*

near the track as to be dangerous when hanging low on a ladder to look under a car is decided in *McKee v. Chicago, R. I. & P. R. Co.* (Iowa) 13 L. R. A. 817.

As to the duty of a brakeman who has ample opportunity to become familiar with a bridge over the track, see *Williamson v. Newport News & M. Valley Co.* (W. Va.) 12 L. R. A. 297.

For some cases on the general rule as to the assumption of risks, see *note to Foley v. Pette-Mach. Works* (Mass.) 4 L. R. A. 51.

*Headnote by GUMMERE, J.

NOTE.—The duty of an employee to "exercise proper watchfulness" in order to see that machinery does not become defective and dangerous for want of repair is stated by the court in the above case, and might be interpreted to make something of a change in the usual doctrine. But it may be doubted if the court meant to go beyond the ordinary rule which holds an employee liable for failure to guard against risks which are obvious.

That an employee was presumed to know the fact that wing fences at cattle guards were so 47 L. R. A.

U. Teleg. Co. v. McMullen, 58 N. J. L. 155-159, 32 L. R. A. 351, 33 Atl. 384; *Foley v. Jersey City Electric Light Co.* 54 N. J. L. 411, 24 Atl. 487; *Newman v. Fowler*, 37 N. J. L. 89; *Demars v. Glenn Mfg. Co.* 67 N. H. 404, 40 Atl. 802.

Whether the plaintiff had such knowledge of and experience in the machines as would have informed him of the danger attending the operation of pushing back the old badly worn belt with a stick was a legitimate question for the consideration of the jury. In case of a reasonable ground for difference of opinion upon that subject, the court cannot usurp the province of the jury, or decide as a matter of law what is plainly a question of fact.

Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 29 N. E. 464; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Bridges v. St. Louis I. M. & S. R. Co.* 6 Mo. App. 389; *Kain v. Smith*, 89 N. Y. 375.

The plaintiff had a right to believe that the defendant had provided him with reasonably safe machinery.

North Deutscher Lloyd S. S. Co. v. Ingebreghsten, 57 N. J. L. 402, 31 Atl. 619; *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756.

Messrs. Vredenburg & Garretson for defendant in error.

Gummere, J., delivered the opinion of the court:

This action is brought by the plaintiff, Coyle, against the defendant company, for personal injuries received by him while at work in their employ. His employment began in September, 1895, and he commenced operating the machine at which he was hurt about three weeks later. His injuries were received in November, 1896. His work upon the machine included the oiling, twice each week, of certain pulleys, which communicated power to it by means of belting which ran to the main shafting of the shop. There were three pulleys to the machine; the outer ones being "loose," and turning on the axle, the inner one being "tight," and fastened to it. The axle, running through the three pulleys, operated machinery at its left end by means of cog wheels. The object of the loose pulleys was to provide a means of throwing the belting off the tight pulley, thus stopping the operation of the machine. The belting ran through a guide in front of the pulleys, and was shifted from the loose to the tight pulley (and *vice versa*) by means of a lever which ran across the three pulleys. The guide through which the belting ran was fastened to this lever, and extended down over the pulleys like an arm. The pulleys ran at a speed of between 800 and 900 revolutions a minute. The cogs which started the machinery to the left of the pulleys were about 3 inches away from the nearest pulley. There were oil tubes on the inside of the loose pulleys. In order to oil them, the operator would throw the belting on the tight pulley, and thus start the machinery. The loose pulley would continue to revolve for some time by its ac-

quired momentum, which was stopped by the operator, either by pushing a stick underneath, or by holding the hand against the flat part of the pulley. On the morning of the accident, Coyle stopped the loose pulleys in the usual manner, and, after taking out the plugs from the oil tubes, started to pour in the oil. He did this with his left hand. While he was putting back the plugs into the tubes, the belting was suddenly shifted from the tight to the loose pulley which he was oiling. It immediately commenced to revolve rapidly. One of the spokes struck Coyle's hand, throwing it between the cogs immediately to the left. The result was that he lost two fingers and part of his hand, the use of which was entirely destroyed.

The ground upon which the plaintiff seeks to impose upon his employer responsibility for the accident from which he is suffering is that, with the machine in proper order, the belt would not have shifted from the tight to the loose pulley. The defect in the machine is said to have been caused by the absence of a bolt which fastened the lever to the guide, and it is claimed, and is beyond question true, that inspection by the master would have led to the discovery of the defect. The machine, as originally constructed, had two bolts making this fastening. The natural result of the absence of one of them, as was shown by the testimony produced on the part of the plaintiff, was to cause the guide to work loose from the level, thereby making it possible for the belting to shift from one pulley to another, although not thrown over by the man operating the machine. After the testimony on both sides was in, the trial judge, considering that the testimony showed, among other things, that the defect in the machine which caused plaintiff's injury was an obvious one, directed a verdict in favor of the defendant. The plaintiff now seeks to set aside the judgment entered upon that verdict.

That the insecure fastening of the lever to the guide, due to the absence of a bolt, was an obvious defect, and one which the plaintiff, by exercising a reasonable degree of caution, would have discovered, is clearly shown by the proofs offered by him. By those proofs it appears that the bolt had been out for nearly nine months preceding the date of the accident. The plaintiff himself testified that, although he had not observed the absence of the bolt before he was injured, he noticed immediately afterwards, while standing in front of the machine, that there was but one bolt in the guide, and that there was only a hole where the other one should have been. It cannot be doubted that a defect so easily seen would have been discovered by him had he used ordinary care in observing if the machine fell out of repair. Although the master is charged with the duty to his servant of providing reasonably safe and proper machinery and appliances for the latter to work upon, and of using due care in keeping such machinery and appliances in repair, and of making inspection thereof at proper intervals, the servant who operates a machine or mechanical appliance

is on his part also chargeable with certain duties with relation to such machinery and appliances. He must exercise a proper watchfulness in order to see that, in the course of its use, it does not become defective for want of repair, and so more dangerous in its operation than it would otherwise be. And, if the repairs needed are not such as should be made by him, his duty requires him to report the condition of the machine to his employer. And this duty becomes more imperative when personal danger to himself and others may follow from the continued use of the machine while out of repair. *Bailey, Master's Liability for Injuries to Servant*, p. 169, and cases cited. As a corollary to this rule, it follows that, where a machine becomes defective during use, and consequently more dangerous to operate, and such defect is an obvious one, which might have been discovered by the servant by the use of reasonable diligence, he is presumed to have taken upon himself the

risks incident to its further use while out of repair, and, if injury results to him from such use, the master is not liable. In other words, the servant assumes all the risks and perils usually incident to the employment, and included in such risks and perils are those which it is a part of his duty to take knowledge of by observation. *Foley v. Jersey City Electric Light Co.* 54 N. J. L. 411, 24 Atl. 487; *Chandler v. Atlantic Coast Electric R. Co.* 61 N. J. L. 328, 39 Atl. 674; *Johnson v. Devol Snuff Co.* 62 N. J. L. 417, 41 Atl. 936. The testimony in the case would not have supported any other verdict than that directed by the trial judge, and there was, consequently, no error in the instruction complained of. *Ayorigg v. New York & E. R. Co.* 30 N. J. L. 460; *Meyers v. Birch*, 59 N. J. L. 238, 36 Atl. 95; *McCormack v. Standard Oil Co.* 60 N. J. L. 243, 37 Atl. 617.

The judgment of the Supreme Court should be affirmed.

NORTH DAKOTA SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY, *Resp't.*, v.

W. A. McCLURE *et al.*, *App'ts.*

(.....N. D.....)

*1. On October 1, 1892, the Northern Pacific Railroad Company leased a portion of its right of way to the defendants for warehouse purposes. The defendants covenanted in the lease that, in addition to paying a nominal rent, they would save and hold the lessor harmless from losses arising out of the destruction of property on the leased premises by fires set by the lessor's engines. Said lease contained a stipulation that all of its covenants and conditions should be binding upon the assigns of both parties to it. On August 18, 1896, the Northern Pacific Railroad Company transferred all of its property, including the premises demised and the lease, to the Northern Pacific Railway Company, the plaintiff in this action. The lessees consented to such transfer, and attorned to the plaintiff as their landlord under said lease. *Held*, in an action by plaintiff to recover the amount of a loss suffered by it as a result of a fire set by its engine, that the covenant to save harmless passed to plaintiff, and it is accordingly entitled to recover thereon.

2. Sections 3784-3787, Rev. Codes, which declare what covenants in grants of real property run with the land, and designate a number of such covenants by name, construed; and *held*, that said sections do not confine covenants which run with the land to those specifically named, but that such covenants as by reason of their character are within the meaning of said sections also run with the land.

(November 14, 1899.)

*Headnotes by YOUNG, J.

NOTE.—As to covenant in lease to relieve a railway company from loss, by fire, see also *King v. Southern P. Co.* (Cal.) 29 L. R. A. 755.
47 L. R. A.

APPEAL by defendants from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to enforce a covenant in a lease to indemnify plaintiff from liability for fire set out upon its right of way. *Affirmed.*

The facts are stated in the opinion.

Messrs. Newman, Spalding, & Stambaugh, for appellants:

The covenant does not run with the land.

Rev. Codes, §§ 3784-3787; Taylor, Land. & T. § 260; 1 Washb. Real Prop. § 4, subd. 10, 11; *Norman v. Wells*, 17 Wend. 145; *Morse v. Garner*, 1 Strobb. L. 514, 47 Am. Dec. 565; *Countryman v. Deck*, 13 Abb. N. C. 114, note; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 503, 10 L. ed. 1048; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 9 L. ed. 512.

The provision is a contract of insurance.

Rev. Code, § 4441.

A provision in a contract for insurance or indemnity does not run with the land, but is a strictly personal covenant.

Dunlop v. Avery, 89 N. Y. 599; *Reid v. McCrum*, 91 N. Y. 412; *Harsha v. Reid*, 45 N. Y. 419; *Scott v. McMillan*, 76 N. Y. 141; *Cromwell v. Brooklyn F. Ins. Co.* 44 N. Y. 47, 4 Am. Rep. 641; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 152.

Messrs. Ball, Watson, & MacLay, for respondent:

All the covenants and agreements which were wrapped up and involved in the use of the premises and the purposes for which they were leased, and which were part of the consideration upon which the lease was based, became operative in favor of the plaintiff railway company upon attornment to it by the lessees.

Cornish v. Searell, 8 Barn. & C. 471; *Doe ex dem. Wright v. Smith*, 8 Ad. & El. 255; *Austin v. Ahearne*, 61 N. Y. 6.

Upon the reorganization of a corporation, the new corporation may succeed to the

rights of its predecessor; in such case an assignment is a matter of form, and not of substance.

New York Bank Note Co. v. Hamilton Bank Note Engraving & Print. Co. 28 App. Div. 411, 50 N. Y. Supp. 1093.

Under the statute, covenants such as the one in question are held to run with the land.

Winterfield v. Stauss, 24 Wis. 394; *State, Roberts, Prosecutor, v. McPherson*, 62 N. J. L. 165, 40 Atl. 630; *State, Watson, Prosecutor, v. Idler*, 54 N. J. L. 467, 24 Atl. 554; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31.

Young, J., delivered the opinion of the court:

In this case a demurrer to the complaint was interposed by defendants' counsel upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court, and, defendants having elected to stand upon their demurrer, judgment was ordered and entered for the plaintiff for the relief demanded. The defendants appeal from the judgment, and submit for review the correctness of the court's order overruling the demurrer, and that question only. If that ruling is sustained, the judgment must be affirmed. If not, it will be reversed. By interposing the demurrer, the defendants admit the truth of all facts alleged in the complaint which are well pleaded, but challenge their sufficiency in law to create a cause of action against them in favor of the plaintiff. The material facts so admitted by the demurrer are concisely stated in the brief of respondent's counsel, from which we will quote. They are these: "On October 1, 1892, the defendants leased from the Northern Pacific Railroad Company part of its right of way at Richardton, North Dakota, adjacent to its tracks, for a term of five years. Such leasing was for the benefit and advantage of both parties, through the facilities furnished to defendants for carrying on their business of storing and shipping merchandise; and to the railroad company, by reason of the increased traffic acquired thereby for its road. Said lease was given in consideration of a nominal rent, and in further consideration of the covenant, among others, on the part of the lessees, that they would and did assume all risks of loss or damage to any property upon the leased premises, and that they would save harmless the lessor from all damages or claims for losses or injury suffered to said property, by whomsoever claimed. Afterwards, and during the continuance of the lease, said Northern Pacific Railroad Company was reorganized under the name of the plaintiff, Northern Pacific Railway Company; and all the property of the railroad company, including the land and lease in question, was on the 18th day of August, 1896, conveyed and transferred to the Northern Pacific Railway Company. Thereupon said plaintiff railway company operated said line of railroad, and the control and management of said road thereafter was in 47 L. R. A.

the same hands, substantially, as before the reorganization; and the personnel of the operating and engineering departments, and the method of its operation and management, were thereafter substantially the same as they had been while the road was operated under the name of the Northern Pacific Railroad Company. The lessees consented to the transfer and conveyance from the railroad company to the railway company, and attorned to the plaintiff railway company as their landlord; and after such transfer they accepted and retained all the rights, benefits, and privileges conferred upon them by the lease, as lessees thereunder; and the lease was, by its express terms, binding upon the railway company, as the successor and assign of the railroad company. . . . The lessees permitted the McCormick Harvesting Machine Company to store their property upon the leased premises, and on April 26, 1897, during the continuance of the lease, such property was accidentally destroyed by fire. The machine company sued the plaintiff to recover damages for the destruction of said property, and the plaintiff duly notified and requested the defendant lessees to defend the action, but they failed to do so. The plaintiff thereupon defended the action, and did all in its power to protect its own rights and those of the defendants; but judgment was duly recovered against it, and paid by it to the machine company."

This action is brought, upon the indemnity covenant in the lease from the Northern Pacific Railroad Company to the defendants, to recover the amount disbursed by plaintiff in paying the judgment referred to; also, the costs incurred in defending the action wherein the judgment was rendered. In the lease in question the Northern Pacific Railroad Company is named as the first party, and the defendants as second parties. The portion of said lease upon which plaintiff relies is in the following language: "The said parties of the second part shall, and do hereby, assume all risks of loss, damage, or destruction of any property, building or contents, coal, lumber, or material, that may be upon, or in proximity to, the grounds included in this lease, by the parties of the second part or by any other party, occasioned by fire or sparks from locomotive engines, or other cause, or by neglect, carelessness, or misconduct of any person in the employment or service of the said party of the first part; it being the intent hereof that the said parties of the second part shall and do release, forever discharge, save and hold harmless, the said party of the first part from all damages and claims for losses or injury suffered or sustained, or that may be suffered or sustained, to said property, or to any other property on or near said demised premises." No question is raised as to the validity of the contract of lease as a whole, or as to the foregoing covenant. On the contrary, counsel for defendants expressly concede in their brief that the agreement of defendants to save and hold the lessor harmless is a binding agreement, and that the lessor might have

successfully maintained an action against them for recovery thereon for a breach of the same. But it is contended that this covenant did not pass to the plaintiff, as the assign and grantee of the lessor, and that it cannot, therefore, recover thereon. Defendants' whole contention is based upon the last proposition. Did the covenant to save the lessor harmless against claims for damages for losses of property upon the demised premises pass to the new corporation, the Northern Pacific Railway Company, the plaintiff in this action? If this covenant of the lessees did pass to the plaintiff by the transfer of the lease to it by the lessor, or by the grant to it of the right of way which is the subject of the lease, then it is patent that plaintiff has stated a cause of action entitling it to the relief demanded; for it is sufficiently alleged that it has suffered such a loss as entitles it to a recovery under the covenant referred to. The loss by fire occurred about eight months after the transfer of the land and lease by the old corporation to the plaintiff.

At early common law a lease was considered like any other agreement or chose in action, and was not assignable so as to give the assignee an action against the tenant. Later the injustice which this rule caused was partially corrected by the enactment of 32 Hen. VIII. chap. 34, § 1, declaring that the assignee of the reversion should become invested with the rents. It was thereafter held that the assignment of the reversion created a privity of estate between the assignee and the tenant; also, that a subsequent attornment of the tenant to the assignee created a privity of contract between the tenant and the assignee, which authorized the latter to sue for rent in his own name. *Fisher v. Deering*, 60 Ill. 114; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31. In this state some of the uncertainty as to the rights and remedies of grantees and devisees of a lessor against tenants of the latter is removed by direct legislation. Section 3366, Rev. Codes, provides that "a person to whom any real property is transferred or devised upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture as his grantor or deviser might have had." It is also provided in § 3367, *Id.*, that the lessor has the same remedies against the assignee of the lessee for the breach of an agreement in the lease as he has against the immediate lessee; also, that the lessee has the same remedies against the assignee of the lessor which he may have had against the lessor himself, except upon covenants against encumbrances, or relating to the title or possession of the premises. Section 3543 also provides that "grants of rents or of reversions or of remainders are good and effectual without attornments of tenants, but no tenant who before notice of the grant shall have paid rent to the grantor must suffer any damage thereby." Most of the states now

have similar statutes. The supreme court of Wisconsin, in construing their statute (which is substantially like §§ 3366 and 3367, *supra*, and wholly so, in effect, when the two sections are construed together) in *Winterfield v. Stauss*, 24 Wis. 394, said: "The effect of this statute is to cause the covenants entered into on the part of the lessee, or the conditions under which he holds, to run with the land; and to pass by conveyance or assignment to the assignee of the lessor, or of the reversion, so that such assignees may at once, and without attornment by the lessee, take advantage of any covenant or condition contained in the lease, the same as the lessor himself might have done. The consent of the lessee, or what was called 'attorning,' is no longer required, as at the common law, for this purpose; but the assignee succeeds immediately to all the rights and remedies which the lessor had, or might have had if no assignment had been made. In other words, the assignee becomes himself the landlord, standing in the place of the lessor, and enjoying all his rights and privileges under and by virtue of the lease. . . . The assignee here has all the rights and remedies of the lessor. He becomes the lessor by virtue of the assignment, and stands in the relation of landlord to the tenant in possession under the lease." We think the interpretation of the Wisconsin court, with the exception hereafter noted, is entirely sound, and evidently conforms to the legislative intention in enacting the remedial statutes, which was to place the assignees of both lessors and lessees in the same position relative to the lease which their assignors had, and to give to them the same rights and the same remedies.

Counsel for defendants contend, however, that plaintiff cannot recover upon the covenant in question, because there is no privity of estate or contract between it and the defendants. That privity both of contract and estate existed by virtue of the transfer of the lease and grant of the premises to the plaintiff by the lessor is shown by the case of *Fisher v. Deering*, 60 Ill. 114; also *Winterfield v. Stauss*, 24 Wis. 394; also by the weight of authority. *Hunt v. Thompson*, 2 Allen, 341; *Pfaff v. Golden*, 126 Mass. 402; *Kendall v. Carland*, 5 Cush. 74; *Scott v. Lunt*, 7 Pet. 596, 8 L. ed. 797; *Abercrombie v. Redpath*, 1 Iowa, 111; *Crosby v. Loop*, 13 Ill. 625; *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312; *Dixon v. Buell*, 21 Ill. 203; *Hatfield v. Lookwood*, 18 Iowa, 296; *Page v. Esby*, 54 Me. 319; *Moffatt v. Smith*, 4 N. Y. 126; *Glover v. Wilson*, 2 Barb. 264; *Port v. Jackson*, 17 Johns. 239; *Morris v. Niles*, 12 Abb. Pr. 103; *Bonetti v. Treat*, 91 Cal. 223, 14 L. R. A. 151, 27 Pac. 612; *State, Watson, Prosecutrix, v. Idler*, 54 N. J. L. 467, 24 Atl. 554.

Counsel has called our attention to sections 3784-3787, Rev. Codes, in support of their contention that the covenant to indemnify did not pass to plaintiff. They are as follows:

"Sec. 3784. Certain covenants contained in

grants of estates in real property are appurtenant to such estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

"Sec. 3785. The only covenants which run with the land are those specified in this article and those which are incidental thereto.

"Sec. 3786. Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property or some part of it then in existence runs with the land.

"Sec. 3787. The last section includes covenants of warranty, for quiet enjoyment or for further assurance on the part of the grantor, and covenants for the payment of rent, or of taxes or assessments upon the land on the part of the grantee."

We do not think these sections aid counsel's contention, for an examination of them makes it obvious that the legislature did not undertake to enumerate by name all of the particular covenants which run with the land, and pass to assigns and grantees. These sections, taken together, have a twofold purpose: They declare the effect of covenants which run with the land to be as binding upon the assigns of the covenantor and covenantee as if they had been personally made by them. In addition, they declare the test as to what constitutes a covenant which runs with the land, by the aid of which courts must determine in each particular case whether a covenant in question comes within the statute. At common law the principle which determined whether a covenant run with the land required that it be, in a sense, inherent in the estate demised, or connected with it, or that it touched the land or its value, or the value of the reversion or of the term, or went to fix the amount of the rent. See *Norman v. Wells*, 17 Wend. 136; *Allen v. Culver*, 3 Denio, 284; *Dolph v. White*, 12 N. Y. 296. Certainly our statute does not restrict us to narrower limits, for its express language extends to covenants "appurtenant to such estates," covenants "for the direct benefit of the property or some part of it then in existence," and those which "are incidental thereto." The conclusion cannot be drawn that because § 3787 enumerates five of the most common covenants, namely, of warranty, for quiet enjoyment, for further assurance, for payment of rent, and for payment of taxes and assessments, as running with the land, that all others are excluded. The language of the section itself forbids such a construction, for it shows that these particular covenants are merely included among those not mentioned. Further, it is not conceivable that the legislature intended to limit such covenants to those mentioned, and exclude the great number which have for generations been held as covenants running with the land, and as binding assigns. Among those, we name but a few: Covenants to repair. *Shelby v. Hearne*, 6 Yerg. 512; *Allen v. Culver*, 3 De-
47 L. R. A.

nio, 284. To pay for improvements. *Ecke v. Petzer*, 65 Wis. 55, 26 N. W. 266. Not to erect and operate a rival mill. *Norman v. Wells*, 17 Wend. 136. To leave in repair. *Demarest v. Willard*, 8 Cow. 206; *Myers v. Burns*, 33 Barb. 401. To maintaining existing fences. *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. For right of ingress and egress to and from a building. *Bush v. Calis*, 1 Show. 389. Not to assign or underlet. *Williams v. Earle*, 9 Best & S. 740. Not to erect a building in front of the demised premises. *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80. Not to plow or cultivate in a certain manner. *Cockson v. Cock*, Cro. Jac. 125. To use land in a husbandlike manner, and leave it in like condition. *Watson v. Walsh*, 1 Esp. N. P. *295. To manure land each year. — *v. Davis*, M. S. M. T., 42 Geo. III. To leave land with certain crops planted. *Hooper v. Clark*, 8 Best & S. 150. To reside on the premises during the term. *Tatem v. Chaplin*, 2 H. Bl. 133. Not to carry on particular trades on the premises. *Harron v. Richard*, 3 Edw. Ch. 96. To erect only buildings of a certain kind, and use them only for a specified purpose. *St. Andrews' Lutheran Church's Appeal*, 67 Pa. 512. To erect buildings on the premises. *Fisher v. Lewis*, 1 Clark (Pa.) 422. To erect and maintain an adjoining fence. *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335. To insure buildings when the money is to be used to rebuild. *Thomas v. Von Kapff*, 6 Gill & J. 372. The cases, it will be seen, are as various as the particular covenants upon which they are based. Likewise in the future each particular case must be determined by itself, by the application of the principle declared by common law or by statutes, where they exist.

Our conclusion is that the covenant in question in the case at bar passed to the plaintiff, and invested him with the same rights thereunder which the old corporation had. In reaching this conclusion, we are not controlled by the fact simply that it is a covenant contained in a lease, for, in our opinion, that is not enough; and in this respect we think the language of the Wisconsin court in *Winterfield v. Stauss*, 24 Wis. 394, is too broad, if it was intended to mean that all covenants of the lessee with the lessor passed to the assigns of the latter, regardless of the nature of the covenants. For it must be conceded that covenants and stipulations may be, and often are, inserted, which are wholly foreign to the subject-matter of the lease, and, while they are binding between the immediate parties thereto, are so disconnected with the estate that they do not pass by assignment, but remain as covenants between the original parties. But the covenant here involved is not of that nature. We think it is a covenant directly connected with the estate, and within the meaning of our statutes. While it is probably true that it is not an agreement to pay "rent," as that word is commonly understood, yet it has to do with determining the compensation which

the lessor is to receive for the use of the premises. It is perfectly apparent that the agreement to pay \$10 per year as rent was merely a nominal sum, and that the real consideration for the use of the lands was this particular agreement that the lessor should not suffer loss from damage suits brought to recover for the destruction of property upon the premises so leased to the defendants. If counsel's contention were true, that this covenant did not pass, then the only obligation the defendants would owe the plaintiff for the use of the property is the payment of the nominal rent of \$10 per year, and that would be the extent of their liability; for it is clear that they can incur no liability to the old corporation, in fact or in law. For, by reason of the sale of all of its property to the plaintiff, it cannot be the moving agent in negligently setting fire to property on the premises from which alone the liability would arise. Further, none of the covenants of the lease have been binding upon the lessor since August 18, 1896; for on that day all of its rights were transferred to the plaintiff, and the defendants attorned to it as their landlord under the lease in question. The legal effect of these acts was a surrender of all of the rights which the lessor had in the lease to the plaintiff which were connected with the estate, and an assumption of all of the obligations therein by the lessee as thereafter binding upon him in favor of his new landlord. Moreover, this was in accordance with the intention of the original parties, and their express agreement in the lease, contained in the following language: "It is further mutually covenanted and agreed by and between the said parties hereto that the covenants, agreements, and conditions herein contained shall be binding upon the executors, administrators, and assigns of the said parties of the second part, and the successors and assigns of the said party of the first part." The covenants and conditions which are thus expressly agreed to be binding upon

the assigns of the lessor must be considered as binding upon the lessee, also, in order to effect mutuality; and such, without doubt, was the intention of the parties in making the stipulation. It would also seem that the covenant in question was one which directly affected the value of the property. It certainly would during the five years in which the lease run. For, without this covenant to save the lessor harmless, the lease of the property would, as this case shows, have been productive of loss, instead of profit, to the lessor or its assigns. So, too, the agreement to indemnify the lessor was one of the conditions, and the most important one, under which the defendants held the property, and was extremely valuable to the assignee of the lessor, and one which, as we have seen, was valueless to the lessor after its assignment of the lease, both in fact and by reason of its surrender. Covenants to indemnify and hold harmless, like that we have been considering, are not entirely new to the courts. They have been held to be legitimate provisions, and have been upheld as not against public policy. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193. But we have not been able to find an adjudication upon the question whether this particular kind of a covenant runs with the land, and passes to the assigns of the lessor. Our conclusion, however, is, for the reasons stated, that this covenant passed to the plaintiff, and invested it with the same rights of protection against losses by it, and to the same extent and in the same manner as the lessor might have asserted had there been no assignment of the lease. The demurrer was properly overruled.

Judgment affirmed.

All concur.

Rehearing denied.

OREGON SUPREME COURT.

STATE of Oregon, *Respt.*,

v.

L. SCHUMAN, *Appt.*

(.....Or.....)

1. The possession within the state, for the purpose of sale, of trout lawfully caught in another state, is subject to Laws 1899, p. 199, making it unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time, without reserving any open season or making any saving clause under which trout may be sold.

2. The presumption of innocence is not sufficient to raise an inference in the appellate court that a sale was of the original package so as to warrant that court in considering the claim that one convicted of illegal sales was immune from prosecution under the state law because the sale was of an original package brought from another state, where that question was not raised below and the record shows only that the property was shipped from the other state without showing that it was in the original package.
3. The wholesomeness of trout as food does not make a statute prohibiting them to be sold or kept in possession for

NOTE.—For game laws as affecting interstate commerce, see *State v. Geer* (Conn.) 13 L. R. A. 804, and note. This case was affirmed by the Supreme Court of the United States in 161 U. S. 519, 40 L. ed. 793. See also *State v. Swett* (Me.) 29 L. R. A. 714; and *People v. O'Neill* (Mich.) 33 L. R. A. 696.

For possession during close season of game 47 L. R. A.

killed in another state, see *Dickhaut v. State* (Md.) 36 L. R. A. 765.

For possession during close season of fish lawfully caught, see *State v. McGulre* (Or.) 21 L. R. A. 478.

For unconstitutionality of statute prohibiting export of fish from state, see *Territory v. Evans* (Idaho) 7 L. R. A. 288.

the purpose of sale operate to deprive the owner of property without due process of law, where the statute permits him to have them in possession for the purpose of eating them or giving them away.

4. The sale of a commodity may be subject to the exercise of the police power, though its use would not necessarily subvert the morals, impair the health, or disturb the peace of society.

(October 23, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting him of unlawfully selling trout contrary to the provisions of the statute. *Affirmed.*

Statement by Moore, J.:

The defendant, L. Schuman, was charged in the justice's court of Portland district with unlawfully having in his possession for sale, offering for sale, and selling, seven trout. A plea of not guilty having been entered, the cause was submitted upon the following agreed statement of facts: "It is hereby stipulated and agreed, by and between the parties hereto, that the defendant is a dealer in fish, and operates and runs a fish market, in the city of Portland, state of Oregon; that on the 3d day of March, 1899, the said defendant, within the said city of Portland, Multnomah county, state of Oregon, had in his possession, and offered for sale and sold, the trout mentioned in the complaint herein; that said trout were lawfully caught in the state of Washington, and shipped into the state of Oregon to said defendant, and said defendant received said trout within the city, county, and state aforesaid, for the purpose of selling the same in said city, county, and state." The court upon this evidence found the defendant guilty, and sentenced him to pay a fine, from which judgment he appealed to the circuit court, where the cause was again submitted upon said stipulation, and the jury having found him guilty as charged, he was sentenced to pay a fine of \$20, from which he appeals to this court.

Messrs. Raleigh Stott and Ernest E. Merges, for appellant:

The act of February 20, 1899, prohibiting the selling, offering for sale, or having in possession for sale any species of trout at any time does not, and was not intended to, apply to trout lawfully caught in another state and shipped into Oregon as an article of commerce.

State v. McGuire, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666; *Diokhaut v. State*, 85 Md. 451, 36 L. R. A. 765, 37 Atl. 21.

This act could have no extraterritorial effect, even if such had been the intention of the legislative assembly.

Com. v. Wilkinson, 139 Pa. 304, 21 Atl. 14.

The importer of the fish in this case had an absolute property in them, and had a clear legal right to import them into the state.

The state cannot deprive a person of his
47 L. R. A.

property without due process of law under the 14th Amendment to the United States Constitution.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 750, 28 L. ed. 585, 586, 4 Sup. Ct. Rep. 652; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Tiedeman*, Pol. Power, §§ 135, 136.

It is one of the absolute rights of the individual to be free from unreasonable restraints upon the sale or transfer of his personal property.

Tiedeman, Pol. Powers, § 136.

Mr. J. N. Teal, with **Messrs. D. R. N. Blackburn**, Attorney General, and **Russell E. Sewall**, for respondent:

The state of Oregon, in its sovereign capacity and as the representative of its people, is the owner of, and under its police power can protect, its food fishes.

State v. Geer, 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 732, 22 Atl. 1012; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *State v. Craig*, 80 Me. 85, 13 Atl. 129; *State v. Beal*, 75 Me. 289; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

Trout are *fera natura*, and the state can limit and qualify the possession thereof.

State v. Theriault, 70 Vt. 617, 43 L. R. A. 290, 41 Atl. 1030; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Allen v. Wyckoff*, 48 N. J. L. 90, 2 Atl. 659; *Organ v. State*, 56 Ark. 267, 19 S. W. 840; *State v. Harrod*, 95 Ala. 176, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 10 So. 752; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *People v. Fishbough*, 134 N. Y. 393, 31 N. E. 983; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *State v. McGuire*, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666; *Com. v. Barber*, 143 Mass. 560, 10 N. E. 330; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468.

When trout are imported into the state they are subject to its laws from the moment they become a part of its general property; and a law prohibiting their sale absolutely is constitutional.

Merritt v. People, 169 Ill. 218, 48 N. E. 325; *Magner v. People*, 97 Ill. 320; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 525; *State v. Farrell*, 23 Mo. App. 176; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468; *Com. v. Barber*, 143 Mass. 560, 10 N. E. 330; *New York Asso. for Protection of Game v. Durham*, 19 Jones & S. 306.

Moore, J., delivered the opinion of the court:

It is contended that the act under which defendant was convicted was not intended to apply to trout lawfully caught in another state, and shipped into Oregon. The statute in question (Laws 1899, p. 199) is entitled "An Act to Protect Trout and Other Food Fishes and to Prevent Their Destruction by Use of Powder or Chemicals, and Providing Punishment for a Violation Thereof." Section 5 of said act reads as follows: "It shall be unlawful to sell, offer for sale, or have in possession for sale, any species of trout at any time." The object of the statute was undoubtedly to protect the trout of this state, and hence it can have no application to trout caught in another state until they are brought into the state of Oregon, and become a part of the general property thereof. *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402. Defendant's counsel to support the legal principle for which they contend, rely upon the case of *State v. McGuire*, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666, in which it was held that to have in one's possession, during a closed season, salmon lawfully caught in the state during the open season, was not in violation of an act making it unlawful to fish for salmon in its waters during certain closed seasons, differing in time as to certain rivers, or to receive or have in one's possession, or offer for sale or transportation, or to transport, during said closed seasons, salmon "which may be caught in any of the streams as aforesaid." The statute then under consideration, if strictly construed and enforced according to such construction, would have necessitated the destruction of vast quantities of salmon lawfully caught and canned during the open seasons; in view of which it was held that, if the act was susceptible of two constructions, that should be adopted which would avoid such manifest injustice, and that the words "as aforesaid" did not relate to the streams themselves, but to the time and manner of taking fish from them. In *Com. v. Wilkinson*, 139 Pa. 298, 21 Atl. 14, it was held that an act of that state which forbade any person to "kill or expose for sale, or have in his possession, after the same has been killed, any quail," between certain dates in each year, did not prohibit the selling or having possession, during said period, of quail killed in, and imported from, another state. In *Dickhaut v. State*, 85 Md. 451, 36 L. R. A. 765, 37 Atl. 21, the supreme court of Maryland, relying upon the case of *State v. McGuire*, 24 Or. 366, 21 L. R. A. 478, 33 Pac. 666, held that an act of the legislative assembly of that state which forbade having rabbits in one's possession during certain months did not apply to such game when killed in another state, and shipped into Maryland during the closed season. In the cases to which attention has been called it was lawful to have in one's possession, and to offer for sale, during certain months, the game in question, and, inasmuch as the acts are each susceptible of two constructions, it was properly held that such possession or

offering for sale was not an offense thereunder. In the case at bar, however, the act provides that "it shall be unlawful to sell, offer for sale, or have in possession for sale, any species of trout at any time." There is no open season reserved, and no saving clause under which trout may be sold, and the statute being mandatory in character, and not susceptible of two constructions, but certain and unambiguous in its terms, it applies with as much force to trout shipped into this state and becoming a part of its general property as to those caught within its limits. *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *State v. Farrell*, 23 Mo. App. 176; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468; *New York Asso. for Protection of Game v. Durham*, 19 Jones & S. 306.

It is contended that the trout having been lawfully caught in the state of Washington, and shipped as an article of commerce into this state, the defendant had an unqualified title to them; and, since no presumption of his guilt can be indulged, it must be inferred that he sold them in the original package; and, this being so, to hold that the selling complained of was an offense, under the act in question, would render it obnoxious to, and violative of, article 1, § 8, subd. 3, of the Constitution of the United States, as being an attempt on the part of the legislative assembly to regulate interstate commerce. But we do not consider it necessary to pass upon this question, as it does not appear to have been raised in the court below. The transcript shows that the stipulation was offered in evidence, and that the court thereupon instructed the jury that, if the facts agreed upon were true, the defendant was guilty, and refused to charge, when requested, that, upon the evidence submitted, the jury should return a verdict of not guilty, to which rulings exceptions were taken. It does not appear that the attention of the trial court was called to the claim of immunity from prosecution under the state law because of the sale being made in the original package. In *State v. Tamler*, 19 Or. 528, 9 L. R. A. 853, 25 Pac. 71, it was held that a motion asking the court to direct an acquittal in a criminal case on account of the failure of proof, unless such failure is a total one, must specify wherein it is claimed such proof fails. Mr. Justice Bean, speaking for the court in deciding the case, says: "If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated, and thereby given the court an opportunity to have passed upon them; and, if the ruling was against him, preserve the same on the record, so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted might have been obviated at the trial, had they been stated. We are not advised from the record what reason, if any, was assigned in the court below why this mo-

tion should have been allowed, nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear, and, in a case of this kind, the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds thereof." The rule of practice is universal that, under § 709, U. S. Rev. Stat. the immunity denied must be specially set up, at the proper time and in the proper way, in the court below. Mr. Chief Justice Waite, in *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, in discussing this question, says: "To give us jurisdiction under § 709 of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time, in the proper way. To be reviewable here, the decision must be against the right so set up or claimed. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more." To the same effect, see *Hoyt v. Shelden*, 1 Black, 518, *sub nom. Hoyt v. Thompson*, 17 L. ed. 65; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Brown v. Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; *Powell v. Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Chemical Nat. Bank v. City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

It is also contended that the trout were wholesome food, and that as long as they remained in that condition they could not be-

come subject to the police power of the state, and that the act prohibiting their sale is tantamount to their destruction, and, if enforced, is a violation of the 14th Amendment of the Constitution of the United States, inasmuch as it would result in depriving the defendant of his property without due process of law. The statute permits the person to have such fish in his possession, to eat them, or give them away, and hence it does not deprive him of his title, but qualifies or limits the rights appurtenant thereto. In *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, it was held that an act of the legislative assembly of Ohio forbidding the sale of quail applied to such game when killed in another state and shipped into Ohio, and that said act was constitutional, the court saying: "Everyone is presumed to know the law, and persons who acquire such property when the statute is in force take it subject to its provisions." In *State v. Farrell*, 23 Mo. App. 176, it was held that an act of the legislative assembly of Missouri forbidding the possession of quail applied to such game when killed in another state, and brought into Missouri, and that such act did not violate any provision of the Constitution of the United States. To the same effect, see *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524. The trout which defendant sold were undoubtedly wholesome food, and the prohibition of their sale by the act under consideration was evidently not predicated upon the usual grounds for the exercise of police power; for their consumption as food would not necessarily subvert the morals, impair the health, or disturb the peace of society. But we do not understand that a commodity must possess any of these properties to render it subject to the exercise of such power. That the state, acting in its sovereign capacity, for the best interest of all its citizens, may prohibit the taking or sale of fish within its borders, is settled beyond controversy. When trout are caught in another state, and brought into, and mingled with, and become a part of, the mass of the property of this state, they become subject to the laws thereof, and defendant, having imported them with knowledge of the existence of such law, must suffer the penalties which it prescribes.

It follows that the judgment is affirmed.

OHIO SUPREME COURT.

SCHRODER

v.

OVERMAN, Clerk of St. Bernard *et al.*

(.....Ohio.....)

*1. Where, in a suit brought to enjoin the collection of a street assessment

*Headnotes by the Court.

NOTE.—As to constitutionality of local assessments, see *Asberry v. Roanoke* (N. C.) 42 L. R. A. 636, and *note*; also *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289.
47 L. R. A.

as invalid, and the taking of property without due process of law, it appears that the ordinance levying the assessment provided that the cost and expense of the improvement should be assessed upon the abutting property by the foot front, and not otherwise, but it also appears that an issue was made by the pleadings on the question whether or not the land so assessed was in fact benefited by the improvement to an amount in excess of the cost so assessed, which issue is found by the trial court against the plaintiff, and it is neither shown nor claimed that the cost and expense was not apportioned fairly between

the property of plaintiff affected by the assessment and that of others so affected, the collection of such assessment should not be enjoined simply because the proceedings of the council in enacting the ordinance and levying the assessment do not show affirmatively that the question of benefit to the land was taken into consideration in levying such assessment.

2. In providing for the cost and expense of such an improvement, abutting land, not laid out into lots, when the depth from the street is ascertained, is to be treated as a parcel of land for the purposes of assessment, and it is not the duty of the council to subdivide it, even though it may appear that the value of a portion of it, if assessed separately, would be less than four times the amount of the assessment levied upon the same after the improvement is made.

(October 24, 1899.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to enjoin the collection of a street-improvement assessment. *Affirmed.*

Statement by Spear, J.:

The action below was against the defendant in error Overman, as clerk of the village of St. Bernard, and the auditor and treasurer of Hamilton county, to perpetually enjoin the collection of an assessment which had been assessed by order of the village council upon plaintiff's lands abutting upon Church street, in that village, for the improvement of that street by grading, draining, and macadamizing the roadbed thereof. Among other things, the petition averred that the resolution and ordinance to improve and ordinance to assess for the improvement provided arbitrarily that plaintiff and all other property holders owning property abutting on the street should be assessed by the foot front, and not otherwise; that said rule of assessment is contrary to law and the Constitution of Ohio and of the United States, in this: that it is an arbitrary assessment, without in any way being levied in accordance with any benefit conferred by said improvement. Also, that the improvement was not for any special benefit, nor of any benefit whatever, to the real estate owned by plaintiff and abutting said improvement, but, on the contrary, was a detriment and damage to her abutting property; and that the assessment is the taking of her property without due process of law, and to her great and irreparable injury. Also that the resolution and ordinance to improve provided that the assessment should extend only to the depth of 150 feet back from the line of the street upon the lands which were not subdivided into lots, and that a portion of plaintiff's land was not subdivided into lots, but was land in bulk; and that the assessment was in excess of 25 per cent of the fair market value of said lands to the depth of 150 feet after the improvement was made. The allegation that the action of the council in reference to making the improvement provided that the same should be assessed by the foot front, and the allegation that a por-

tion of plaintiff's abutting lands was land in bulk, were admitted by the answer. All other allegations were denied. At the trial in the circuit court, to which the cause had been appealed, the issues were found for defendants, the assessment found to be a valid and subsisting lien against the premises, and the petition of the plaintiff was ordered dismissed, and judgment for costs awarded. At request of plaintiff the court stated separately its findings of fact, and, among other things, found that "the plaintiff was the owner of property abutting on the north side of said Church street, having in all a frontage of 857.33 feet; that said frontage consists of lot No. 55, fronting 90 feet on said street, and of land in bulk fronting 767.33 on the north side of said Church street, and that said land in bulk was assessed to the depth of 150 feet, said distance being the average depth of lots in the neighborhood. And the court further finds that the value of said lot No. 55 after said improvement was made was more than four times the amount of the assessment levied and assessed against said lot; and that the residue of said 857.33 feet front, after deducting therefrom 90 feet, the frontage of said lot 55, leaving a frontage on said improvement of 767.33 feet to a depth of 150 feet, was in one tract, of which about 250 feet was considerably below the grade of said street, and had a ravine through it, and was used for pasturage purposes; and the court finds that if the said part of the premises of the plaintiff should be assessed separately from the remainder of the tract on which the dwelling house is situated, the value thereof would be less than four times the assessment levied upon the same, after said improvement was made. But the court further finds that the value of the whole of said tract, with a frontage of 767.33 for a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment levied against the same, and that said tract of 767.33 feet in front, to a depth of 150 feet, is, for the purposes of said assessment, to be considered as a single and undivided tract. . . . The court finds that the improvement of said Church street is a benefit to plaintiff's said property, and that the amount of the benefits to said property is more than the amount of said assessment against the same." To reverse the judgment so rendered this proceeding in error was brought.

Mr. Theodore Horstman for plaintiff in error.

Mr. Samuel B. Hammel for defendants in error.

Messrs. Rendigs, Foraker, & Dinsmore for county officials.

Spear, J., delivered the opinion of the court:

The preliminary statement presents the question whether the proceedings relating to the assessment were invalid (1) because the assessment against plaintiff's lands was by the foot front; or (2) because the improve-

ment was not of any benefit to the lands, but rather a damage, and that, therefore, the assessment was the taking of plaintiff's property without due process of law; or (3) because the assessment was in excess of 25 per cent of the fair market value of the plaintiff's lands to the depth of 150 feet after the improvement was made.

1. As to the assessment by the foot front. It is conceded that, should the court be governed by its previous decisions, notably *Ernst v. Kunkle*, 5 Ohio St. 520; *Upington v. Oviatt*, 24 Ohio St. 232, and *Findlay v. Frey*, 51 Ohio St. 390, 38 N. E. 114, the assessment could not be held invalid simply because it was undertaken to be made by the foot front. But the contention of plaintiff is that the case at bar is controlled by the recent decision of the Supreme Court of the United States in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. And it may be conceded that, if the principle of the above case applies to the case made by the record in this case, the assessment would, of necessity, be held invalid, and the judgment below reversed. We look, therefore, to the record of the *Norwood Case*, to see whether or not we have a like case here. The defendant in error in that case, Mrs. Baker, owned land in the village of Norwood through which the village authorities opened a street by a proceeding in condemnation, and paid to her the ascertained value of her land, assessed irrespective of benefit to her, viz., \$2,000. By proceedings by and before the village council the cost and expense of the condemnation, including the compensation thus paid, cost of the condemnation proceedings, cost of advertising, and all other costs, amounting in all to \$2,218.58, were assessed against the abutting property of Mrs. Baker, and the same was entered upon the tax duplicate, and sent to the county treasurer for collection as a lien and charge against the abutting property so assessed. The ordinance provided that such cost and expense of the condemnation of the property "should be assessed per foot front upon the property bounding and abutting." This upon the supposed authority of § 2264, Rev. Stat., which provides: "The council may decline to assess the costs and expenses in the last section mentioned, or any part thereof, or the costs and expenses of any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof, which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restrictions herein contained. . . ." Mrs. Baker commenced

a suit in equity in the circuit court of the United States for the southern district of Ohio to enjoin the collection of the assessment. A decree having been rendered in her favor in that court, the case was appealed to the supreme court. Her suit in both courts proceeded upon the ground that the assessment in question was in violation of the 14th Amendment, providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the Constitution of Ohio. This contention was sustained, the court holding in the syllabus that "the principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. . . . The Constitution of Ohio authorizes the taking of private property for the purpose of making public roads, but requires a compensation to be made therefor to the owner, to be assessed by a jury, without deduction for benefits. The statutes of the state . . . make provisions for the manner in which this power is to be exercised. In the case of the opening of a new road they authorize a special assessment upon bounding and abutting property by the front foot for this entire cost and expense of the improvement, without taking the special benefits into account. The alleged improvement in this case was the construction through property of the appellee of a street 300 feet in length and 50 feet in width, to connect two streets of that width running from each end in opposite directions. In the proceedings in this case the corporation of Norwood manifestly went upon the theory that the abutting property could be made to bear the whole cost of the new road, whether it was benefited or not to the extent of such cost, and the assessment was made accordingly. This suit was brought to obtain a decree restraining the corporation from enforcing the assessment against the plaintiff's abutting property, which decree was granted. Held, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits. . . ."

It is important to note that the record nowhere shows that the question of benefits to the property assessed was considered by the council, and that there is an absence of any showing that the property was benefited; and it seems to be apparent from the foregoing that the gist of the holding is that the proceeding of council, having been conducted upon a rule which excluded the consideration of the question of benefits, and placed the burden upon the land on a theory inconsistent

ent with such consideration, the assessment is, therefore, an illegal one. This conclusion is further shown by the language of the majority opinion delivered by Mr. Justice Harlan. At page 278, 172 U. S., 43 L. ed. 447, and page 190, 19 Sup. Ct. Rep., these words: "But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?" Again, at page 279, 172 U. S., 43 L. ed. 447, and page 190, 19 Sup. Ct. Rep., this language: "But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." And at page 290, 172 U. S., 43 L. ed. 451, and page 195, 19 Sup. Ct. Rep., after referring to the provisions of § 2264, Rev. Stat., this: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." Also, at page 294, 172 U. S., 43 L. ed. 453, and page 196, 19 Sup. Ct. Rep., this: "While abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it,—that is, by benefits that are not shared by the general public; and that 47 L. R. A.

taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation." Again, at page 293, 172 U. S., 43 L. ed. 453, and page 196, 19 Sup. Ct. Rep., referring to the decree of the circuit court, this language is found: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property." Mr. Justice Gray, Mr. Justice Shiras, and Mr. Justice Brewer dissented from the judgment of the majority. The dissent seems to be based upon the proposition that the fixing of the limits of the taxing district is a legislative function, properly determinable by the council, and that the determination is conclusive. In the dissenting opinion of Mr. Justice Brewer, on page 302, 172 U. S., 43 L. ed. 455, and page 199, 19 Sup. Ct. Rep., occurs this language: "The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or a suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that a legislative act charging the cost of an improvement in laying out a street (and the same rule obtains if it was the grading, macadamizing, or paving of the street) upon the property abutting thereon is adjudged, not only not conclusive that such abutting property is benefited to the full cost thereof, but, further, that it is not even *prima facie* evidence thereof, and that, before such an assessment can be sustained, it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also that, by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement is *prima facie* void; that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of

equity canceling *in toto* the assessment, without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement." Enough has been given, we think, to make it clear that the ground of the relief granted to the landowner by the circuit court, sustained by the supreme court, was that there had been an assessment against her lands, without regard being had to the question whether or not the lands would be benefited by the improvement; the difference of opinion among the members of the court seeming to be that while, by the majority, the action of the council, as exhibited in the record, was considered as conclusively showing that no attempt had been made to assess according to benefits, the minority held to the opinion that the action taken by the council impliedly shows that benefits were considered, and that at least the record establishes *prima facie* that the assessment was legal. In either view, it seems to us apparent that, had the record shown affirmatively that the lands were benefited to an amount equal to the cost of the improvement so assessed, no injunction restraining the collection of the assessment could properly have been allowed.

How is it with the case at bar? The record discloses that the question of benefits to the land assessed was made an issue, being tendered by the plaintiff herself, and that upon that issue the finding of the trial court is distinct that "the improvement of Church street is a benefit to plaintiff's said property, and that the amount of benefit to said property is more than the amount of said assessment against the same." Perhaps this finding may be assumed to involve also the conclusion, inferentially, that the cost and expense of the improvement had been properly apportioned among the lots and lands benefited thereby. However, this latter suggestion may be unimportant in view of the fact that there is in the present case no claim that the cost and expense of the improvement had not been apportioned fairly between the property of plaintiff affected by the assessment and that of others so affected. Undoubtedly, as has been held by this court again and again, the principle which permits the assessment of the cost of local improvements upon abutting and contiguous lands is that such property receives benefit beyond that common to the public at large, and the conclusion would naturally follow, and does follow, that such assessment can in no case, save by express consent of the owner, lawfully exceed such benefit. It follows, further, that any system which results in imposing such assessments without respect to benefits must be vicious and unsound. But we are dealing with a case where the court has determined, upon a trial, that the benefit in fact exceeds the amount of the assessment, and yet where the plaintiff asks the

interposition of a court of equity to prevent the commission of an alleged wrong upon her property. We are of opinion that the *Norwood Case* does not control the case at bar, and that the relief prayed for should not be granted simply because the proceedings of the council do not show affirmatively that the assessment was assessed according to benefits, nor that the subject of benefits was not, by that body, taken into consideration. The questions involved are of high importance to many of the municipalities of the state, as the validity of a large number of assessments is likely to be affected by the disposition of the issues as they shall finally be determined. We, of course, bow cheerfully to the judgment of the Supreme Court of the United States in all cases coming within its cognizance, but at the same time feel that it is our duty to follow the decisions of this court, except where they have been distinctly overruled by that court, or are clearly inconsistent with its holdings. A public duty will be performed by the submission of the issues in this case to that tribunal for its judgment thereon.

2. The foregoing sufficiently disposes of plaintiff's second proposition, and no further comment on that is needed.

3. Does the record show that the assessment was in excess of 25 per cent of the fair market value of the lands to the depth of 150 feet after the improvement was made? The plaintiff owned a parcel of land fronting over 700 feet on the street. It was in one tract, — land in bulk, in other words. A considerable part (some 250 feet of frontage) was below the grade of the street, and had a ravine through it, and was used for pasturage purposes. If that part should be assessed separately from the remainder of the tract, on which the dwelling house is situated, the value would be less than four times the assessment for the improvement. But the value of the whole tract to a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment. The contention is that the council, and upon its neglect to do so the court, should have divided the parcel thus standing in bulk, and that the court should grant relief by enjoining the assessment as to that portion which is in value less than four times the amount of the assessment. There is plausibility in the claim that the rule adopted reaches an unfair and inequitable result, and perhaps it is sufficiently important to call for legislative action on the subject. But we are of opinion that the authorities giving construction to the statutes are against the claim as a legal proposition. *Rev. Stat. § 2269; Cincinnati v. Oliver*, 31 Ohio St. 371; *Griswold v. Pelton*, 34 Ohio St. 482.

Other questions are argued. We have considered them, but do not regard any as requiring a reversal of the judgment.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William O'MALEY

v.

SOUTH BOSTON GASLIGHT COMPANY.

(158 Mass. 185.)

1. The maxim *Volenti non fit injuria* applies in case of an injury to a servant by falling from a run along which he was employed to wheel coal, and which was without guards to prevent his falling off and being injured, even under a statute making the employer liable for injuries to servants from defects in the ways, works, or machinery which arise from, or have not been discovered or remedied owing to, the negligence of the employer, or of a person in his service charged with the duty of seeing that such things are in proper condition.

2. The validity of a servant's contract to take the risk of an unsafe working place is not affected by the fact that he does not know and appreciate the particulars of the danger, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars.

3. There is an implied contract to assume the risks when a servant agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is carried on, although the statute makes the employer liable for injuries from defects in the ways, works, or machinery arising from, or not discovered or remedied owing to, the employer's negligence.

(January 17, 1893.)

NOTE.—*Volenti non fit injuria* as a defense to actions by injured servants.

I. Introductory.

II. Meaning and effect of the maxim, as a matter of verbal construction.

III. Relation of the maxim to the doctrine of a contractual assumption of risks.

IV. Maxim not available as a defense, unless plaintiff's knowledge of danger is shown.

V. Logical significance of the servant's knowledge.

VI. How far voluntary action may be inferred from the servant's knowledge of a risk; generally.

VII. Specific circumstances bearing on question whether servant was volens.

a. Fact that risk was one ordinarily incident to the service.

b. Fact that risk was known to the servant when he entered the employment.

c. Fact that risk was not known to the servant when he entered the employment.

d. Fact that conditions were or were not under the control of the servant.

e. Fact that work was undertaken by servant *ex proprio motu*.

f. Fact that servant complained of the dangerous condition.

g. Fact that servant's motive for continuing work was his fear of dismissal.

h. Fact that duty violated was statutory.

i. Necessity of proving consent to particular risk.

j. Circumstances indicating master's acceptance of the responsibility.

VIII. Negligence of the servants of a person other than the plaintiff's employer not a risk assumed.

IX. Relation of the maxim to the defense of contributory negligence.

X. Bearing of the servant's knowledge upon the question whether he was negligent.

I. Introductory.

Unless the division of the court in *DAVIS v. FORBES* is to be regarded as the result merely of a difference of opinion respecting the extent of the right of the court to make a peremptory ruling upon the effect of the particular evidence adduced to establish an assumption of the risk by the plaintiff, the decision of the majority of the judges seems to conflict with that rendered in 47 L. R. A.

Mahoney v. Dore (1892) 155 Mass. 513, 80 N. E. 366, which adopted the English doctrine (explained in VII. c, h, *infra*), that the question whether the servant's acceptance of a risk arising from temporary defects created by the master's negligence after the commencement of the service was voluntary, within the meaning of the maxim *Volenti non fit injuria*, is primarily and essentially one of fact for the jury. That the judgment was understood by Knowlton, J., to be one which actually amounted to a repudiation of this theory is a reasonable inference from the tenor of his argument, and in this point of view his dissent is rendered still more significant by the fact that the judgment of the whole court in the earlier case was delivered by him. The circumstances in the intermediate case of *O'MALEY v. SOUTH BOSTON GASLIGHT Co.* were, it will be observed, not such as to raise the same issue as *Mahoney v. Dore*, and the concurrence of the learned judge in that ruling merely indicates that he considered the maxim to be, as matter of law, a bar to the action, where the servant has continued to expose himself to permanently dangerous conditions which have remained unaltered for many years.

If the bearing of *DAVIS v. FORBES* be what we have suggested, it must evidently be taken as denoting the final expulsion from Massachusetts of the more liberal English doctrine to which recognition had been accorded in *Mahoney v. Dore*, and therefore as indicating the conclusion of the court that dangers incurred by a servant with a full comprehension of their extent should be held, as a matter of law, to be assumed, whether that assumption is referred to the theory of an implied contract, or to the principle embodied in the maxim.

This categorical declaration for a view which places one of the most authoritative of the American courts in direct antagonism to those of the mother country marks an important stage in the development of the law of the subject, and furnishes a convenient opportunity for an exhaustive examination of the cases with a view to ascertaining with as much exactitude as is possible, under the circumstances, the theory of the common law as to the meaning of the maxim.

It is well settled that, independently of the relation of master and servant, there may be a voluntary assumption of the risk of a known danger which will debar one from recovering compensation in case of injury to person and property therefrom, even though he was in the exercise of due care. *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County directing a verdict in defendant's favor in a proceeding to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Judgment on the verdict.*

The facts are stated in the opinion.

Mr. J. P. Barlow for plaintiff.

Messrs. Charles P. Greenough and James P. Parmenter, for defendant:

The plaintiff cannot recover because he voluntarily exposed himself to an obvious risk which he knew and fully appreciated.

The principle expressed in the maxim *Volenti non fit injuria* applies.

Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685; *Corbury v. Downing*, 154 Mass. 249, 28 N. E. 162; *Brady v. Ludlow Mfg. Co.* 154 Mass. 468, 28 N. E. 901.

Nor does Stat. 1887, chap. 270, alter the

plaintiff's position, so far as the above-stated principle is concerned. Before that statute there can be no question that this plaintiff could not recover.

Moulton v. Gage, 138 Mass. 390; *Leary v. Boston & A. R. Co.* 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115.

At most, the effect of the statute is to place the servant in the position of a stranger using the master's premises at his invitation on business.

Stat. 1887, chap. 270, § 1, cl. 3; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685; *Webbin v. Ballard*, L. R. 17 Q. B. Div. 122.

And while the owner of premises is liable for injuries caused by their unsafe condition to a third person who is ignorant of the danger when the owner knows of the danger and gives him no notice (*Carlton v. Franconia Iron & S. Co.* 99 Mass. 216), the

Wherever there is no contractual relation between the plaintiff and defendant, it is evident that this defense must rest upon the general principle expressed in the maxim *Volenti non fit injuria*, and cannot be founded upon the theory of an implied agreement to which it has been usually referred in suits by a servant against his own employer. The absence of privity of contract necessarily entails the consequence that, as has been held in one case, there is no presumption that the servant of one person accepts, as an implied term of his contract, the hazards arising from the negligence of a stranger. *Brewer v. New York, L. E. & W. R. Co.* (1891) 124 N. Y. 59, 11 L. R. A. 483, 28 N. E. 324 (said of an express messenger).

It happens that most of the cases in which the maxim has been discussed in connection with the kind of accidents to which workmen are liable have been actions in which the defendant was the plaintiff's master. But a more adequate conception of its meaning will be obtained by also utilizing the discussions in those cases recently reviewed in this series,—*James v. Rapides Lumber Co.* (1898; La.) 44 L. R. A. 33, where the person sued was a stranger. The use of both lines of authorities indifferently is amply justified by the fact that, as the maxim is of universal application, the determination of the question whether it is or is not available cannot be affected by the mere fact that the relations of the parties to the action were for some purposes defined by a contract. See, especially, the opinion of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

It is not amiss to mention that in compiling this note the writer has made free use of an article written by him for the *American Law Review*, vol. 32, pp. 57 *et seq.*

An instructive discussion of the operation of the maxim in the case of a stranger entering upon premises without permission will be found in the so-called "Spring-Gun Case," *Hott v. Wilkes* (1820) 3 Barn. & Ald. 304, which, as will be remembered, was the subject of an amusing essay by Sydney Smith in the *Edinburgh Review*. The language of the opinions is decidedly interesting in the present connection, as it indicates the views held by English judges not long before the doctrine of assumption of risks was introduced in the law of master and servant by *Priestley v. Fowler* (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987. The phraseology of such a passage as this (from the opinion of Bayley, J.) bears a curious resemblance 47 L. R. A.

to that which has since become so familiar in employers' liability cases: "It is sufficient for a party generally to say, 'There are spring guns in this wood,' and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law *Volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring guns. Notwithstanding that caution he says, 'I will go into the wood, and I will run the risk of all consequences.' Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no right to enter the wood, and in so doing, he became a trespasser and a wrongdoer."

II. Meaning and effect of the maxim, as a matter of verbal construction.

The maxim *Volenti non fit injuria*, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome, who, in concert with another, permitted himself to be sold as a slave in order that he might share in the price, suffered a serious injury, and he was, in the strictest sense of the term, *volens*. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he, too, may be *volens* in the sense of English law. *Lord Watson in Smith v. Baker* (1891) A. C. 325 (p. 355), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

What effect should be ascribed to the maxim in its present environment, especially in relation to actions for negligence, is a question to which the cases supply no certain answer. This uncertainty does not arise from any difficulty in ascertaining the meaning which it bears when considered from the standpoint merely of verbal construction, for the subjoined translations and paraphrases show that there is no substantial difference of opinion on this question among the authorities.

"One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong." *Lord Herschell in Smith v. Baker* (1891) A. C. 325, 360, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

"One man cannot sue another in respect of a

owner is not liable to one who voluntarily assumes the risk of a known danger.

Miner v. Connecticut River R. Co. 153 Mass. 398, 26 N. E. 994.

The plaintiff's fear of losing his place, based merely on his own alleged understanding of the reason why other workmen had been discharged, without any threat from or communication with the employer or with the other men, is not sufficient to alter the rule of law.

Haley v. Case, 142 Mass. 316; *Leary v. Boston & A. R. Co.* 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; *Wescott v. New York & N. E. R. Co.* 153 Mass. 460, 27 N. E. 10.

To constitute a defect there must be some inadequacy in the actual physical condition of the ways, works, and machinery for the purpose for which they are used.

Walsh v. Whiteley, L. R. 21 Q. B. Div. 371;

danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person." *Bowen, L. J.*, in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 690, 56 L. J. Q. B. N. S. 840, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

"One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure." *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155, 29 N. E. 464.

"No one can maintain an action for a wrong, where he has consented or contributed to the act of which he complains." *Curtis, J.*, in *Byam v. Bullard* (1852) 1 Curt. C. C. 100, Fed. Cas. No. 2,262.

No one can maintain an action for a wrong where he has consented or contributed to the act which occasioned it. *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

"That to which a person assents is not esteemed in law an injury." *Broom, Legal Maxims*, 268.

No one can maintain an action for a wrong where he has consented to the act which occasions his loss. *Broom, Legal Maxims*, p. 265.

"He who consents to an act is not wronged by it." *Cal. Civ. Code*, § 3515.

"Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . [A man] is not injured by a negligence which is partly chargeable to his own fault." *Cooley, Torts*, 2d ed. *163, p. 187.

III. Relation of the maxim to the doctrine of a contractual assumption of risks.

(Its relation to the defense of contributory negligence is discussed in IX., *infra*.)

The difficulties of the subject begin when we endeavor to extract from the cases an answer to the wider question, Under what circumstances shall a plaintiff be regarded as a voluntary agent in such a sense that his action will be barred by the maxim? It will be found that the rulings and *dicta* of the judges, especially in England, are so hopelessly irreconcilable in regard to many of the most important points upon which disagreement is possible that the commentator can do little more than register the effect of the authorities in such a manner as to exhibit clearly the grounds upon which the opposing theories are rested by their respective advocates. To attempt to construct a consistent L. R. A.

Webb v. Ballard, L. R. 17 Q. B. Div. 122; *Paley v. Garnett*, L. R. 16 Q. B. Div. 52.

But the condition of things in the neighborhood of the ways, works, and machinery, but not forming a part of them, is not a defect under the act.

Thomas v. Quartermaine, L. R. 17 Q. B. Div. 414; *McGiffin v. Palmer's Shipbuilding & I. Co.* L. R. 10 Q. B. Div. 5; *O'Connor v. Neal*, 153 Mass. 281, 26 N. E. 857; *May v. Whittier Mach. Co.* 154 Mass. 29, 27 N. E. 708.

Knowlton, J., delivered the opinion of the court:

The plaintiff, while wheeling coal in a barrow on a run in one of the defendant's coal sheds, fell off and was injured. The action is brought under the employers' liability act (Stat. 1887, chap. 270) for an alleged defect

and symmetrical body of law from the materials furnished by the reports would be to undertake a hopeless task.

That the defense of assumption of risks might, in actions by a servant against his own master, be referred either to the doctrine of an implied agreement or to the broader principle expressed in the maxim, has been taken for granted in several decisions under common-law rule. *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23; *Mad River & L. E. R. Co. v. Barber* (1856) 5 Ohio St. 541, 67 Am. Dec. 312; *Gibson v. Pacific R. Co.* (1870) 46 Mo. 163, 2 Am. Rep. 497; *Louisville, N. O. & T. R. Co. v. Conroy* (1886) 63 Miss. 562; *Devitt v. Pacific R. Co.* (1872) 50 Mo. 302; *Mundle v. Hill Mfg. Co.* (1894) 86 Me. 400, 80 Atl. 16.

This alternative point of view is also noticed by Lord Watson in *Smith v. Baker* [1891] A. C. 325, 355, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660: "In its application to questions between the employer and the employed the maxim, as now used, generally imports that the workman had, either expressly or by implication, agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is, not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that if injury should befall him the risk was to be his, and not his master's."

So, also, in the same case Lord Herschell said: "The maxim has no special application to the case of employer and employed though its application may well be invoked in such a case."

The distinction thus suggested between the rationale of the defense in cases where there is, and cases where there is not, a privity of contract between the parties was doubtless present to the mind of Willes, J., when he remarked in *Indermaur v. Dames* (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243: "The cases referred to, as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, . . . also have their special reasons. The servant or other person so employed is supposed to undertake, not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his

in the ways, works, or machinery of the defendant; it being contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work, at various times, during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction. If the action were at common law, it would be too plain for argument that the plaintiff took the risk of such accidents as that which happened, and that the defendant is not liable. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366. But it is contended that under the statute referred to the rule is different. It is well settled that, in the absence of a special contract affecting the rights and liabilities of the parties, the

statute has taken away from defendants, in the cases mentioned in it, the defense that the injury was caused by the act of a fellow servant of the plaintiff. It is also established by an adjudication of this court, and by decisions under a similar statute in England, that it has not taken away the defense that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it. *Mellor v. Merchants' Mfg. Co.* 150 Mass. 302, 5 L. R. A. 792, 23 N. E. 100; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685; *Yarmouth v. France*, L. R. 19 Q. B. Div. 647; *Thruswell v. Handyside*, L. R. 20 Q. B. Div. 359; *Walsk v. Whiteley*, L. R. 21 Q. B. Div. 371; *Smith v. Baker* [1891] A. C. 325.

Precisely how and when this defense can be availed of in cases where the ways, works, and machinery of the defendant are found to be defective has never been decided in this

fellow servants, not, however, including those which can be traced to mere breach of duty on the part of the master."

See also *O'MALEY v. SOUTH BOSTON GASLIGHT CO.*

See also the opinion of Chief Justice Shaw in *Farwell v. Boston & W. R. Co.* (1842) 4 Met. 49, 38 Am. Dec. 339, *infra*, the reasoning of which has been adopted by every American court.

But some judges have used language importing that the contractual acceptance of risks is referable solely to the theory by which a servant is viewed as one whose rights are regulated by contract, express or implied,—a theory which was thus summed up, as regards the obligations on the master's side, in a well-known case before the House of Lords: "A master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do." *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, per Lord Cairns.

"Under the old law it would have been said: 'You' (the servant) 'have entered into or continued in this employment where this thing of which you complain is open and palpable, and therefore it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer.' As between master and servant that was the way the immunity from liability was always stated. The maxim *Volenti non fit injuria* was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 651, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, per Lord Esher.

There is, however, some inconsistency in the utterances of the learned judge. He remarks: "Before the employers' liability act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery, which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim *Volenti non fit injuria*."

This theory as to the contractual basis of the doctrine of assumption of risks, first formally enunciated by Chief Justice Shaw in *Farwell v. Boston & W. R. Co.* (1842) 4 Met. 49, 38 Am. Dec. 339, dominates the whole of the law of employer's liability to such an extent that even the defense of contributory negligence, which is in 47 L. R. A.

no wise dependent upon contract, has been referred to an implied undertaking of the servant that he will exercise reasonable care to avoid injury. *Lake Shore & M. S. R. Co. v. McCormick* (1881) 74 Ind. 440; *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 152, 5 N. E. 187. One court has gone so far as to lay it down that a servant assumes the risk of his own negligence, of the negligence of his fellow servants, and of any occurrence not due to the master's negligence. *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83. It is submitted, however, that the assumption of the risk of one's own negligence is a conception which is scarcely consistent with the generally received view that the defense of contributory negligence is merely an application of the doctrine of proximate cause.

But in most of the decisions, owing to the fact that the phraseology appropriate to the discussion of a contractual acceptance of risks must be essentially the same as that employed where the acceptance is discussed independently of a contract, it is often impossible to say with any confidence whether the court intended to rely on the maxim or the contract. This uncertainty concerning the foundation of the doctrine is usually of slight importance; for, in most instances, the use of the maxim must necessarily lead to the same conclusions as those which would be reached through the conception of an implied contract.

This remark is, however, subject to one notable exception,—namely, the rule which, as explained in IX. *infra*, declares the defense of co-service to be available only where the servant is suing his own master.

IV. Maxim not available as a defense, unless plaintiff's knowledge of danger is shown.

That a master who seeks to escape liability to his servant on the ground that he assumed the risk as a part of his contract must lay a foundation for the defense by proving that he understood the risk, is a familiar principle. *Scanlon v. Boston & A. R. Co.* (1888) 147 Mass. 484, 18 N. E. 209; *Bland v. Shreveport Belt R. Co.* (1896) 48 La. Ann. 1057, 36 L. R. A. 114, 20 So. 284; *Hoffman v. Clough* (1889) 124 Pa. 505, 17 Atl. 19; *Rummel v. Dilworth* (1890) 131 Pa. 509, 19 Atl. 345; *Comben v. Belleville Stone Co.* (1896) 59 N. J. L. 226, 36 Atl. 473; *Pennsylvania R. Co. v. Whitcomb* (1887) 111 Ind. 212, 12 N. E. 380; *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141, 38 N. E. 411; *Clapp v. Minneapolis & St. L. R. Co.* (1886) 36 Minn. 6, 29 N. W. 340; *Higgins v. Williams*

commonwealth. The nature of the defense was somewhat considered in *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464, and *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, which were cases at common law; and it was held that, to be precluded from recovering on this ground, the plaintiff must not only know and appreciate the risk, but must assume it voluntarily. The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied, but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim *Volenti non fit injuria*. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another, who is primarily responsible for the

existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty. That part of the statute under which this action is brought gives a remedy only for defects "which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, and machinery are in proper condition." A pro-

(1896) 114 Cal. 176, 45 Pac. 1041; *Shearm. & Redf. Neg.* § 209.

That the mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk, see *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 155, 29 N. E. 464, and cases cited.

The same rule prevails where the plaintiff's assumption of the risk is referred directly to the maxim.

"When, as is commonly the case, his [the servant's] acceptance or nonacceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it, unless he knew of its existence, and appreciated or had the means of appreciating it." *Smith v. Baker* [1891] A. C. 825, 855, 870, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

Before the servant can be charged with having voluntarily undertaken a dangerous business "plus the risk from defective machinery," it must be shown that there was "an assent to undertake the work with full appreciation of the risk." *Ibid.*, per Lord Morris, p. 869 [1891] A. C.

A judgment for the plaintiff should be entered though the jury find that he worked "voluntarily" with a knowledge of the danger, where he has testified that he had not full knowledge of the danger he was incurring, but only that an accident might happen, and the question has not been put to them, whether he knew the particular risk he was incurring. *Sanders v. Barker* (Q. B. D. 1890) 6 Times L. R. 324.

A miner who was injured while he was being hoisted from a shaft cannot be debarred from recovering on the ground that there was no bankman stationed at the pit mouth during the ascent of the cage, as the rules of his employer required, unless it is shown that those rules were brought to his notice. *Baddeley v. Granville* (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822.

For other illustrations see *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 132, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525; *Illingsworth v. Boston Electric Light Co.* (1894) 161 Mass. 583, 25 L. R. A. 552, 37 N. E. 778; *Perham v. Portland General Electric Co.* (1897; Or.) 40 L. R. A. 799, 53 Pac. 14 (these two last-named cases were actions against a stranger); also the cases cited in subsequent sections.

The necessity for showing the plaintiff's knowledge of the risk, where contributory negligence (the other predicament which is covered by the maxim (see IX. *infra*) is relied upon) 47 L. R. A.

will, of course, follow directly from the broad principle that negligence can be affirmed only in respect of situations and conditions known to the party to whom it is imputed. *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, 19 So. 1001, and the cases cited in the note in *Walkowski v. Penokee & G. Consol. Mines* (1898; Mich.) 41 L. R. A. 38, *et seq.*

Where direct proof of the servant's knowledge is not obtainable the problem for solution is whether the circumstances are such that constructive notice of the danger must be imputed to him. Primarily, of course, this question is one for the jury. The point to be determined is whether the servant ought, as a reasonably careful man, to have ascertained the nature and extent of the perils to which he was exposed. The circumstances to be considered as bearing upon this point are the natural intelligence and acquired information and experience of the servant, the simple or recondite character of the facts to which the inquiry relates, and the opportunities which a person in his position would have had for exercising his faculties of observation. All these elements have been discussed by the courts most elaborately in relation to cases in which the defendant has been the master of the plaintiff, and for further information upon the subject the reader is referred to treatises in which those cases are collected. Many of them are cited in a note lately published in this series on the *Duty of a master to instruct and warn his servants as to the perils of the employment*, *James v. Rapides Lumber Co.* (1898; La.) 44 L. R. A. 83.

In an action by a stableman for injuries received from the bite of a vicious horse, allegations that the horse was a dangerous animal, and on several previous occasions had attacked, bitten, and severely injured those who had charge of it, have been held to show that the plaintiff knew the animal's temper, and was therefore well aware of and wilfully assumed the risk he incurred in entering the stall to tie it up. *Fraser v. Hood* (1887) 15 Ct. Sess. Cas. 178. But here it would seem that the jury should at least have been allowed to pass upon the question whether the servant really did know, or ought to have known, the animal's temper. It was surely not a conclusive presumption that the occurrences indicating viciousness operated as notice to plaintiff of such viciousness. That the question whether the plaintiff's act was voluntary should also have been left to the jury, can scarcely be disputed, since the decision in *Smith v. Baker* [1891] A. C. 825, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660 (see *infra*, V.).

ceeding under it necessarily involves the question whether there was negligence in not having the ways, works, and machinery in better condition. The negligence referred to is the neglect of a duty owed to the plaintiff, and not of a general duty, which, by reason of the relations of the parties, does not extend to him. The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. In the numerous enterprises of every kind which involve the employment of labor, there is necessarily almost every degree of danger to employees. Improvements are constantly being made in the methods of doing business, and in ways, works, and machinery used. The adoption of the latest and best machinery would often involve the displacement and loss of that which has been but

little used, and which was the best obtainable when bought. It would be unreasonable to attempt to require everyone hiring laborers to have the safest place and the best machinery possible for carrying on its business. It would be an unwarranted construction of the statute which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place, and from the kind or quality of the machinery used. Nothing but the plainest expression of intention on the part of the legislature would warrant giving the statute such an interpretation. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery as well since the enactment of this statute as before. If he does so, his employer owes

The following specific rulings have also been made in cases where the servant was suing a stranger.

Constructive knowledge of the effect of moisture in destroying the insulation of an electric-light wire is not imputed to a dishwasher at a hotel. *Giraudi v. Electric Improvement Co.* (1895) 107 Cal. 120, 28 L. R. A. 596, 40 Pac. 108.

A hotel dishwasher has no such interest in the sufficiency of the insulation of electric-light wires that he is chargeable with negligence in failing to notice that such insulation was defective at any particular spot. *Ibid.*

In *Perham v. Portland General Electric Co.* (1897; Or.) 40 L. R. A. 799, 53 Pac. 14, the court, in discussing the contention that the plaintiff, a carpenter in the service of a railway company, was chargeable with notice that the insulation of certain electric wires was defective, said: "It is not claimed that the deceased had any more knowledge of electricity or its effects than such as is possessed by persons of average intelligence. He knew that there is such a force carried by wires and used in driving cars and lighting streets and houses, and that the wires in question were used for that purpose; but he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with the result of making them safe. He had no knowledge of the fact, as this record discloses, that wires are used for the transmission of electricity, which, on account of the high voltage carried, cannot be insulated at any reasonable cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any special knowledge of electricity or its effect possessed by the deceased; and there is no pretense that he knew the wires were in fact dangerous. . . . These wires were visible, insulated, and to all appearances perfectly harmless. There was nothing in their appearance to warn the deceased of the great force being carried over them, or that there was any danger in coming in contact with them. The danger was a hidden and secret one, and the insulation of the wires deceptive. The familiar rule that one who deliberately goes into a place of known or apparent danger and is injured must take the consequences of his hardihood can have no application here, because there was in fact no apparent danger, but, on the contrary, so far as the deceased—a nonexpert—could ascertain from an examination, the wires were entirely safe, and in perfect condition. He had 47 L. R. A.

a right, therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, wires which he knew to be dangerous."

V. Logical significance of the servant's knowledge.

From a purely logical standpoint the bearing of a plaintiff's knowledge upon the applicability of the maxim seems to be that proof of such knowledge merely raises the issue of fact, whether he was or was not a voluntary agent, and that the decisions in which it has been said that an assumption of a risk may be deduced, as a matter of law, from such proof are merely illustrations of the principle that a court is entitled to declare what inferences should be drawn from the evidence, where it is conceived to point unmistakably in one direction. The operative word of the maxim being *volens*, it is, we think, impossible to assert that it is a case of which a presumption of law, in the proper sense of the term, can be predicated. That this is the view of modern English judges, at all events, will be apparent from a perusal of the language used by them in the most recent cases.

"Knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier [of premises] must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not, *Scienti non fit injuria*, but *volenti*. It is plain that mere knowledge [of the risk] may not be a conclusive defense. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily. . . . Knowledge is not a conclusive defense in itself. But when it is a knowledge under circumstances that leave no inference open but one, *vis.*, that the risk has been voluntarily encountered, the defense seems to me complete. . . . Knowledge . . . is not conclusive where it is consistent with the facts that, from its imperfect character, or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here on the plain facts of the case knowledge on the plaintiff's part can mean only one thing. For

him no duty in respect to such risks; and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute, the maxim *Volenti non fit injuria* applies, and he cannot recover. Whether he knows and appreciates the particulars of the danger is immaterial, if he knows there is danger, and expressly contracts in regard to it, without caring to know the particulars, and in such a case he must be deemed to encounter it willingly. One who makes a contract to enter into a new relation undertakes voluntarily what he agrees to do; and his agreement, inasmuch as the other party acts upon it, is to be construed in reference to the obvious facts and circumstances to which it pertains. When he agrees to assume the risk from a certain kind of machinery, his action is equally voluntary in reference to every such risk, wheth-

er he fully appreciates the danger, or chooses to take the risk of it without knowing its extent, and he absolves his employer from what otherwise would be a duty to make the machinery safer.

The same reason applies equally where the employee, without any express stipulation in regard to risks, enters a service which, by reason of the obvious condition of the ways, works, and machinery, involves peculiar dangers. Such a contract is implied as ought to be implied from the situation and dealings of the parties, and it has the same effect as if expressly made. The work to be done may have special reference to defects in the works or machinery. One may be hired to make repairs which expose him to peculiar dangers by reason of the condition of the defective parts. Surely, it cannot be said that a workman does not impliedly contract to

many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk." *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 696, 697, 699, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Bowen, L. J.

"Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions." *Fry, L. J.*, p. 703 of Law Reports.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, the sentence in passage just quoted from Lord Justice Bowen's opinion to the effect that "there may be a perception of the existence of the danger without comprehension of the risk," was objected to by Lord Esher (p. 657 of Law Reports) on the ground that it implied that a dull man might recover where a man of intelligence might not, as both would know of the danger, but one would be imperfectly informed as to its nature and extent. This criticism seems to be just. The proper question under such circumstances must surely be, not merely whether the servant appreciated the risk, but whether he ought to have appreciated it, and this can be determined only by assuming a certain normal standard of intelligence amongst employees of the class to which the plaintiff belongs. Individual cases of defective understanding must be disregarded except where it is due to special causes such as youth or inexperience, and even then the question of fact to be answered, though it covers a more limited area, should still be couched in a general form, *viz.*: Would a person of average intelligence, at the same age and with the same experience as the plaintiff, have appreciated the given risk?

"Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring [him] the workman within the maxim." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 657, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, per Lord Esher.

According to a statement in a subsequent case before the court of appeal, the effect of the two cases last cited is that a person who, "knowing and fully appreciating a danger, voluntarily encounters it," cannot maintain an action, but the bearing of the servant's knowledge of the danger upon the question whether his

continuance of work was voluntary was not discussed. *Amos v. Duffy* (C. A. 1890) 6 Times L. R. 339.

The plaintiff is entitled to recover "unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." Per Lord Esher in the same case (statement adopted in *Osborne v. London & N. W. R. Co.* (1888) L. R. 21 Q. B. Div. 220, 57 L. J. Q. B. N. S. 618, 59 L. T. N. S. 227, 36 Week. Rep. 309, 52 J. P. 806).

"The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." *Lindley, L. J.*, p. 660 of Law Reports.

"If then, the employer thus falls in his duty towards the employed, I do not think that, because he does not straightway refuse to continue his service it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, *Volenti non fit injuria*, becomes applicable. . . . I think that, where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk, and does not remonstrate, does not preclude his recovery in respect of the breach of duty, by reason of the doctrine, *Volenti non fit injuria*, which, in my opinion, has no application to such a case." Lord Herschell in *Smith v. Baker* (1891) A. C. 325, 362, 365, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

In the same case Lord Watson, putting the hypothetical case that the servant appreciated the risk, said: "I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case." (p. 355.)

"Mere knowledge by the workman that a risk would be run by him is not enough to deprive him of the right to recover. There must be a thorough comprehension on his part of the dan-

take the obvious risks from the condition of the machinery when he agrees to do work in the repair of it. Nor can it any more be said that he does not impliedly make a similar contract when he agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is to be carried on. He is free to accept the service or not, as he chooses; and, if harm comes to him by reason of his acceptance of it, he suffers voluntarily. It is manifest that these considerations in reference to a contract, express or implied, do not apply to dangers resulting from conditions which arise, or defects which come into existence, after the making of the contract, which cannot be deemed to have been contemplated when the contract was made.

The precise question involved in this case does not seem to have been settled in Eng-

land, although there has been much discussion, and a variety of opinion, in regard to questions closely allied to it. It is held by all the judges there that the maxim *Volenti non fit injuria* applies as well to actions under the statute as to those at common law; but none of the cases which have come to our attention have determined the effect of a contract to work in a place obviously dangerous by reason of inferior machinery or appointments when the contract was made. Sometimes it seems to have been assumed that the defense of an implied contract to assume the ordinary risks of a business is taken away by the statute, without recognizing any distinction between an implied contract founded on the known condition of the ways, works, and machinery in reference to which the contract is made, and a contract in reference to dangers from the negligence of fel-

low and the risk, and a voluntary undertaking by him of that risk and danger." *Brooke v. Ramaden* (1890) 63 L. T. N. S. 287, 55 J. P. 202.

In order that the maxim may constitute a valid defense, "the jury ought to be able to affirm that he [the servant] consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself." *Smith v. Baker* (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, per Lord Halsbury.

A judge is not justified in withdrawing the case from the jury unless the evidence can bear no other construction than that the servant thoroughly understood the risk. *Amos v. Duffy* (C. A. 1890) 6 Times L. R. 389.

One of the obstacles to the establishment of a uniformity of views upon the subject remains to be noticed. Many judges ascribe to the maxim a significance which virtually removes it altogether from the category of defenses properly so called, and converts it into a statement of a reason for denying the existence of any duty whatever in respect to the plaintiff.

It becomes a serious problem, therefore, whether the liability of the master should be determined on the theory that some conduct on his part which justifies the inference that he has failed in attaining a certain definite standard of care, incumbent on all who engage in his particular business, must first be established by independent evidence, without any reference to the position of the servant, as one cognizant or ignorant of the conditions created by the employer, the effect to be attributed to the servant's action in the premises being left to be settled as a separate question; or whether the investigation should proceed on the theory that the ignorance or knowledge of the servant has a material bearing upon the question whether the employer has or has not been negligent. The latter of these theories is apparently the one which is supported by the weight of authority. Its essence is that an employer is guilty of no breach of duty in accepting the services of one who understands the perils incident to his employment, from whatsoever cause they arise. An obvious corollary of this doctrine is that, where the servant thus comprehends fully the position in which he is placed, the inquiry whether the agencies provided for the use of the servant fall short of an ideal standard of excellence which the law, apart from extraneous conditions, exacts from the employer, becomes wholly irrelevant.

"The duty of an occupier of premises which have an element of danger upon them reaches 47 L. R. A.

its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk, *Volenti non fit injuria*." *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 605, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Bowen, L. J. Compare the remarks of Fry, L. J. (pp. 701 and 702) 32 Am. L. Rev. p. 61, note 1."

"If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the defendants." *Smith v. Baker* [1891] A. C. 325 (p. 352), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, per Lord Watson.

In the same case Lord Bramwell remarked (p. 344): "In the course of the argument I said that the maxim *Volenti non fit injuria* did not apply to a case of negligence, that a person never was *volens* that he should be injured by negligence,—at least, unless he specially agreed to it. I think so still. The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work."

The remark of Lord Cranworth that "a party who rushes into danger himself cannot say, That is owing to your negligence," is possibly another judicial recognition of the theory. *Paterson v. Wallace* (1858) 28 Eng. L. & Eq. 48, 1 Macq. H. L. 748.

See also opinion of Cockburn, Ch. J., in *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 386, 46 L. J. Exch. N. S. 521, as quoted in VII. b. *infra*.

So, also, in *O'MALEY v. SOUTH BOSTON GAS-LIGHT CO.* It is said that, if a servant contracts to take the obvious risks of danger from defective machinery, "his employer owes him no duty in respect to such risks, and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute [employers' liability], the maxim *Volenti non fit injuria* applies, and he cannot recover."

Other cases in which the same standpoint has been taken with more or less distinctness, but with reference rather to the assumption of the risk as a matter of implied contract than to the maxim, the original agreement of the master to keep his instrumentalities in proper condition being superseded *pro tanto* by the servant's election to expose himself to the additional danger, are the following: *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506; *Flisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510; *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396; *Gleason v. New York & N. E. R. Co.* (1893) 159 Mass. 68, 34 N. E. 79; *McGinnis v. Canada Southern Bridge Co.*

low servants, or the subsequent neglect of the master. In *Walsh v. Whiteley*, L. R. 21 Q. B. Div. 371, the decision of the Lords Justices Lindley and Lopes, a majority of the court of appeals, tends to support the view we have taken, although the judgment is on different grounds. So, also, does the judgment in *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, which has been often considered and explained, but never overruled. In *Smith v. Baker* [1891] A. C. 325, elaborate opinions were given in the House of Lords, showing considerable difference of view on some of the questions we have been considering; but the effect of a contract to work under exposure to peculiar dangers from machinery, obvious when the contract was made, was not much considered.

In the present case the plaintiff, when he made his contract, knew and fully appreciated the dangers to which he was about to expose himself, for they were obvious, and he had been accustomed to work on the runs, from time to time, for fifteen years, during which period they had remained unchanged. We are of opinion that he impliedly contracted to work on the runs as they were, and that, if they can be considered defective, the defect is not within the description in the Statute of 1887, chap. 270, § 1, inasmuch as the defendant owed him no duty in regard to it, and he cannot say that its continued existence was owing to negligence of his employer.

Judgment on the verdict.

(1882) 49 Mich. 466, 13 N. W. 581; *Ragon v. Toledo*, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612; *Rush v. Missouri P. R. Co.* (1887) 36 Kan. 129, 12 Pac. 582; *Bonnet v. Galveston, H. & S. A. R. Co.* (1895) 89 Tex. 72, 33 S. W. 334. See also VII. b, c, *infra*.

One court has gone so far as to extend this theory to cases where the defense raised is contributory negligence, and has declared that a jury "should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful." *Fitzgerald v. Connecticut River Paper Co.* (1891) 155 Mass. 156, 29 N. E. 464.

But this doctrine is inconsistent with the accepted view of the significance of this defense, as being merely an allegation that the plaintiff's negligence has severed the causal connection between the defendant's act and the injury complained of. *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 697, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Bowen, L. J., who also remarks that "contributory negligence arises when there has been a breach of duty on the defendant's part, not where, *ex hypothesi*, there has been none.

On the other hand, judges of the highest eminence have taken the ground that the rationale of the application of the maxim in this type of cases is that the master has been guilty of a breach of duty, but that the voluntary action of the servant in exposing himself, with knowledge, to the danger created by such breach prevents him from relying upon it as a cause of action. The most forcible exposition of this view is contained in the following passage from Lord Esher's opinion in a case where the servant was injured by a vicious horse of whose qualities he had for some time past been fully aware: "If the master had any duty at all to take care of his workmen, then allowing this imperfect plant to continue to be used was surely a breach of that duty. But it is said he may have had that duty, and may have neglected it as to those of his workmen who did not know of, or were not affected by, the particular defect, but not as to the plaintiff, who, knowing of the defect, still continued to drive the horse, and therefore comes within the maxim referred to. I confess that has always seemed to me to be not a bad way of illustrating the result; but it is to my mind a horrible way of stating the duty, to say that a master owes no duty to a servant who knows that there is a defect in machinery, and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly 47 L. R. A.

abominable. It may be that the breach of this duty gives no right of action,—that it is what is called a duty of imperfect obligation." *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 652, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

In a later passage in his opinion the same judge, referring to the theory of Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 694, 695, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, that "the duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk," said (p. 657 of Law Reports): "I must confess I do not like that way of putting it. I think there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger, voluntarily elects to encounter it." Lindley, L. J., in the same case seems to have regarded the situation in the same light. See p. 659 of the Law Reports.

Compare also the statement of Lord Herschell in *Smith v. Baker* [1891] A. C. 325, 366, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, that "if there had been no breach of duty, it would obviously have been unnecessary to inquire whether the maxim afforded a defense."

Lord Halsbury also, in describing the conduct of the defendant in the same case, said (p. 336), that he emphasized the word "negligently" because "some of the judgments below seemed to him" to "alternate between the question whether the plaintiff consented to the risk, and the question whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition."

Compare also the language of Lord Herschell in *Membury v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 193, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244.

In *Sanders v. Barker* (Q. B. D. 1890) 6 Times L. R. 324, Mathew, J., speaks of the judgment of Bowen, L. J., in *Thomas v. Quartermaine* as one which was "an astonishing instance of the capacity of the human intellect, though it had not convinced him."

Which of these antagonistic views is correct as a matter of abstract logic is a question upon which the commentator may well refrain from expressing any decided opinion, since it is apparent from the above citations that any opinion which he expresses must necessarily run counter to that of some of the most distinguished of modern jurists. But it seems quite safe to say that the latter view is the more likely, in the practical administration of justice, to lead to

Alexander DAVIS, by Next Friend,
v.

William H. FORBES.

(171 Mass. 548.)

1. The risk of the sufficiency of a stirrup strap will be assumed by a minor who has had two years' experience in riding colts, where, after his complaint of its insufficiency, his employer's foreman makes a test of it in his presence, and informs him that it is sufficient, from which he becomes satisfied that it is so, and uses it in his employment.
2. An employer is not liable for injuries resulting from failing to promptly furnish medical attendance to one injured in his employment, even though he is responsible for the original injury.

(Knowlton, J., dissents.)

(July 14, 1898.)

correct conclusions. An act which changes its quality completely, according as the servant is or is not aware of the physical consequences which it may entail, is, we think, a conception altogether too subtle and refined to be comprehended by the average juror. This consideration should perhaps be deemed decisive in any court which follows the rule laid down in *Smith v. Baker* [1891] A. C. 825, 80 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, that the question whether the maxim is a bar to an action must always, in the first instance at least, be one of fact; though it is of less moment in those states in which the functions of the jury are virtually restricted to determining in doubtful cases whether the servant fully appreciated the conditions under which he was working at the time of the accident.

VI. *How far voluntary action may be inferred from the servant's knowledge of a risk; generally.*

That the ultimate question to the solution of which evidence of the servant's knowledge of the risk is directed is whether he was a voluntary agent in exposing himself to it, is a necessary deduction from the meaning of the operative word in the maxim.

To let in the maxim as a defense it must be shown, not only that the servant was a volunteer in the sense that he went into the place of danger when he might have stopped away, but that he went voluntarily with a full knowledge and understanding of the risk. *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 137, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525, per *Bramwell, B.*

It is, of course, easy to suggest circumstances which would indisputably negative the exercise of a free volition. Voluntary action clearly cannot be predicated as a matter of law, if he is actually terrorized and subjected to downright physical coercion (*Wells & F. Co. v. Gortorski* (1893) 50 Ill. App. 445 [ignorant foreigner pushed into a place of danger, and forced to remain there under the influence of fear]); or where he is a convict under the control of a guard who has the power to secure obedience by the exercise of force (*Chattahoochee Brick Co. v. Braswell* (1893) 92 Ga. 631, 18 S. E. 1015; *Dalheim v. Lemon* (1891) 45 Fed. Rep. 225); or where, as in the case of seamen, who are subject to strict discipline and render themselves liable to severe corporal punishment if they refuse to obey orders (*Rothwell v. Hutchinson* (1886) 18 Sc. Sess. Cas. (4th ser.) 463; *The Frank & Willis* (1891) 45 Fed. Rep. 494 47 L. R. A.

EXCEPTIONS by plaintiff from a ruling of the Superior Court for Suffolk County directing a verdict for defendant in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. *Overruled.*

The injury was caused by the breaking of a saddle strap used by plaintiff while training a young horse on defendant's stock farm. The farm was in charge of William D. Abbott, who had exclusive control and furnished the equipments to employees. The first count in the declaration alleged that the strap furnished was insufficient, although Mr. Abbott assured plaintiff that it was sufficient, and that plaintiff, relying upon Mr. Abbott's assurance, used the strap, and that it broke and caused the injury complained of. The second count was for failure to furnish suitable medical and surgical attendance to

(496) [seamen "not required to vindicate their right to security by refusal to work at the risk of being put in irons or going to jail"] *Eldridge v. Atlas S. S. Co.* (1892) 184 N. Y. 187, 32 N. E. 66 (see IX. *infra*), followed in *Anderson v. New York & C. Mail S. S. Co.* (1896) 17 Misc. 93, 39 N. Y. Supp. 425; or where the servant is working under a statute which provides that laborers who hire themselves out to serve on plantations may not leave the person who has hired them, and that they cannot be sent away by the proprietor until the term of their engagement has expired, unless good and just causes can be assigned. *Poirier v. Carroll* (1882) 35 La. Ann. 706. The court reasoned thus: "Had Poirier thrown up his engagement and left his employment, owing to his fears and apprehensions of danger and injury which might have resulted from his conception of Rolf's incompetence, and had he afterwards brought an action for payment, and been unable to establish with legal certainty the existence of a just and good cause, to the satisfaction of a court, with a burden of proof upon him, the consequence would have been to him the loss of, not only his pay for time to come, but also the return to his employer of that already received. Rev. Civil Code, 2748, 2750. Poirier was not bound to undertake that risk. He had a right to remain, notwithstanding his fears of danger. By remaining and doing his duty, he would be entitled to pay, and thus meet his responsibilities."

In an English case *Bramwell, B.*, declared that he "should not consider that he [the servant] was acting under compulsion, even if he had been bound by contract to serve." *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 27 L. T. N. S. 125, 20 Week. Rep. 525, 41 L. J. Exch. N. S. 99 (as reported in the latter serial only p. 101). The learned judges' views on what is and is not compulsion are, however, of a somewhat peculiar character, as will be shown below.

It has been held that evidence tending to show that an employee had no way of leaving his employer's mill except by going down steps covered with ice is proper to be considered in deciding whether he voluntarily took the risk of using the steps. *Fitzgerald v. Connecticut River Paper Co.* (1892) 155 Mass. 155, 29 N. E. 464.

The rule that any coercion on the master's part will prevent the operation of the principle that the servant assumes the known risks of his employment has no application to a case where an injury is received at the very time the mas-

plaintiff after the injury, although plaintiff was unable by reason of his injuries to secure it for himself, and that, although knowing that plaintiff was suffering great pain and was in need of immediate surgical attention, defendant's servants wrongfully permitted plaintiff to remain for a period of thirty-seven hours without such assistance, by reason of which he alleged that he suffered great pain and permanent injury.

Further facts sufficiently appear in the opinions.

Messrs. Philip J. Doherty and Ewing W. Hamlen, for plaintiff:

There was no assumption of the risk of injury from the defect in the saddle strap furnished because: (1) Plaintiff was coerced into using the defective saddle strap. (2) He told Mr. Abbott that the strap furnished didn't look right; and the language used by

Mr. Abbott may be considered to be an order to use the defective strap temporarily, and he promised to replace it with a new one, which is equivalent to a promise to repair. (3) As a boy with limited experience, he had a right to rely, without any imputation of negligence on his part, upon the positive and unconditional assurance of safety in the use of a saddle strap given to him by a man of authority and experience.

Mere knowledge on the part of the plaintiff of a defect is not conclusive evidence that he was careless, and the question should be submitted to the determination of the jury.

Snow v. Houston 10 R. Co. 8 Allen, 441, 85 Am. Dec. 720; *Hannah v. Connecticut River R. Co.* 154 Mass. 529, 28 N. E. 682; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 667, 21 L. ed. 745.

ter's representative is refusing to permit the servant to stop work immediately upon his expressing a wish to do so, and that injury is really caused by the fact that the servant's attention is distracted by the conversation. Under such circumstances, it is plain that the accident would have happened, even if the words spoken had been expressive of consent, and not of refusal. *Malasky v. Schumacher* (1894) 7 Misc. 8, 27 N. Y. Supp. 831.

But in regard to cases not presenting some special features like those enumerated above there is an irreconcilable conflict of opinion. This want of harmony seems to be, as the present writer has suggested in the article above referred to, due to the fact that it is possible to regard the social and economic relations between the parties to a contract of service from two points of view which are fundamentally and essentially different. It was this difference which Lord Esher had in mind in the following passage of an opinion in which he was discussing the meaning of a provision in the employers' liability act of 1880: "There have always been, I think, two schools of thought in relation to cases of this kind. . . . The view of one school has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be narrowed, and that they should be construed as strictly as possible. The view of the other school is that master and workmen are not really on an equal footing; that, if there is danger in the employment it does not exist with regard to the master, but only in the case of the workman; and the workman is not on an equal footing, because he must run the risk or give up his employment. . . . I myself have always belonged to the latter school." *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 871, 874, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 58 J. P. 38.

The theory of the former of the schools here mentioned is based on the supposed mobility of labor, and involves the conclusion that a servant is perfectly free to accept, remain in, or abandon an employment of which he knows some particular risk to be an incident.

According to the judges who take this view of the situation, the servant's proper course is to throw up his position, as he has a right to do. *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, per Cockburn, Ch. J., whose remark that, "if a man, for the sake of the employment, takes it or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of 47 L. R. A.

injury," seemed to Lopes, L. J., to embody the true principle; *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 666, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281; *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. See, generally, VII. f, g, *infra*.

According to the alternative theory, based on the actual facts of everyday life in civilized countries, no real freedom can be predicated on the acts of anyone who must take his chances in a labor market which, under normal conditions, is constantly glutted, and in times of unusual stress is "thronged with suitors" to such an extent that a man of average capacity is fully justified in believing that if he declines an offered situation, or leaves one which he holds, he will be exposing himself and those dependent on him to a really serious danger of destitution.

Both schools of thought are apparently agreed upon the doctrine that knowledge is conclusive against a servant, where he is to receive higher pay in consideration of his doing the work which involves an abnormal risk due to a defective condition of the instrumentalities.

There is "a marked distinction . . . [between] the case of one who undertakes dangerous work in the ordinary course of his employment, and one who undertakes extra risk for extra wages. In the latter case he would be properly considered a 'volunteer,' because for a higher rate of remuneration he undertakes the risk, knowing its nature." *Channell, B.*, in *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 138, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525.

In *Smith v. Baker* [1891] A. C. 825, 844, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lord Bramwell laid it down that a servant who undertakes work exposing him to a particular danger for a certain compensation less than that which he demanded is in the same situation as one whose wages the master agrees to increase in consideration of his incurring the additional risk.

On the other hand, we find a chief advocate of the more liberal view expressing himself as follows: "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that if we put this maxim into plain English part of it is true; that is to say, that if a thing is put before a workman,

If a master or superior orders an inferior into a situation of danger, and he obeys and is injured, the law will not charge him with assumption of the risk, unless the danger is so glaring that no prudent man would enter into it.

Miller v. Union P. R. Co. 12 Fed. Rep. 600; *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 285.

An employer is liable for injury to a servant, caused by the dangerous condition of appliances, even though the servant knew of said dangerous condition and carefully used said appliances, trusting to a promise of the superintendent and foreman to repair the same, and acting upon a direction of said superintendent and foreman to use the appliances with care.

Patterson v. Pittsburg & O. R. Co. 76 Pa. 389, 18 Am. Rep. 412.

and he is told, 'Now, I do not ask you to do this unless you like; but I will give you more wages if you do. You see what it is. There is a rotten ladder; it is ten to one that it will break under you; but if you choose to run that risk, I will give you higher wages.' If the workman, seeing the risk, elects to incur it, no one could doubt that he would be precluded from recovering damages against his employer for any injury he might sustain from the breaking of the ladder. The same result would follow if the injured person was not a workman fit for hire." Lord Esher in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 36 Week. Rep. 251, 57 L. J. Q. B. N. S. 7.

Compare the following passage, which also suggests the limitation of the effect of the maxim to cases where there is adequate consideration for incurring the additional risk caused by defective appliances: "If the employed agreed, in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow, by providing proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk in their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance,"—per Lord Herschell (*arg.*) in *Smith v. Baker* [1891] A. C. 825, 862, 60 L. J. Q. B. N. S. 888, 65 L. T. N. S. 467, 55 J. P. 660.

In the case just cited Lord Halsbury (p. 836 of Law Reports) thought that the nonconclusiveness of a plaintiff's knowledge of a risk might be deduced of principles which are independent of the fact that the person sued is his employee. He said: "It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim *Volenti non fit injuria*. I think they must go to the extent of saying that, wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies it applies equally to a stranger as to anyone else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events, some years ago, before the admirable police regulations of later years) could 47 L. R. A.

A person cannot be said to take a risk unless he knows, not only the condition of things, but also that danger exists in such condition.

Anderson v. Clark, 155 Mass. 368, 29 N. E. 589; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *O'Connor v. Adams*, 120 Mass. 427; *Ryan v. Tarbox*, 135 Mass. 207; *Lawless v. Connecticut River R. Co.* 136 Mass. 1.

The question whether the knowledge of the defect possessed by the plaintiff was sufficient to charge him with full knowledge and appreciation of the danger from such defect is for the determination of the jury.

Coombs v. New Bedford Cordage Co. 102 Mass. 572, 3 Am. Rep. 506; *Clarke v. Holmes*, 7 Hurlst. & N. 937.

The fact that a person voluntarily takes

have crossed London streets without knowing that there was risk of being run over."

A similar point of view is perhaps apparent in *Sword v. Cameron* (1839) 1 Sc. Sea. Cas. (2d ser.) 493, where the defendant was held liable for a defective system in blasting which left the workman an insufficient interval to reach a place of safety after the signal to fire the charge. Lord Mackenzie remarked that he did not see any ground for supporting the finding of the lower court, implying that the plaintiff had not used sufficient expedition to escape, except it should be thought that the maxim *Volenti non fit injuria* could apply. "The English of that," said the learned judge, "would just be that, if the pursuer wished to be killed why let him be so. But I am afraid that will hardly do. Suppose that the pursuer had walked up to the blast and sat down on the top of the charge, it could scarcely be pleaded that Duff (the foreman) was entitled then to fire the shot, and say that if the pursuer wished to be blown up, he should be indulged." This case was relied upon by Lord Watson in *Smith v. Baker* [1891] A. C. 825, 60 L. J. Q. B. N. S. 888, 65 L. T. N. S. 467, 55 J. P. 660, who considered that Lord Cranworth, although he did not refer directly to the maxim must have approved of the reasoning of the Scotch court as he expressed the opinion that the decision was justifiable in *Barton's Hill Coal Co. v. Reid* (1858) 4 Jur. N. S. 767, 3 Macq. H. L. Cas. 290.

Where the defendant has neither relied on the maxim in his pleadings, nor asked during the trial for a finding on the question whether he had consented to take the risk from which his injury resulted, it is error to enter a verdict for him upon findings to the effect that the plaintiff had the same means of knowing that the appliance (a defective ladder) was dangerous, and that he did know it was dangerous. *Williams v. Birmingham Battery & Metal Co.* [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918.

See also *infra*, VII. b, c, f, g, h.

VII. *Specific circumstances bearing on question whether servant was volens.*

a. *Fact that risk was one ordinarily incident to the service.*

That a servant is "volens" in regard to what are termed the "ordinary" risks of his employment—that is to say, risks the existence of which does not import negligence on the master's part,—is axiomatic in this branch of law. As to these the presumption both of knowledge and of voluntariness of action is conclusive.

some risk is not conclusive evidence, under all circumstances, that he is not using due care.

Lawless v. Connecticut River R. Co. 136 Mass. 1.

Messrs. John Lowell and R. E. Forbes for defendant.

Morton, J., delivered the opinion of the court:

It is difficult to understand why it was a great deal safer, as the plaintiff testified that it was, to put the buckle in the hole where the strap broke than it was to put it in the hole next to it. But, assuming that it was as the plaintiff said, we think that the plaintiff took the risk of using the strap as he did in the condition in which it was. It does not appear what his age was, except that he was a minor. But he had been riding

colts for two years before the accident, and, though a boy, it is fair to assume that he had become experienced in matters pertaining to saddles and riding tackle. According to his testimony, he noticed a bad place in the strap, and told Mr. Abbott that it did not look right. Then, as he testified, "Mr. Abbott took it out of his hand, got hold of it, and pulled it; that he then put it on the floor, and pulled it up, and said it was strong enough to hold him, and that it had got to hold the plaintiff till he got a new one." The plaintiff further testified "that he believed the straps were strong enough after Mr. Abbott tested them and told him they were strong enough." There seems to have been what amounted to a common examination of the straps by the plaintiff and Abbott, and, though the plaintiff relied to some extent, as was natural, on Abbott's judgment, he ap-

"There are many kinds of work in which danger is necessarily inherent, where precautions such as would insure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him, and not with the employer." Lord Watson in *Smith v. Baker* [1891] A. C. 325, 356, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

"The maxim," said Lord Herschell in the same case, "has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes in relation to cases of employer and employed, been stated thus: A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause." [1891] A. C. 360.

This principle is applied freely in cases, even where the work which the servant is called upon to execute is inherently more dangerous than that which an employee of one engaged in that particular kind of business is usually required to take in hand. For example, a servant who hires himself out to a railway company which is constructing an elevated railway is deemed to assume risks caused by the unfinished condition of the supporting structure which he would not be held to have assumed in the case of a completed road. *Kennedy v. Manhattan R. Co.* 47 L. R. A.

(1895) 145 N. Y. 288, 39 N. E. 956. Compare *Evansville & R. R. Co. v. Henderson* (1893) 134 Ind. 636, 83 N. E. 1021, 142 Ind. 596, 42 N. E. 216; *Manning v. Chicago & W. M. R. Co.* (1895) 105 Mich. 260, 68 N. W. 312; *Walling v. Congaree Construction Co.* (1893) 41 S. C. 388, 19 S. E. 723.

And, generally, it may be said that a servant assumes the known risks of restoring to a safe condition the instrumentalities of his employer which have temporarily fallen below the normal standard of safety. Cases of this sort are quite numerous, but the following will suffice for present purposes. *Yeaton v. Boston & L. R. Corp.* (1883) 135 Mass. 418 (removing defective cars to repair shop); *Kelley v. Chicago, St. P., M. & O. R. Co.* (1886) 35 Minn. 490, 29 N. W. 173 (same work); *Kanz v. Page* (1897) 163 Mass. 217, 46 N. E. 620 (servant sent to clean room filled with fragments of shattered fly-wheel); *Martineau v. National Blank Book Co.* (1896) 166 Mass. 4, 43 N. E. 513 (servant injured while repairing defective machine); *Dartmouth Spinning Co. v. Achord* (1889) 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449 (same work); *McGlynn v. Brodie* (1886) 31 Cal. 377 (same work). See also cases cited in *Shearn & Redf. Neg. 5th ed. § 185*.

Upon the principle, *Cessante ratione, cessat et ipsa lex*, it has been held that a pilot whom a shipowner is compelled by statute to employ at a fixed rate of compensation does not assume the risk of injury from the negligence of the shipowner's servants. *Smith v. Steele* (1875) L. R. 10 Q. B. 125, 44 L. J. Q. B. N. S. 60, 32 L. T. N. S. 195, 23 Week. Rep. 388. Blackburn, J., said: "In the present case the accident happened before the actual commencement of the voyage, but it is clear that the deceased was on board only because he was going on that voyage as a pilot, and under the same terms as to risk as if the voyage had begun. We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and the pilot whom they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants."

The learned judge after pointing out that under the provisions of the merchant shipping acts, the maximum of compensation which a pilot could demand was peremptorily fixed, proceeded thus: "He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord Cairns points out

pears to have been satisfied himself, from the test that was made in his presence, that the strap was suitable for use, as he proposed to use it, in the condition in which it was. No complaint was made that the test was not a reasonable one, and not such as the plaintiff's practical experience commended. There is nothing to show that Abbott's declaration "that it had got to hold the plaintiff until he got a new one," and "Here is a pair of old stirrup straps hanging in the case that you will have to use," coerced the plaintiff into using a strap which he did not think fit, or led him to assume a risk which he would not otherwise have taken. On the contrary, he testified, as already observed, "that he believed the straps were strong enough after Mr. Abbott tested them and told him they were strong enough," and evidently used them relying on what his own senses had told him concerning the test to which they were subjected, corroborated as it was by Abbott's

statement that they were strong enough. See *Williams v. Churohill*, 137 Mass. 243, 50 Am. Rep. 304. The fact that the strap afterwards broke under a strain to which it was subjected, has, of course, no tendency to show that the plaintiff was coerced into using it, or did not assume the risk.

The defendant was under no legal obligation to furnish the plaintiff with medical attendance, even if he had been liable for the injury, and the ruling that the plaintiff could not recover under the second count was therefore correct. The case of a seaman injured on shipboard is different.

In the view which we have taken of the case it is unnecessary to consider whether there was any evidence of negligence on the part of the defendant.

Exceptions overruled.

Knowlton, J., dissenting:

Because I consider the decision in this case

(at least theoretically), the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk."

b. Fact that risk was known to the servant when he entered the employment.

By nearly all judges, both English and American, the principle of an assumption of risks, as a matter of implied contract, has been extended so as to cover any risk of which the servant had actual or constructive notice at the time he entered the employment, although its existence may indicate that the condition of the instrumentalities was such as would have rendered the master chargeable with a breach of duty, if the servant had not known of their imperfections.

"If a servant enters into an employment knowing there is danger, and is satisfied to take the risk, it becomes part of the contract between him and his employer that the servant shall expose himself to such risks as he knows are consistent with the employment." *Saxton v. Hawksworth* (Exch. 1872) 26 L. T. N. S. 851, 853, per Willes, J.

There is probably another exception to the rule that a master is liable for his negligence, *viz.*, "where [he] the master has furnished instruments or machinery which are dangerous, but the servant knows that they are dangerous, and the danger is so normal that it is in the ordinary course of the employment; in that case the servant cannot complain of an injury which he has sustained, because he undertook the employment with that risk." *Mellors v. Shaw* (1861) 1 Best & S. 435, 446, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, per Blackburn, J. (*arguendo*).

"The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant, being fully capable of choosing and contracting for himself, with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or

unsuitable tools, machinery, or appliances, no such implied contract arises." *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506 (uncovered cogs).

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 590, 52 Am. Rep. 733, 2 N. E. 115 (jolting of locomotive in passing over ill-constructed frogs threw servant off foot-board).

"Except in regard to the danger of injuries from the negligence of fellow servants in certain cases, under the Statute of 1887, chap. 270, and possibly some other dangers under the same statute, a servant impliedly agrees to assume the obvious risks of the business in which he engages, and his implied agreement, except as it may be affected by that statute, which we are not now considering, includes not only the risks which are ordinarily incident to that kind of business, but also those which grow out of the peculiar way in which his employer is conducting it, so far as that way and those risks are obvious when he makes his contract. If he agrees to work in a business which he knows is carried on with machinery much more dangerous than that commonly used in that kind of business, he assumes the obvious risks incident to the use of that machinery. By making a contract to serve for pay where such dangers surround him, he exposes himself to the danger voluntarily." *Mahoney v. Dore* (1892) 155 Mass. 518, 30 N. E. 366.

A servant "assumes, not only all the risks incident to such employment, but all dangers which are obvious and apparent. . . . If he voluntarily enters in, or continues in, the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk, and to waive any claim for damages against the master in case of personal injury to him." *Crown v. Orr* (1893) 140 N. Y. 450, 35 N. E. 648.

"If a servant has knowledge of the circumstances under which the employer carries on his business, and chooses to accept the employment, or continue in it, he assumes such risks

wrong as an invasion of the province of the jury, and because the opinion seems to me misleading in regard to the principles applicable to cases of this kind, I feel constrained to express my dissent. The fundamental questions upon which the rights of the parties depend in actions for negligence are whether the defendant was negligent, and whether the plaintiff was in the exercise of due care. In my opinion, the question whether the plaintiff assumed the risk is only important as it bears upon one of these two questions. It does not affect the fundamental propositions on which the law of negligence rests. In its nature it is rather a collateral inquiry, the answer to which often easily decides the case in accordance with these fundamental propositions, without the necessity of considering either of them by itself. I do not remember ever having read or heard any exposition or argument to show

that the doctrine of the assumption of the risk by a plaintiff has changed the rule of law that one who is himself without fault, and in the exercise of due care, and who suffers from the negligence of another, may recover the amount of his damages. The maxim *Volenti non fit injuria* is applicable to actions for negligence, as it is to other cases. The doctrine of the assumption of the risk is merely a formal statement of this maxim in its application to concrete cases. If a plaintiff voluntarily assumes a risk, and afterwards sues for an injury that he has suffered which was within the risk, he cannot recover, because he encounters one or the other of two facts, either of which is fatal to his claim. In such a case it would appear in the last analysis, if the truth were ascertained, either that the plaintiff was negligent, or that the defendant was not negligent. In every case where the evidence

incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so." *Wood v. Heiges* (1896) 83 Md. 257, 34 Atl. 872 (no precautions to prevent scattering of flying pieces of castings when broken by the fall of a weight).

The theory that a servant is a free agent to select the employment in which he shall enter had also been recognized in an earlier case in this state. *Wonder v. Baltimore & O. R. Co.* (1870) 82 Md. 411, 3 Am. Rep. 143.

"Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee." *Ragon v. Toledo, A. A. & N. M. R. Co.* (1898) 97 Mich. 265, 56 N. W. 612 (unfilled space between ties).

Compare the application of this principle in *Anderson v. Clark* (1892) 155 Mass. 368, 29 N. E. 589 (condition of windlass); *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153, 36 N. E. 789 (projecting set-screw in shaft); *Shaw v. Sheldon* (1886) 103 N. Y. 667, 9 N. E. 183 (uncovered machinery); *Brossman v. Lehigh Valley R. Co.* (1886) 118 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226 (low bridges); *Wells v. Burlington, C. R. & N. R. Co.* (1881) 56 Iowa, 520, 9 N. W. 364 (same danger); *Titus v. Bradford, B. & K. R. Co.* (1890) 136 Pa. 618, 20 Atl. 517 (defective system); *Kelley v. Chicago, M. & St. P. R. Co.* (1881) 58 Wis. 74, 9 N. W. 816 (same danger); *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303 (same danger); *St. Louis, A. & T. R. Co. v. Lemon* (1892) 83 Tex. 143, 18 S. W. 331 (unusually heavy hand-car); *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 56 N. W. 60 (gang-plank used in unloading cars alleged to be defective); *Long v. Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 107 (defects in car couplings); *Latremouille v. Bennington & R. R. Co.* (1891) 63 Vt. 336, 22 Atl. 656 (inefficiency of fellow servant); *Baltimore & O. R. Co. v. State, Woodward* (1874) 41 Md. 268 (insufficient number of brakemen).

The assumption upon which the courts have 47 L. R. A.

proceeded in such cases is that the servant has taken the employment with the additional risk because he was induced to do so by higher wages. *Mellors v. Shaw* (1861) 1 Best & S. 485, 446, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, per Blackburn, J.; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 49, 38 Am. Dec. 389; and numerous other cases.

"It is a rule of good sense that, if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate." Lord Bramwell in *Smith v. Baker* [1891] A. C. 325, 344, 60 L. J. Q. B. N. S. 688, 65 L. T. N. S. 467, 55 J. P. 660. Compare VI. *supra*.

Similar conclusions have been drawn in cases where the effect of the maxim *Volenti non fit injuria* was directly under discussion.

"A workman, whether he belongs to the regular staff of the occupier of premises, or is called in for the occasion, cannot be heard to complain that a part of those premises which he is hired to repair was in a dangerous condition, as he is paid for the risk he runs in doing the work, and voluntarily incurs it." *Roberts & W. Employers' Liability*, 3d ed. p. 252, quoted with approval by Fry, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 702, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. See also the whole opinion of Bowden, L. J., in the same case, in which a majority of the court of appeal denied the right of a servant to recover damages for injuries received through a fall into a vat of hot liquid while he was working near it, the vat having been unfenced, to his knowledge, for several months, during the whole of which time he had been in the service of the defendant.

"If people will enter into dangerous employment, they do so without making other people liable for injuries they sustain." Lindley, L. J., in his opinion delivered in the court of appeal in *Smith v. Baker* (see p. 343 of the report of that case in [1891] A. C. 325).

In the same case (p. 346 of the same report), Lord Bramwell argues on the hypothesis that the maxim operates as a bar to an action under such circumstances, and expressly approves of the statement in the court of appeal, that "a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform."

In *Knisley v. Pratt* (1896) 148 N. Y. 372, 32

warrants it, a defendant has a right to have this test applied. Sometimes each of the fundamental questions in the law of negligence would be difficult to answer upon the evidence, were it not easy to determine that the plaintiff voluntarily assumed the risk. In such a case the defendant prevails without a separate decision of either of the two questions whether he was negligent or whether the plaintiff was in the exercise of due care. Such a result, considered in reference to the law of negligence, is a decision that the plaintiff has failed to establish one or the other of the two propositions which must be established in every suit for negligence before there can be a recovery. The cases to which these principles are applied may be divided into two classes. The first is where the plaintiff, for a valuable consideration, voluntarily assumes the risk by virtue of a

contract which expressly or impliedly includes the assumption of it. In ordinary cases, when one contracts to enter a business as employee he voluntarily agrees, for the wages to be paid him, to assume all the open and obvious risks of the business, "including the manifest dangers attendant upon the use of the ways, works, and machinery of a permanent character that are plainly intended to be retained as a part of the plant to which the contract for service relates." This may be called a contractual assumption of risk. In regard to the dangers covered by it, the employer owes the employee no duty, and he cannot be held guilty of negligence. The rights of the parties depend, not necessarily upon that which the employee in fact understands and appreciates, but upon that which he ought to understand and appreciate in making such a contract for service, and upon

L. R. A. 867, 42 N. E. 986, the New York court of appeals laid down a similar doctrine, saying: "Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver evidenced by his entering the employment with a full knowledge of all the facts;" citing *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 866.

So, the maxim has been held to debar a brakeman from recovering damages for an injury caused by his falling into an uncovered culvert, where he knew at the time when he accepted the service that the culverts were all in this condition, and had remained three years in the service without objection. *West v. Southern P. Co.* (1898) 56 U. S. App. 323, 85 Fed. Rep. 892, 29 C. C. A. 219.

The most elaborate presentment of the theory under which the servant is in these cases disabled from recovering is to be found in *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, where the exchequer chamber, by a majority of three judges to two, rendered a decision which was virtually to the effect that the position of a defendant who was sued by a servant for injuries received in the course of his employment was the same, whether his relations to the plaintiff were such as would enable him to avail himself of the doctrine of an implied agreement by the servant to assume all the known risks of the work, or, on account of the absence of a contractual relation, he was forced to rely upon the defense furnished by the maxim. (For the facts, see the note to *Cleveland, C. C. & St. L. R. Co. v. Berry*, 46 L. R. A. 33, 75.)

Cockburn, Ch. J., said: "If the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company, the decision of the court of exchequer in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work and its attendant risks when he entered into the employ of the contractor for the job in question, or at all events he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures such as the dangerous nature of the service rendered reasonably necessary would be taken, he had a right to throw up his engagement and to decline to go on with the 47 L. R. A.

work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative to quit the service. If he continues to take the benefit of the employment he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. . . . But it may be said the plaintiff was not in the service of the defendants at all. He was on their premises, not only on lawful business, but it may be said by their invitation, as he was working under a contractor employed by them to do the work in question. He sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is therefore entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company

that which the employer has a right to suppose that he understands and appreciates. *Murch v. Thomas Wilson's Sons & Co.* 168 Mass. 408, 47 N. E. 111; *Ladd v. New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331; *Lovejoy v. Boston & L. R. Corp.* 125 Mass. 79, 28 Am. Rep. 206; *Coombs v. Fitchburg R. Co.* 156 Mass. 200, 30 N. E. 1140; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, ante, 161, 32 N. E. 1119; *Fisk v. Fitchburg R. Co.* 168 Mass. 238, 33 N. E. 510; *Goodridge v. Washington Mills Co.* 160 Mass. 234, 35 N. E. 484; *Rooney v. Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789; *Feely v. Pearson Cordage Co.* 161 Mass. 426, 37 N. E. 368; *Goodes v. Boston & A. R. Co.* 162 Mass. 287, 38 N. E. 500; *Austin v. Boston & M. R. Co.* 164 Mass. 282, 41 N. E. 288; *Content v. New York, N. H. & H. R. Co.* 165 Mass. 267, 43 N. E. 94; *Sweeney v. Berlin &*

J. Envelope Co. 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Appel v. Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550, 19 N. E. 93; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166. The second class of cases is where an employee has suffered from the negligent conduct of an employer in reference to some matter not included in his assumption of risks by virtue of the contract under which he is working at the time of the injury. As to these cases different considerations apply. The employer is under an implied contract or duty to provide safe and proper machinery, tools, and appliances for the employee. There is often evidence on which it is contended that he is guilty of negligence in this particular. In dealing with such a case, upon the question whether the plaintiff is precluded from

with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before: With full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that by the exercise of extra vigilance and care on his part the danger might be avoided. By a want of particular care in depositing one of his tools he exposed himself to the danger, and unfortunately suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the circumstances under which it was to be executed. The plaintiff as his servant did the same. They are in a very different position from that in which they would have stood had they been at work on the defendants' premises in ignorance of the danger." Mellor, J., expressed his concurrence as follows: "When, therefore, the contractor in this case undertook to perform the work in question, and in the performance of which the plaintiff was engaged at the time of the accident, it is reasonable to assume that the character and nature of the work was duly considered and included in the price paid for it; and if the plaintiff thought that there was danger of an unusual character in the nature of the work, he ought either to have stipulated with his master or the company to provide some additional means or precautions against such possible danger, or, as he was better able to judge than they whether the work could safely be performed without additional precautions, he ought to have refused the task unless they were provided. . . . I think that the company can in no respect be said to be guilty of negligence. They conducted the business in the ordinary way, and the accident did not occur through any misconduct or mismanagement on their part. I think that the plaintiff, who must be presumed to know the ordinary traffic of the company, and the limited space within which he had to work, came within the maxim *Volenti non fit injuria*, and has, at all events, no remedy against the defendants." "In the present case the plaintiff 47 L. R. A.

had probably the same opportunity of judging of the possible danger as his master had, and might have declined the work, and refused to undertake it, without additional precautions being taken or means provided by his master, but, as it appears to me, that was a matter affecting his relation with his master, and not in any way affecting the duty of the company."

The views of the majority of the court have been enforced and applied in several American cases, where the defendant was not the plaintiff's master, and the doctrine of a contractual assumption of risks had, therefore, no pertinence.

An employee of a railroad company which has the right under a contract to use the railroad track of another party has no right of action against the owner of the track for injuries received in consequence of his foot becoming caught in a defective or improperly protected frog in such track where he went to work upon the track knowing its condition. His assumption of the risks of the employment is no less than if he had been under contract with such owner. *Wood v. Locke* (1888) 147 Mass. 604, 18 N. E. 578.

The danger which arises from the fact that merchandise is piled against the slats inclosing the well of a freight elevator in a leased store in such a manner that the tenant's employees can only start the elevator by standing on the platform is obvious, and therefore accepted by them in such a sense that one of them cannot hold the landlord liable for injuries received in operating the elevator. *McCarthy v. Foster* (1892) 156 Mass. 511, 31 N. E. 885.

In *Erslew v. New Orleans & N. E. R. Co.* (1897) 49 La. Ann. 86, 21 So. 153, it was conceded that a brakeman employed by a steam railroad, who was injured through being swept off the top of a car by a guy-wire maintained in a dangerous position by an electric-railroad company, would be debarred from recovering damages from the latter company if it had been proved that he had continued in the service with a positive knowledge of the precise danger assumed; but it was held that the evidence did not establish the conclusion.

A servant of a company which is hauling over its line the cars of another company equipped with brakes of a certain size and pattern of a common construction and familiar to such servant from past experience is deemed to have assumed the risk attendant upon the use of such brakes. *Wright v. Delaware & H. Canal Co.* (1886) 40 Hun, 843.

The doctrine of the above cases however, was

recovery on the ground that he assumed the risk, it must be assumed that the jury properly might find the defendant guilty of negligence. The question is to be determined in reference to the possibilities of a finding either way on that point. If, looking to the conduct of the defendant alone, the finding ought to be against him, on what ground can the plaintiff be cut off from his right to damages? Under the law of negligence it is only on the ground that he is himself in fault through failure to exercise proper care or otherwise. If the facts relied on to establish this defense are merely that he continued to work, knowing of the defect which afterwards caused his injury, and if the defect is so slight, viewed in reference to the defendant's duty to provide for his safety, that it is just a little outside of the line which separates due care on the part of the

defendant from negligence, the question arises whether there was such a voluntary assumption of the risk on the plaintiff's part as to put him in the same category with the defendant in reference to the alleged negligence. It is the law of Massachusetts that if he knew and fully appreciated the risk, and continued to work without any special exigency constraining him so to do, his exposure to the risk must be deemed to have been voluntary, and, if the condition of the defective part was such that to provide it, or keep it for his use, constituted negligence on the part of the defendant, who was under an obligation to have it safe, his continued use of it, knowing and appreciating the danger from it, equally constituted negligence which prevents him from recovery. This rule bears rather hard upon employees, for, *ex hypothesi*, the employer is primarily in

powerfully combated by *Mellish*, L. J., in *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, in the following words: "Is it, then, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight, without making any objection, and without abandoning his service with his master, that he consented to the company's running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion it is not. In the first place it is by no means certain that the plaintiff, an ordinary bricklayer's laborer, understood at all what the extent of the risk was which he was running, or what the precautions were which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel were not reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment, or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say: 'I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also.' Suppose this case: A man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defense: 'You know my style of driving, you have seen me drive for a fortnight, I was only driving in my usual style.' 'Yea, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it.' It will not be disputed the scraper of the streets in the case I have supposed is entitled to maintain his action, and in my opinion his case does not differ from the case we have to determine, there being no contract between the defendants and the plaintiff any more than between the cabman and the scraper of the streets. On the whole, I am of opinion that the judgment of the court below ought to be affirmed."

47 L. R. A.

In the series of English cases which began with *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 702, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 518, and ends with *Smith v. Baker* [1891] A. C. 325, 344, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 690 (see preceding sections, and also *infra*), and which has established the doctrine that the inference that a servant was *volens* cannot usually be drawn merely from evidence that the servant was aware of the risk, the judges who argued in favor of the doctrine did not suggest that any distinction should be made between risks known at the beginning of the service and those discovered afterwards, and it seems permissible to conclude from the reasoning that they considered the same principle to be applicable to both situations.

c. Fact that risk was not known to the servant when he entered the employment.

A person who is seeking employment generally enjoys a larger liberty of action in regard to the acceptance or rejection of work which involves an abnormal amount of danger than one who, after he has entered upon the performance of his duties, finds himself confronted by the necessity of choosing between incurring an additional peril or looking for a new place. But a servant's unwillingness to decline a situation which is desirable, except in the single respect that some of the instrumentalities are in a bad condition, is a feeling which is the same in kind as his unwillingness to throw up a situation having the same drawback. It is not easy, therefore, to perceive any satisfactory ground upon which it can be affirmed that evidence of the servant's having had notice of a risk before he entered the employment should be regarded as raising an absolute bar to an action for injuries due to that risk, while voluntariness of action is not a necessary inference from evidence that he obtained knowledge of a risk after entering the employment, and with that knowledge went on working. To ascribe essentially different legal consequences to the operation of a specific constraining motive, simply because it may exercise a somewhat more powerful influence in the one case than in the other, is, it is submitted, wholly unjustifiable. There is clearly no logical alternative between refusing altogether to treat this feeling as a factor in the problem, and declaring it to be a constant quantity in that problem, the effect of which is that, whether the extraordinary risk existed when the contract of service was made, or only arose afterwards, the servant's assumption of

the wrong and practically the employee has no alternative but to abandon his contract, and quit the service, even though that might mean starvation for his family. His remedy by a suit upon his contract would be costly and uncertain, and the damages recoverable would be small. In England, and in some of the American states, continuing to work under such circumstances is not deemed, as matter of law, a voluntary assumption of the risk. *Smith v. Baker* [1891] A. C. 325; *Thruswell v. Handyside*, L. R. 20 Q. B. Div. 359; *Yarmouth v. France*, L. R. 19 Q. B. Div. 647. But the rule is established in Massachusetts, and I do not desire to depart from it.

It must be remembered that the rule is applicable only when the plaintiff understands and appreciates the risk. Nothing less than his full understanding and appreciation of

that risk cannot be inferred from his knowledge alone.

The former alternative is the one adopted by courts which take it for granted that the servant is a free agent, economically speaking, in regard to entering or quitting any employment. By these it is held that the responsibility for the consequences of dangerous conditions is shifted to the servant as soon as he has, or ought to have, ascertained the actual facts. Sometimes the judges use language which is susceptible of the construction that they considered the servant bound to abandon the employment the moment he receives notice of risk, and that, if he fails to do this, it is presumed to have been accepted. See, for example, *Rogers v. Leyden* (1890) 127 Ind. 50, 26 N. E. 210. But we know of no case where such a doctrine has been categorically laid down, and it has been repudiated by courts of high authority. *Northern P. R. Co. v. Mares* (1887) 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321; *Louisville & N. R. Co. v. Kelly* (1894) 24 U. S. App. 103, 63 Fed. Rep. 407, 11 C. C. A. 260.

As a matter of fact it will almost always be found that, where the servant has been held to have assumed a new risk, the injury was received a sufficient time after the servant's knowledge was acquired to render it not unreasonable to say that he had had an opportunity for considering whether he should go on with or give up the work. The time may be only a few hours, or it may be several years, but if it has been long enough to furnish an opportunity for real deliberation and an estimate of the comparative advantages of continuing in or leaving the employment, it would seem that the respective rights of the master and servant are definitively fixed, and that an extension of the period can carry with it no additional or characteristic legal results.

In *Membery v. Great Western R. Co.* (1880) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244, the original agreement between the plaintiff's master and the defendant was that the latter should furnish an assistant for the purpose of enabling him to execute with greater safety the shunting work which his master had contracted to perform. This agreement had been carried out for several years. A new arrangement was then made, the purport of which was merely that the defendant should furnish an assistant, if it had one available, and the plaintiff continued to work for several years, sometimes with an assistant and sometimes without one. It was held that, under these circumstances, he

it can make his exposure to the danger voluntary, and charge him with negligence whenever the employer is negligent. It is only when his knowledge of the danger is such as to make his conduct as culpable as that of the employer that he can be precluded from recovery on this ground. The question oftenest arises when it is difficult to tell whether there was sufficient danger properly to charge with negligence the employer, whose duty it was to know that his appliances were safe; and if the conditions are such that the conduct of the employer in procuring the defective appliance falls only a hair's breadth below the line of due care, nothing less than a full understanding of the danger can charge the employee with negligence in using it when it was provided for him. It will hardly be contended that a hired servant always works at his own

could not recover damages for an injury caused by the want of an assistant.

In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 685, 65 L. T. N. S. 467, 55 J. P. 660 (see facts VII. c. *infra*), Lord Bramwell expressed the opinion that if a servant found himself exposed to a new danger after his term of employment had begun, the right course for him to take was to sue for a breach of the engagement, and that, if he continued work with a knowledge of the conditions, the maxim would prevent his claiming any indemnity for an injury traceable to that danger.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lopes, L. J., in his dissenting opinion considered that the fact that the plaintiff was not engaged to drive a dangerous horse was met by the fact that he continued in the service after he knew the horse was dangerous. Commenting on *Woodley's Case* (see *supra*) the learned judge said: "The only distinctions that I can find between that case and the present are the following: Woodley was hired to do dangerous work, and knew its dangerous character and attendant risks. Yarmouth was hired to do work not dangerous, *viz.*, amongst other work to drive horses, which most frequently are manageable. The horse which did the mischief was intrusted to his care after he entered on the employment, and it was then first he learned its propensities; but long after he had been made aware of its vicious nature he continued to drive it. There was no evidence that Woodley ever made any complaint to his employer. Yarmouth, on the contrary, complained, but continued in the employment. Having regard to the judgments of the majority of the court, I do not think that what I have suggested furnishes any substantial ground for distinction."

In *Fraser v. Hood* (1887) 15 Ct. of Sess. Cas. (4th Ser.) 178, it was held that, although the vicious temper of a horse was a defect in the plant of his employer, a stableman who entered his stall, well knowing the animal to be a dangerous one, was, as matter of law, debarred from recovering for injuries caused by a bite.

But the above rulings and *dicta* embody a doctrine which has now been definitely rejected in England. See *Smith v. Baker* [1891] A. C. 325, 346, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, *infra*.

In Massachusetts, one of the few states in which the maxim has been discussed to any great extent in relation to the extent of an employer's liability, the accepted doctrine is still

risk when he continues in service after discovering that his employer's negligence in failing to repair machinery, or in introducing unsafe machinery, has somewhat increased the perils of his situation. So to hold would altogether deprive the employee of the benefit of the salutary provision of law which makes it the duty of the employer to provide proper tools and machinery with a view to his safety. It is often consistent with due care for him to continue in the service when he knows that the provision for his safety is not as good as it should be. He may think that the danger is not great enough reasonably to require him to refuse to work. That full knowledge and appreciation of the risk on the part of the plaintiff is essential to the maintenance of this defense in cases of this kind has repeatedly been held, and I am not aware that any dif-

ferent doctrine has been enunciated. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464; *Mahoney v. Dora*, 155 Mass. 513, 30 N. E. 366; *Tenant v. Boston Mfg. Co.* 170 Mass. 323, 49 N. E. 654; *Ferren v. Old Colony R. Co.* 143 Mass. 197, 9 N. E. 608; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Lawless v. Connecticut River R. Co.* 136 Mass. 1; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73. That the danger is obvious is not necessarily enough to defeat the plaintiff on this ground, although it may warrant a finding by a jury against him. The danger may be so great and so obvious that in any possible view of the evidence the general judgment of common men would at once condemn his conduct in continuing to work as careless. In such a case it would be the duty of the court

what it was declared to be from the standpoint of a contractual assumption of risks, *viz.*: That, where a new risk is created by the introduction of new appliances after the servant has entered the employment, and he continues to work without any objection, he is equally debarred from an action as if the risk had existed when he first entered the employment. *Carlgan v. Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 1079.

The following cases may also be cited as a few illustrations out of many which might be given of the principle that where the rights of the parties are referred to the implied terms of their contract the mere fact of the risk having come into existence after the inception of the service is considered by many courts not to be a reason why the servant's appreciation of the conditions should not be deemed, as matter of law, to bar his action. *Dynen v. Leach* (1857) 26 L. J. Exch. N. S. 221 (plaintiff worked several months after a less safe device had been substituted for the one formerly used); *Powers v. New York, L. E. & W. R. Co.* (1885) 98 N. Y. 274 (handle of hand car on which plaintiff rode out of repair for three weeks before the accident); *East Tennessee, V. & G. R. Co. v. Smith* (1882) 9 Lea, 685 (unsound handle of hand car in use one month); *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965 (conductor injured by insufficiency of crew of train, force having been reduced about one year before the accident); *Mundie v. Hill Mfg. Co.* (1894) 86 Me. 400, 30 Atl. 16 (servant tripped over splinter in floor—danger known for three months).

Compare also the cases in which a servant in the permanent employ of a master finds himself obliged to decide whether he will undertake duties which require him to deal with particular agencies which he has never handled before, but which unquestionably belong to a category which brings their use within the scope of his contract. Here he cannot recover if he proceeds to perform the work with a full appreciation of the risk. *Goldthwait v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 554, 36 N. E. 486 (where the risk was the obvious one that new street cars with projecting steps would, when passing round a curve, swing closer to a certain wall than cars without such steps, and the servant had known of the altered conditions a month before the accident); *Pingree v. Leyland* (1883) 135 Mass. 398 (expert machinist in employ of stevedore ordered to use a defective winch on a particular vessel); *Carey v. Boston & M. R. Co.* (1898) 158 Mass. 228, 33 N. 47 L. R. A.

E. 512 (projecting screw on handle of hand car caught clothes of section hand, and threw him off, several days after the car was furnished in place of another one); *Hale v. Cheney* (1893) 159 Mass. 268, 34 N. E. 255 (injury caused by slippery condition of floor of room to which plaintiff had been transferred three weeks before accident); *Richmond & D. R. Co. v. Mitchell* (1893) 92 Ga. 77, 18 S. E. 290 (plaintiff undertook to couple cars where number of trainmen was known to be insufficient for perfect safety); *Sullivan v. Louisville Bridge Co.* (1872) 9 Bush, 81 (laborer on railroad construction work injured by fall of temporary foot-bridge).

It must be admitted, however, that the Massachusetts cases just cited are extremely difficult to reconcile with some that will be referred to below, unless the court intends to assert the doctrine that the inference of an assumption of the risk which is drawn from the servant's knowledge is more peremptory where the defense is based upon the doctrine of an implied contract than where it is based upon the maxim.

There is some authority for the proposition that the maxim does not shift the responsibility to the servant until the next date has passed at which he may, without breaking his contract, leave the employment. In *Smith v. Baker* [1891] A. C. 325, 346, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lord Bramwell, speaking with special reference to the terms of the contract of hiring, under which most English laborers work, said: "In these services every week there is a new engagement, and, therefore his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose the contract was from week to week, till determined by notice, surely he is volens if he does not give the notice."

To the other theory under which knowledge is not an absolute bar to the action of a servant who is injured by a risk which is superadded to his employment after he has begun work, a few of the earlier cases have accorded some slight recognition.

In *Clarke v. Holmes* (1862) 7 Hurlst. & N. 947, 31 L. J. Exch. N. S. 856, 8 Jur. N. S. 992, 10 Week. Rep. 405, Byles, J., considered that a master who violated his contract with his servant to provide a fence for machinery exercised a species of compulsion over him, but whether he thought the essential element of this compulsion to be the fear of losing the employment is not apparent from the report.

In *Ladd v. New Bedford R. Co.* (1870) 119 Mass. 412, the court distinguished between the

to order a verdict against him on the ground of a want of due care; but it would not necessarily follow that he voluntarily assumed the risk, so as to come within the doctrine, *Volenti non fit injuria*. He might have been stupid, or inattentive, and merely careless, in not ascertaining the extent of the danger.

To decide against the plaintiff on this ground involves an affirmative finding of fact. The negligence which is fatal to his case is not merely an omission to take proper precautions. It is positive negligent action. It is a voluntary exposure to a well-understood danger, so great that due care requires him to avoid it. The defendant must establish the plaintiff's knowledge and appreciation of the risk, and voluntary assumption of it, if he would prevail, when, on other grounds, the plaintiff's case might be

decided in his favor. When a fact is to be established by evidence, a court can seldom say, as matter of law, that it is proved. Where the plaintiff has the burden of proof to show the defendant's negligence or his own due care, the case is different. There the court must determine, as a matter of law, in the first instance, whether any evidence has been introduced in support of the propositions. As was said in *Osborne v. London & N. W. R. Co.* L. R. 21 Q. B. Div. 220, of the discussions in *Yarmouth v. France*, L. R. 19 Q. B. Div. 647, and in *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685: "Those observations go far to make it hard for a defendant to succeed on such a defense as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk; but that can-

position of a servant who continues to work with knowledge of a permanent imperfection in an agency of the master's business (there the check-chains on its cars), and the position of a servant who goes on with his duties, where the premises or instruments upon which or by which the business is carried on are temporarily defective, and remarked that, although the employer was never liable in the former case, he might be liable in the latter case, especially if he had promised the servant to remedy the dangerous conditions and failed to do so.

Of late years, however, this principle has emerged into greater prominence, and, so far as England is concerned, there is no doubt that it has superseded the older doctrine formulated in cases of which *Dynen v. Leach* (1857) 26 L. J. Exch. N. S. 221, was the earliest example.

Passing over the case of *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 702, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, in which, as already noted, the general theory was first enunciated that the continuance of work with knowledge of a particular risk is not necessarily conclusive, but no suggestion was offered that a distinction should be made between cases in which the risk existed at the beginning of the service from those in which it arose afterwards, we come to the important decision in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, where the point was directly involved, as the injury was caused by a vicious horse bought several years after the plaintiff had entered the employment. The essence of the evidence was that the plaintiff objected to driving him, and told the foreman of the stable that the horse was unsafe to drive, whereupon the foreman said: "You have to drive him; and, if any accident happens, we (meaning the employer) will be responsible." The trial judge thought he was bound by *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 702, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, to decide that there could be no recovery for injuries caused by a kick which the plaintiff received from the animal. Two members of the court of appeal, Lord Esher and Lindley, L. J., were of a different opinion, while Lopes, L. J., a portion of whose opinion has been quoted above, held that the maxim was a bar to the plaintiff's claim. Commenting on the construction placed by the trial judge upon *Thomas v. Quartermaine*, Lindley, L. J., said: "The principles laid down in that case are no doubt to be accepted and followed; and, if I may say so, I entirely concur

in them; but it is not, in my opinion, correct to regard that case as deciding this. The facts there and the facts here are materially different. In *Thomas v. Quartermaine* the facts were all one way: there was evidence that the plaintiff was *volens* and not merely *sciens*; he was not even directed to do what led to his injury; he did it voluntarily, of his own accord; there was no evidence that the plaintiff was *sciens*; the plant was not defective or dangerous to persons engaged in the ordinary course of their employment; the plaintiff had never complained of it; the injury was the result of a pure accident; and the case might well have been decided on that ground alone. In the present case the horse was vicious; the plaintiff was constantly complaining of it to the defendant's foreman; the foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal; nor is it possible to regard this case as one of accident. Under these circumstances, the question is whether the plaintiff with knowledge and appreciation of both the risk and the danger voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses; and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is, in my opinion, admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself."

In the following year we find two decisions bearing upon the subject. The remarks of Hawkins, J., in *Thrussell v. Handyside* (1888) L. R. 20 Q. B. Div. 350, 57 L. J. Q. B. N. S. 347, 58 L. T. N. S. 344, 52 J. P. 279, will be cited in VII. g. *infra*.

In *Osborne v. London & N. W. R. Co.* (1888) L. R. 21 Q. B. Div. 220, 57 L. J. Q. B. N. S. 618, 59 L. T. N. S. 227, 36 Week. Rep. 809, 52 J. P. 806, a railway passenger was injured in attempting to descend a flight of ice-covered steps. The court laid it down that a defendant cannot succeed in a court of review on the ground that the maxim is applicable, unless he has either had a finding of fact in their favor, or all the facts are before the court, so that it is in a position to decide it. Grantham, J., said: "I think that the judgment of Bowen, L. J., in *Thomas v. Quartermaine* confirms the view which I take, that the maxim *Volenti non fit injuria* does not apply to such a case as the present. If it did, it would go to the root of the liability of all persons who would otherwise be liable to provide safe premises or safe machinery. For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious,

not be helped." In cases of contractual assumption of the risk it is often claimed that the plaintiff has introduced no evidence of any danger which was not obvious and so included in his implied contract, whether he actually understood or not. But in regard to risks not assumed by the plaintiff in his contract for service, resulting from conduct of the defendant while the plaintiff is working under his contract, I think it can seldom be said, as a matter of law, that the employee has lost his legal right to hold his employer for the consequences of his negligence on the ground of voluntary assumption of the risk by continuing to work, unless his own conduct is such that, viewed independently, it furnishes no evidence of his due care.

Is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy? The same considerations would apply in the case of a railway. It seems to me that the whole difficulty in the present case arises from the answer of the plaintiff to a question put to him in cross-examination being too much relied on. What he meant was that he knew there was some danger in going down the steps, and that it was necessary to be careful, but he thought he could get down safely with the assistance of the hand rail. The only chance for the defendants was to show contributory negligence on the part of the plaintiff, and this they have failed to show."

The doctrine of these two cases was definitely established by a majority of the house of lords in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, the effect of which, as stated by the supreme court of Massachusetts in *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 366, is that a servant who continues to work where he is exposed to a danger which he understands and appreciates, and which results from his employer's negligence, and which he did not assume by his implied contract when he entered the service, does not, as matter of law, voluntarily assume it by merely remaining in a place which is rendered unsafe by his master's fault. The plaintiff, after doing different kinds of work for the defendant, had been transferred about two months before the accident to the duties which he was discharging when injured. These consisted in drilling holes in a rock cutting near a crane worked by his coemployees, which at times would swing stones so that they passed over his head. One of the stones broke in pieces while it was in the sling, and fell upon the plaintiff. He sought to recover damages on the ground that this system of handling the stones without taking precautions to warn him so that he might move to a place of safety while the hoisting was in progress indicated negligence. The evidence on which it was asserted that a nonsuit should have been granted consisted of the statements of the plaintiff himself. Speaking of the operation of slinging the stones over the heads of the workmen, he said that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The gang foreman told the workmen to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another workman in his hearing had complained that it was a dangerous practice.

The clearest statement of the precise rationale and effect of this decision, abstracted from the more general discussions of the maxim by 47 L. R. A.

In the present case it cannot be contended that there was a contractual assumption by the plaintiff of the risk of injury from the use of an unsafe and improper stirrup strap. No such risk was obvious when he entered the defendant's service. On the contrary, the defendant, by his contract, impliedly agreed to furnish safe and proper straps. There was no new contract nor any new consideration for a contract when the plaintiff obeyed the order of Abbott to use the strap which broke. The rights and obligations of both parties created by the contract of hiring remained unchanged. It may be that a jury would have found that the plaintiff was careless in consenting to use the strap; but certainly the court cannot say so as a

the judges, from which copious extracts have been made to illustrate the special subject-matter of the several sections in this subdivision, is contained in the following passage of Lord Herschell's opinion (p. 362 of the Law Reports): "Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus falls in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim *Volenti non fit injuria* becomes applicable."

In a case decided in the following year the supreme court of Massachusetts also adopted the doctrine that the question whether the servant voluntarily assumed the risk of injury from a peril which arose after he entered the service was one of fact. *Fitzgerald v. Connecticut River Paper Co.* (1892) 155 Mass. 156, 29 N. E. 464.

Similarly, in *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 366, where a female employee was injured through slipping on a staircase which became temporarily covered with ice during the term of her employment, it was held to be a question of fact whether, when she started down the stairs, she understood and appreciated the danger of going, and, if she understood it, whether she assumed it voluntarily, or because she felt obliged to continue in the service and make the best of the situation in which she found herself. Knowlton, J., after laying it down that the maxim was a conclusive defense in the case of ordinary risks and extraordinary dangers which may be considered normal, proceeded thus: "But in a much larger class of cases it is a question of fact, when one has been injured by reason of an exposure which he knew involved some risk, whether he voluntarily took the risk of the injury which he received. The question divides itself into two parts, first, whether he understood and appreciated the risk, which is sometimes a question of law and sometimes a question of fact; secondly, if he appreciated whether he assumed it voluntarily or acted under such an exigency, or such an urgent call of duty, or such constraint of any kind, as, in reference to the danger, deprives his act of its voluntary character. He may reluctantly, so far as the danger is concerned, and under extraneous pressure which amounts almost to compulsion, expose himself to a danger which originates in another's fault,

matter of law, and the opinion does not put the decision on that ground. The ground of the decision is that the plaintiff assumed the risk. The opinion implies that it may be doubtful whether the defendant was negligent, although there can be no doubt of his duty to furnish safe and proper straps. If the jury found that the defendant was primarily responsible for the injury,—as the opinion assumes that they might find,—the plaintiff is cut off from recovery by a holding of the court, as matter of law, that his relation to the risk by reason of his consenting to use the strap under orders was such as necessarily to make him guilty of negligence. This seems to me to leave out of consideration the facts that the defendant was

under a legal obligation to know that the strap was safe, while the plaintiff was under no such obligation, and, that the plaintiff might rely to some extent upon the probable performance of duty by his employer, and upon the implied representation of his employer, as well as the express representations of Abbott, the foreman, that the strap was sufficiently strong. I think that there was evidence for the jury upon this point, but that the court could not properly say, as matter of law, that the proposition was established. Dealing with it as a matter of fact, I think the weight of the evidence was that he did not fully understand and appreciate the risk. He was undoubtedly influenced by the statements and representa-

and under such circumstances it cannot be said that he assumes the risk voluntarily. . . . The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to." The learned judge added that he was not aware of any adjudications in Massachusetts which were necessarily inconsistent with the "just and reasonable doctrine" of *Smith v. Baker*, although different opinions had been expressed on the point ruled in that case by eminent judges, both English and American.

Wherever this construction of the maxim is accepted as correct, the practical result must evidently be the abolition of the power of a court to declare it to be a bar where the evidence merely shows a knowledge and appreciation of the risk by the servant, except in the more extreme cases where a court would deem itself entitled to say that reasonable men could not disagree as to the proper conclusion to be drawn from the facts.

That this is the true significance and extent of the authorities appears very plainly from the following passage in the admirable opinion delivered by Lord Watson in *Smith v. Baker* [1891] A. C. 325 (p. 354), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660: "The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this: whether, upon the evidence, the jury were warranted in finding, as they did, that the plaintiff did not 'voluntarily undertake a risky employment with a knowledge of its risks.' Whether the plaintiff appreciated the full extent of the peril to which he was exposed or not, it is certain that he was aware of its existence, and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If upon that point there are considerations pro and contra, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendant's case is that the evidence is all one way; that the plaintiff's continuing in their employment, after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank."

In the same case Lord Herschell argued as follows in the same strain: "There may be cases in which a workman would be precluded from 47 L. R. A.

recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work, and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss, but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *Volenti non fit injuria* applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong."

It should be noted that the courts which decline to make any distinction between the cases in which the defect existed at the beginning of the service and those in which it arose subsequently apply the doctrine that where there is evidence merely of the servant's knowledge of a defect the question of his assumption of the risk is for the jury. See, for example, *Lanling v. New York C. R. Co.* (1872) 49 N. Y. 521, 10 Am. Rep. 417. That is to say, evidence which goes no further than to show that the plaintiff was aware that the condition of an instrumentality was to some extent abnormal and possibly unsafe, renders the whole question of his right to recover one of fact.

The uncertainties incident to the application of a rule which leaves so much to the personal equation of individuals are strikingly indicated by the variety of the views which have been expressed by English judges as to the correctness of the decision in *Thomas v. Quartermaine*, *supra*, where that rule was first formally enunciated.

"For myself," said Lord Esher in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 654, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281. "I cannot help thinking that, whether or not a workman has voluntarily agreed to incur the risk of

tions of Abbott. He knew the strap was defective, but he did not know how strong it was. No one can accurately estimate the strength of a piece of old leather from the appearance of it. He saw Abbott pull upon it, but he did not know how much force was applied in pulling. Probably he thought it was stronger than it proved to be. If the strap was only just bad enough to make the defendant liable for negligence in furnishing it, I do not think it follows, as a matter of law, that the plaintiff was negligent in not refusing to use it. I think the questions at issue were questions of fact for the consideration of the jury under proper instructions.

defective machinery, is a question of fact, and that, in my opinion, would have made the decision in *Thomas v. Quartermaine* wrong, for the majority of the judges there took upon themselves to decide the question of fact, whereas in my opinion they had no right to decide it; the utmost they properly could do was to send it back to the county court. They held in that case that the facts were conclusive to show that the plaintiff did voluntarily—in the sense in which they understood the word—accept the risk. This revives the old question as to contributory negligence in cases of railway accidents. . . . I have always protested that it is not for the judge to say whether or not a plaintiff (or the deceased in the case of death) has been guilty of contributory negligence; he (the judge) has no right to hold that the evidence of it is conclusive; it should be left for the decision of the jury."

In *Smith v. Baker* [1891] A. C. 825, 337, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lord Halsbury, said that he was unable to concur in the view that the maxim *Volenti non fit injuria* was, as a matter of law, applicable under the circumstances, while Lords Morris and Bramwell expressed their concurrence with the judgments of the justices who formed the majority.

In *McPeck v. Central Vermont R. Co.* (1897) 50 U. S. App. 27, 79 Fed. Rep. 591, 25 C. C. A. 110, the doctrine of *Smith v. Baker* [1891] A. C. 825, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, was expressly declared not to be the rule of the Federal courts—citing *Tuttle v. Detroit, G. H. & M. R. Co.* (1886) 122 U. S. 182, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.

This statement is undoubtedly correct so far as regards the position of those courts with respect to the effect of knowledge when considered from the standpoint of a contractual acceptance of the risk, but it does not by any means follow that the supreme court would adopt the same theory if a case were presented in which, as in *Smith v. Baker*, it would be necessary to determine the rights of the servant with special reference to the meaning of the maxim. Besides, Judge Putnam in his opinion is mistaken in supposing that the views of a majority of all the judges, taken collectively, in the three courts in which *Smith v. Baker* was discussed were opposed to that of the majority of the House of Lords. The divisional court allowed an appeal for the reason that they felt unable to reconcile certain earlier decisions of the court of appeal, and the court of appeal disposed of the case on the ground that there was no evidence of negligence on the part of the defendant. (See p. 329 of the report in [1891] A. C., and 65 L. T. N. S. 468, 469). The only references in the lower courts to the maxim were one *dictum* by Willis, J., and another by Coleridge, Ch. J., to the effect that it constituted a bar to the action. 47 L. R. A.

Except in cases of contractual assumption of the risk, I think there is great danger of improper interference with the right of plaintiff to a trial by jury upon questions of fact in holding, as matter of law, even when the defendant might be found to be negligent, and even when it does not appear on other grounds that the plaintiff has failed to show his own due care, that the plaintiff has lost his right to recover by a voluntary assumption of the risk. I hope that this fashionable modern doctrine will not lead to a departure from the sound principles on which the law of negligence rests.

The history of the case therefore does not bear out Judge Putnam's theory either as to the precise point decided or as to the weight of authority for and against the ruling, even so far as that may be estimated by the rather unsatisfactory process of counting heads.

Where a judge put the question to the jury whether "the plaintiff, a carrier, knowing the character of a restive horse he was told to drive," did, with that knowledge and with knowledge of the danger to which he was exposed, undertake the charge of it, "a finding that the plaintiff knew of the horse's character and the risk he ran in taking charge of it," was held to imply that the plaintiff went voluntarily to drive the horse and undertook the risk, and to amount, therefore, to a verdict for the defendant. *Wilson v. Boyle* (1889) 17 Ct. Sess. Cas. (4th ser.) 62.

d. *Fact that conditions were or were not under the control of the servant.*

Much importance has been attached by some judges to the distinction between cases where the servant has some personal or physical connection with the operations or conditions which produced his injury and those in which those operations and conditions are independent of his own volition and removed from his control.

A servant "cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim *Volenti non fit injuria* is completely justified." Lord Halsbury in *Smith v. Baker* [1891] A. C. 825, 338, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

Lord Watson also argues, upon the assumption that this view is correct: "The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as *volens*. The case may be very different where there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered [the dropping of a large stone which was slung over his head by a crane] was not evoked by his act, but was brought into contact with him by workmen employed in a different operation." *Smith v. Baker* [1891] A. C. 825 (p. 357), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

In *Membery v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 88 Week. Rep. 145, 54 J. P. 244, this principle was mentioned by Lord Halsbury, as one of the grounds which led him to deny the plaintiff's right to recover.

If these judicial *dicta* should hereafter be made the groundwork of a specific ruling, the importance of the actual decision in *Smith v. Baker* must be reduced very considerably, for the consequence would plainly be that many of the hardships of the old doctrine would be revived in that large class of cases in which the employee's duties are restricted to the handling of some particular instrumentality.

There is, of course, manifest justice in allowing the maxim to bar the action of a servant who has himself created or consented to the creation of a defect. *Highland Ave. & B. R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357, holding that a railway company cannot be held liable for the death of a yardmaster due to his being thrown off the footboard on the front of a switch engine by striking against a pile of coal near the track which had been deposited there by the consignee with his permission. See also *Hart v. Frick Coke Co.* (1890) 181 Pa. 125, 18 Atl. 1011; *Langlois v. Maine C. R. Co.* (1892) 84 Me. 101, 24 Atl. 804.

Similarly, there is nothing unfair in holding that an action which the servant of a contractor who is erecting a building might otherwise have maintained against one who has furnished his employer with a defective derrick for hoisting heavy stone, on the theory that it is an instrument dangerous to human life if not properly constructed, is barred by evidence showing that, being placed in full control of the apparatus, he removed, upon his own responsibility, the rope which had been supplied with the derrick, and procured from the owner one of another kind which was a quarter of an inch thicker than he thought sufficient. *Davies v. Felham Hod Elevating Co.* (1892) 65 Hun, 578, 20 N. Y. Supp. 523, Affirmed, without opinion, in 146 N. Y. 863, 41 N. E. 88.

a. Fact that work was undertaken by servant *ex proprio motu*.

In *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100, it was recognized that there "might be cases where the plaintiff would be held to have taken the risk irrespective of any implied term in his contract of service, even if he could not properly be said to have been negligent." Upon this principle a verdict for the plaintiff was there set aside, the evidence showing that when he was injured he had undertaken to make repairs which it was no part of his regular duty to make, and started to do so of his own free will, upon the suggestion of a fellow workman, after asking and obtaining the mere consent of his own immediate superior. Under such circumstances he was only a volunteer, and could stand on no better footing than a stranger would have done, who should have offered, and should have been permitted, to make the same repairs. Even if it was not negligent of him to approach the dangerous spot, he took the risk of the danger which he necessarily contemplated as existing when he undertook to remove it.

f. Fact that servant complained of the dangerous condition.

The influence of each of the theories noticed in the preceding section is also apparent when the precise question to be solved is, What deduction should be drawn from evidence showing that the servant had or had not complained of 47 L. R. A.

or protested against the maintenance of the dangerous conditions which caused his injury? The more rigorous of these theories sets the servant on the horns of a dilemma. On the one hand, he is confronted with the proposition that his failure to object to his environments should be treated as a circumstance which strengthens the inference that he had consented to take the accompanying risks.

The earliest case in which this conception was distinctly treated as a factor was *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 8 C. L. Rep. 185, 23 L. J. Exch. N. S. 23, where the servant was injured owing to the inadequacy of the number of servants furnished for the work. The judges, during the argument of counsel, unanimously declared that he could not recover for reasons stated by each of them as follows:

"The case," said Platt, B., "falls within the maxim *Volenti non fit injuria*."—"I acted upon that principle at the trial," said Martin, B., "being of opinion that the company was not liable, as the plaintiff had done the same work for several months without any intimation on his part that he was unable to carry it on; and I therefore considered him a voluntary agent." "The defendants," said Parke, B., "were bound to use all due and reasonable care only. Here the plaintiff was engaged in the same work for several months and made no complaint whatever as to the inadequacy of the means employed. If he felt that he was in danger by reason of the want of a sufficient number of fellow servants, he should not have accepted the service." Similar language was employed by Martin, B., in his opinion: "I think that if the case had gone to the jury they must have found a verdict for the defendants. But, as I entertained a very strong opinion on the matter, I thought it clearly to be my duty not to leave the case to them upon the chance of their finding a verdict for the plaintiff from motives of commiseration. The plaintiff brought the accident upon himself, for, if he found that he could not do the work which was set him, he ought to have declined it in the first instance. He, however, carried it on for several months, and never made the least complaint upon the matter."

See also *Assop v. Yates* (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 156; *Yarmouth v. France* (1837) L. R. 19 Q. B. Div. 647, 660, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, per Lindley, L. J.; *Goldthwait v. Haverhill & G. Street R. Co.* (1894) 160 Mass. 554, 36 N. E. 486; *Greene v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 878; *La Pierre v. Chicago & G. T. R. Co.* (1894) 99 Mich. 212, 58 N. W. 60; *Latremouille v. Bennington & R. R. Co.* (1890) 63 Vt. 338, 22 Atl. 656; *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185; *New York, L. E. & W. R. Co. v. Lyons* (1868) 119 Pa. 324, 13 Atl. 205; *Green & C. Street Pass. R. Co. v. Bresmer* (1881) 97 Pa. 103; *Rumsey v. Delaware, L. & W. R. Co.* (1892) 151 Pa. 74, 25 Atl. 37; *Kaare v. Troy Steel & I. Co.* (1893) 139 N. Y. 360, 34 N. E. 901; *Shackelton v. Manistee & N. E. R. Co.* (1895) 107 Mich. 16, 64 N. W. 728; *Scott v. Darby Coal Co.* (1894) 90 Iowa, 689, 57 N. W. 619; *Bogenschutz v. Smith* (1886) 84 Ky. 330, 1 S. W. 578.

"Protest against, or objection to, a service rendered dangerous by defective machinery, if the party making the protest or objection is under no legal obligation to remain in the service, cannot render the services subsequently performed involuntary. There is a disparity in the relation of master and servant, but not such as can make the act of the servant in remaining in a service which he knows to be peculiarly dangerous from defective machinery an involuntary act in legal contemplation." *Galveston, H.*

& S. A. R. Co. v. Drew (1888) 59 Tex. 13, 46 Am. Rep. 261.

Under this theory where there is some evidence that the servant knew of the danger, it is error to refuse an instruction directing the jury to find for the employer if the servant, having such knowledge, continued to work without objection. Wells v. Burlington, C. R. & N. R. Co. (1881) 56 Iowa, 520, 9 N. W. 864.

On the other hand, this theory may be regarded as involving the conclusion that, as the fact of his having complained is conclusive proof that he realized his danger, evidence of that fact only furnishes an additional reason for declaring him to be subject to the consequences entailed by a full appreciation of a risk.

Thus, in Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 86 Week. Rep. 281, we find Lopes, L. J., arguing as follows: "The point that Yarmouth was not engaged to drive a dangerous horse is met by the fact that he continued in the service after he knew the horse was dangerous; and his constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he remains in the service for a long time, knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view. . . . The present case seems a stronger case of voluntary exposure to danger than that of Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 840, 57 L. T. N. S. 587, 85 Week. Rep. 555, 51 J. P. 516. In the latter case there is little, if any, evidence that Thomas knew of or appreciated the danger; but, in the present case, the evidence is strong to show that Yarmouth thoroughly understood the danger to which he was exposing himself. With a knowledge of the danger, though complaining, he continues in the service, indicating thereby a willingness to incur the risk rather than give up his employment."

So, the declaration of a laborer who seeks to recover on the ground that his master furnished unsuitable pieces of wood for checking cars on an incline has been held to show that he cannot maintain the action where it states he was well acquainted with the nature of the timber furnished, and had on two occasions complained to his foreman about the want of proper stuff. McGee v. Egleston Iron Co. (1883) 10 Scotch Sess. Cas. (4th Ser.) 955. See also the extract given in VII. g, *infra*, from Lord Bramwell's opinion in Membrey v. Great Western R. Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 568, 61 L. T. N. S. 566, 88 Week. Rep. 145, 54 J. P. 244.

The above doctrines, however, qualified in favor of the servant to the extent that, if the complaint of the servant elicited from the master a promise to remedy the conditions which menaced the servant's safety, the responsibility for those conditions is shifted for a reasonable period to the master, and the latter is held liable for any injury which the former may receive prior to the expiration of that period, unless the risk of continuing work is so great that no prudent man would have encountered it even for any period however short. This subject is fully discussed in a note in Illinois Steel Co. v. Mann (1897; Ill.) 40 L. R. A. 781.

The judges who uphold the other theory naturally adopt the conclusion that as Lord Herschell puts it, "the mere fact that the servant continues his work, even though he knows of the risk and does not remonstrate, does not preclude

his recovering in respect of the master's breach of duty, by reason of the maxim." Smith v. Baker [1891] A. C. 825 (p. 865) 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660. The learned judge said he would not lay the same stress as Lindley, L. J., had done in Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 86 Week. Rep. 281, upon the fact that the plaintiff had remonstrated.

As to the point that the absence of evidence of a complaint is not conclusive, see also Richmond & D. R. Co. v. Norment (1887) 84 Va. 167, 4 S. E. 211.

It has been held in England by the Queen's Bench division that evidence of a remonstrance by the servant negated the inference of voluntary action on his part. Sanders v. Barker (1890) 6 Times L. R. 824, per Lord Coleridge and Mathew, J.

A court should, it seems, always refuse to draw an absolute inference of assumption of risks, when there is ground for supposing that the servant hesitated to complain lest he should lose his place. Goldthwait v. Haverhill & G. Street R. Co. (1894) 160 Mass. 554, 555, 86 N. E. 486.

Under this theory, the inferences to be drawn from the fact that the servant had made complaint should depend, it would seem, on the length of time during which he had gone on working after the complaint was made. In Smith v. Baker [1891] A. C. 825, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, where the servant had been exposed only two weeks to the danger which produced his injury, two members of the house, Lord Halsbury (p. 837) and Lord Watson (p. 357) considered that his remedy was not barred because he had made repeated complaints. The latter said: "The complaints made to the foreman by his fellow workmen, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it or to accept the risk of it."

So, it had been held many years previously by an Australian court that the maxim is not a bar to an action merely because a servant, although he objects to his master's mode of driving, voluntarily allows himself to be driven by him. The master is still bound to exercise skill and proper caution. Bateman v. Moffatt (1868) 5 W. W. & A. B. (Victoria Law) 125, Reversed in (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. N. S. 369, but not on this point.

In Dean v. Ontario Cotton Mills Co. (1887) 14 Ont. Rep. 119, each of the above antagonistic theories found an advocate in one member of a divisional court.

But where the period during which the servant continued to work is so long that the only inference which can reasonably be drawn is that he has resolved, however reluctantly, to make the best of a dangerous situation, it would seem the presumption of an acceptance of the risk becomes so strong that it cannot be disturbed by evidence that he had often expressed his dissatisfaction.

Thus, in Membrey v. Great Western R. Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 88 Week. Rep. 145, 54 J. P. 244, where the plaintiff had remained in the service several years after the alleged breach of duty in not furnishing a helper, all the Law Lords, including some who concurred in the decision in Smith v. Baker, *supra*, were of opinion that the fact of the servant's having

made repeated demands for additional assistance, and protested against the dangers to which he was exposed on account of its not being furnished, will not prevent the maxim *Volenti non fit injuria* from being a conclusive bar to his action.

The maxim is not a bar to the action where a defective machine was stopped upon the complaint of the plaintiff, and he was told, when he resumed work, that it was working properly. *Bacon v. Dawes* (Q. B. D. 1887) 8 Times L. R. 557.

g. Fact that servant's motive for continuing work was his fear of dismissal.

Intimately connected with the question discussed in the preceding section, and usually presented in any case in which it is raised, is another, *viz.*, What significance shall be attached to the apprehension of a servant that, if he declines to undertake unusually perilous work, he may lose his position? The answer given to this question will of course depend upon which of the economic theories referred to in VII. e, f, *supra*, is deemed to be the correct one. An obvious corollary of the doctrine that if a servant is dissatisfied with his environment he is free to abandon it is that the risk of dismissal can have no terrors for him.

The most uncompromising of the English exponents of this theory was the late Lord Bramwell.

In *Ogden v. Rummens* (1863) 3 Fost. & F. 751, while he was trying a case one of the workmen testified that if he had complained of the danger of the work he would have been told that someone else would do it. The remark of the judge was that this was "a very sensible answer, . . . but that showed that he had an option to do it, or not to do it."

This brief text was expanded into the following incisive homily in the opinion which he delivered in *Members v. Great Western R. Co.* (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244: "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is *volens*? Willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will, but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *volens* is the opposite of *volens*, its negative. There are two men; one refuses to do work, wills not to do it, and does not do it. The other grumbles, but wills to do it, and does it. Are both men *volentes*, unwilling? Suppose an extra shilling induced the man who did the work. Is he *volens* or has the shilling made him *volens*? There must be a strange notion, either that a man who does a thing and grumbles is *volens*, is unwilling, has not the will to do it, or that there is something intermediate between *volens* and *volens*, something like a man being without a will, and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of certain to an uncertain law not make him *volens* as much as any other motive? There have been an infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new. This is an important question. Is the maxim to be got rid of? Are we to say *Volenti fit injuria* provided he grumbles, as Mr. Bell con-

tended? To do so would be most unjust and unreasonable. The master says, Here is the work, do it or let it alone. If you do it, I pay you; if not, I do not. If he has engaged him, he says, I discharge you if you do not do it; I think I am right; if wrong, I am liable to an action. The master says this, the servant does the work and earns his wages, and is paid, but is hurt. On what principle of reason or justice should the master be liable to him in respect of that hurt? On this ground, also, I am of opinion the judgment should be affirmed. I may observe that the court of appeal thought that neither of the cases where this novel notion was entertained bore on the present."

In a later case we find him reiterating these views: "It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports? Acrobats daily incur fearful dangers, so do lion-tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets." *Smith v. Baker* [1891] A. C. 325, 346, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660.

In other cases judges have been equally outspoken.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lopes, L. J., was of opinion that the inference of a voluntary assumption of a risk caused by a master's breach of duty could not be rebutted by showing that he feared that a refusal to incur the risk would cost him his position.

"This is a country of free labor. . . . It has been said that the servant is more powerful than his master. But I rather think the servant is not less powerful than his master; and certainly he is quite able to enforce the contract and defend his rights." *Crichton v. Hen* (1863) 1 Sc. Sess. Cas. (8d Ser.) 407, per Inglis, J.

"Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible.

The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury." *Cockburn, C. J.*, in *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 389, 46 L. J. Exch. N. S. 521.

This case was approved in *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, where it was held that the plaintiff assumed the risk of acting as fireman on an engine, though the duty was not within his original contract. The court said: "The plaintiff did this, it is true, rather than lose the position which he had, and which he desired to retain; but by so doing he ingrafted this duty on his original contract, of which he made it a part. Morally, to coerce a servant to an employment, the risks of which he does not wish to encounter, by threatening otherwise to deprive him of an employment he can readily and safely perform, may sometimes be harsh; but when one has assumed an employment, if an additional and more dangerous duty is added to his original labor, he may accept or refuse it. If he has an executory contract for the original

service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and, while he may require of the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience. The employer is not necessarily unjust, because he wishes to have in his employ a servant who can from time to time relieve a skilled workman, while his ordinary duties will be those of a mere laborer. It must certainly be his right to engage a servant who, while his ordinary duties will be simple and expose him to no danger, is willing, as a part of his service, from time to time to assume duties which in order to be safely performed, require a higher degree of skill, and which expose him to a certain degree of danger."

In *Reed v. Stockmeyer* (1896) 84 U. S. App. 727, 20 C. C. A. 881, 74 Fed. Rep. 186, the court reasoned as follows: "It is urged that Stockmeyer, in obeying the orders of Dreihoble, acted under compulsion, and should not be, therefore, held to have assumed the risks of the work he was directed to perform. It is conceded that he made no objection to the order, that he did not protest any incapacity to comprehend the risk, but that he was coerced into compliance with the order through fear of discharge in case of disobedience. That, however, does not charge liability upon the master. In the absence of restrictive contract provisions, the master is at liberty to discharge the servant at any time. So, likewise, is the servant at liberty to abandon his service at will. The master has the right to demand other service than that for which the servant has engaged. The latter may accept or decline at will. Declining, he may lose employment; accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. That through stress of circumstances he consents to the orders of the master rather than be discharged from employment, does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant."

So, also, in New York it has been laid down that a threat to discharge a servant if he refuses to work with appliances which are in the same condition as when he began work is not coercion. *Sweeney v. Berlin & J. Envelope Co.* (1886) 101 N. Y. 520, 5 N. E. 358; *Prentice v. Wellsville* (1893) 50 N. Y. S. 557, 21 N. Y. Supp. 820. See also to same effect *Wescott v. New York & N. E. R. Co.* (1891) 153 Mass. 460, 27 N. E. 10; *Haley v. Case* (1886) 142 Mass. 316, 7 N. E. 877; *Lynch v. Sagamore Mfg. Co.* (1887) 143 Mass. 206, 9 N. E. 728 (in these two cases the point was considered with reference to the defense of contributory negligence); *Atchison, T. & S. F. R. Co. v. Schroeder* (1891) 47 Kan. 315, 27 Pac. 965; *Southern Kansas R. Co. v. Moore* (1892) 49 Kan. 616, 31 Pac. 138; *Worlds v. Georgia R. Co.* (1896) 99 Ga. 283, 25 S. E. 646 (servant undertook to lift ties which he knew were too heavy for him); *Dougherty v. West Superior Iron & S. Co.* (1894) 88 Wis. 343, 60 N. W. 274. In *Shearm. & Redf. Neg.* 5th ed. § 211 (a), it is stated that in the last-named decision the court relied on cases since overruled. Those cited are *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 53 Am. Rep. 733, 2 N. E. 115; *Bradshaw v. Louisville & N. R. Co.* (1893) 47 L. R. A.

14 Ky. L. Rep. 688, 21 S. W. 846; *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521.

The reply to this assertion is simple. The Massachusetts case has never been disapproved in any later decision in that state, and the point that a fear of dismissal is not coercion was reaffirmed so recently as 1891 in *Wescott v. New York & N. E. R. Co.* 153 Mass. 460, 27 N. E. 10. The Kentucky case remains unimpugned so far as we can discover by any later ruling in that state. The authority of *Woodley's Case* has been doubtless shaken to some extent by the *dicta* and decisions cited below, but on this particular point it has certainly not been overruled categorically. Besides, it will be noticed that these *dicta* and decisions are all of earlier date than the Wisconsin case, and it is at least a reasonable hypothesis that the court deliberately preferred to follow the authorities which it cited rather than any others. These remarks are made, not because we disagree with the learned authors in regard to the doctrine that the fear of dismissal should be regarded as coercion, but because we think it important that there should be no misapprehension as to the real effect of the cases on the subject.

On the other hand, the alternative theory, which takes into account the patent truth that fresh employment is seldom easy and sometimes very difficult indeed to get, involves the corollary that the servant's apprehension of being thrown out of employment is an influence directly operating to deprive him of a considerable part of his freedom of will. Judicial notice of this metaphysical fact, abstruse enough not to be known to more than about ninety-nine sane persons out of every hundred in all civilized countries, has at length been taken both in England and the United States.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 657, 660, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lord Esher and Lindley, L. J., both declared that evidence of the servant's fear of being discharged tended to rebut the inference that he was *coercion* in continuing to work. The latter said: "If nothing more is proved than that the workman saw the danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."

In the following year similar views were thus expressed by Hawkins, J., in *Thruswell v. Handyside* (1888) L. R. 20 Q. B. Div. 359, 57 L. J. Q. B. N. S. 847, 58 L. T. N. S. 844, 52 J. P. 279: "It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger." The learned judge also suggested that, if it had been impossible for the defendants to take precautions against the danger, it might have been held that the plaintiff was bound to take his chance. The case was distinguished from *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521, on the ground that, in the lat-

ter case, the plaintiff not only knew that there was danger, but had it in his power to protect himself, while in the former, the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal.

In *Membership v. Great Western R. Co.* (1889) L. E. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244, the other members of the House of Lords seem to have been somewhat staggered by Lord Bramwell's outspoken advocacy of the doctrine that the putting a man in fear of starvation does not amount, in a legal point of view, to the application of physical coercion, and preferred to reserve their opinion on the subject. Lord Halsbury contented himself with saying that there was no evidence that the plaintiff had been compelled to do the work by any such fear, but subsequently remarked that he wished to leave open the question as to the true scope of the maxim. Lord Herschell also desired that the matter should be left open for argument and declined to express any positive opinion as to the correctness of Lord Bramwell's views. Lord Fitz Gerald did not directly discuss the question whether the fear of losing employment was compulsion, but thought that no compulsion could be predicated of a case where the servant, after having asked for assistance, and met with a refusal, simply went on doing the same work in the same manner in which he must often have done it before during his seven years of service.

The "physical compulsion" theory of Lord Bramwell was, however, emphatically condemned by Lord Coleridge and Mathew, J., in *Sanders v. Barker* (Q. B. D. 1890) 6 Times L. R. 824.

In *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100, Holmes, J., remarked: "It may be that a case like *Thomas v. Quartermaine* comes very near the line; because, if the servant is acting within the scope of his regular employment, or in obedience to special orders, the fear of losing his place may take away his choice so far that he cannot be said freely to take the risk upon himself."

Compare the following remarks of the same judge in *Boyle v. New York & N. E. R. Co.* (1890) 151 Mass. 102, 23 N. E. 827. "This accident happened before the date of this statute, and here there can be no doubt that the risk was assumed by the plaintiff's intestate, so that even if his conduct was not negligent in the sense of culpable, still, as it involved danger manifest to him, he could not complain of the consequences, or argue, as it might be argued, perhaps, in some cases, under the act of 1887, that, if he acted under the fear of losing his place he did not act at his own peril, unless a jury found him to have been culpably careless."

The application of these expressions of individual opinion seems intended to be limited to cases arising under the employers' liability act. If not so limited they are in direct conflict with the specific rulings of the whole court, as noticed above.

But the Virginia court of appeals has spoken in the same sense and with no uncertain note. "The third instruction of the defendant is to the effect that an employer is released from all liability for negligence, although aware of its continued existence, if the injured employee continued to work for him after he knew of the negligent and dangerous manner in which the employer allowed his business to be conducted."

It was palpably improper. It is sanctioned neither by reason, justice, nor law. The usual and legal duty of every employer is to provide all means and appliances reasonably neces-

sary for the safety of those in his employment. It is a cruel, an inhuman, doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees who, serving him under such circumstances, are injured by his negligent acts and omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself." *Richmond & D. R. Co. v. Norment* (1887) 84 Va. 172, 4 S. E. 211.

The same view has commended itself to the supreme court of Indiana. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151, 5 N. E. 187 (duties here were outside scope of employment); *Brazil Block Coal Co. v. Hoodlet* (1891) 129 Ind. 327, 27 N. E. 741. In the latter case the court, in dealing with the contention that the plaintiff assumed the risk, said: "The complaint avers that he did this by the express command of the appellant. But, it may be said, he need not have obeyed the command. He was free to quit the service and thus avoid the danger, and that, by voluntarily continuing in the service and obeying the command, it must be presumed that he consented to take the additional risk. While in theory the employee, whose master furnishes appliances which both know are defective, is at liberty to quit the service, and refuse to be subjected to the enhanced danger, we cannot close our eyes to the fact that the necessities of the struggle for existence tend strongly to deprive the employee of that theoretical independence and freedom of action. While the service cannot be compulsory in the sense that the employee can be compelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon the one side."

In *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, the court said, in reviewing a case where a brakeman had been injured in obeying an order of his conductor which violated a rule of the defendant: "The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakemen on his train is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher official than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior, as it is a matter of universal knowledge is the true state of facts on all railroads, is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to couple cars in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency, and discharged from the service of the company? If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to mani-

fest peril, or chose to subject himself to danger when another safe mode of discharging his duty was open to him, as in *Chambers v. Western N. C. R. Co.* (1884) 91 N. C. 475."

Where the defense relied upon is contributory negligence, and it is proved that the servant was ordered to do a certain act on pain of being discharged if he refused, the action is not barred if it is shown that he did not fully appreciate the risk to which obedience would expose him. *Colorado Midland R. Co. v. O'Brien* (1891) 16 Colo. 219, 27 Pac. 701.

Or that the order was given in an exigency, and the danger to be encountered was not so glaring that a prudent man would not have risked it for the sake of a short job. *East Tennessee, V. & G. R. Co. v. Duffield* (1888) 12 Lea, 68, 47 Am. Rep. 319 (contrast the cases cited above, which illustrate the opposite doctrine as applied to the defense).

An employer is liable for injuries to a boy of fourteen years in cleaning a dangerous machine, from obeying the orders of the foreman to hurry up in such cleaning, where he is not aware of the danger, and he obeys because he thinks the foreman knows better, or he is afraid to disobey. *Tagg v. McGeorge* (1898) 155 Pa. 368, 26 Atl. 671.

Similar views seem to prevail in Quebec. *St. Arnaud v. Gibson* (1898) *Rap. Jud. Quebec*, 13 C. S. 22.

h. Fact that duty violated was statutory.

The English decisions relating to the effect of a servant's knowledge of the breach of a statutory duty to take certain specified precautions for the security of the servant have established the doctrine that, as was remarked by Bowen, L. J., and Fry, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, where a person has a statutory right to protection, the rule is that the defendant does not discharge his legal obligations by merely affecting the plaintiff with knowledge of a danger, which, but for his breach of duty, would not have existed at all.

The case referred to as an illustration of this theory was *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, which the former judge said had been so explained in subsequent decisions. These are not cited by name. One of them is *Indermaur v. Dames* (1866) L. R. 1 C. P. 274, 287, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 248. But the *rationale* of the actual ruling in *Clarke v. Holmes* is simply that the promise of the master to remedy the defective conditions prevented the inferences that would otherwise have been drawn from the servant's continuance of work.

See note to *Illinois Steel Co. v. Mann* (1897; Ill.) 40 L. R. A. p. 784.

The same point devolved of this special feature was subsequently presented in *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 180, 41 L. J. Exch. N. S. 99, where the plaintiff's decedent was caught in an unprotected fly-wheel while greasing the bearings.

The reasons of the judges are rather obscurely stated, and the difficulty of ascertaining their precise point of view is increased by the fact that the language ascribed to them in the Law Reports differs in some important respects from that found in the Law Journal. In the former the gist of the argument of Bramwell, B., is given as follows (p. 187): "It is further contended that at any rate the de-

ceased knew the danger as well as his employers. That may be doubtful in fact.

Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed." In the Law Journal the last sentence is considerably expanded, and appears in this form (p. 101): "Here the plaintiff is not placed in the dilemma which arises when the action is for a breach of a duty at common law. That dilemma is this—either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer; if it was not obvious, there was no negligence in the employer. That dilemma is not in the plaintiff's way here, for the duty is a statutory one. If the deceased dispensed with the performance of it, knowing the duty and knowing the danger, I think he would be *volens*, but not otherwise."

In the same report Channell, B., is said to have expressed his agreement with Bramwell, B., as to the distinction which he drew between an action on a breach of a common-law duty and an action on a breach of a statutory duty, and to have added: "In the latter case, if the plaintiff rushed into the danger with a full knowledge of it, he could not maintain an action for negligence; but in the present case the deceased [plaintiff], though he was *volens*, in the sense that he was at liberty to accept or reject the employment, yet he was not *volens* in the sense of being guilty of contributory negligence. If the servant, fully aware of the dangerous nature of the employment, was induced to accept it by a higher pay, then it is clear that he would be *volens*."

The statements of the Lord Justices in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, were considered by Wills and Grantham, JJ., in *Baddeley v. Granville* (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822, to be an affirmation of the doctrine that the maxim does not apply at all where the injury arose from a direct breach of a statutory obligation. Wills, J., stated that this rule had been put upon grounds of public policy, the theory being that there ought to be no encouragement given to the making of an agreement between two persons that one of them shall be at liberty to break the law which has been passed for the protection of the other. "If" said he, "the supposed agreement between the deceased [servant] and the defendant [his master], in consequence of which the principle of *Volenti non fit injuria* is sought to be applied, comes to this that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to."

There is a good deal to be said on general principles in favor of this view, but there is nothing, either in the case relied on nor in those to which it is based, to justify the sweeping rule here laid down. So far are the earlier decisions from declaring the maxim to be wholly inapplicable where the duty violated is statutory, that the arguments of the judges all as-

sume that under appropriate circumstances it would be available as a bar to an action.

Another objection to which this decision is open is that, in the series of cases beginning with *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, and ending with *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660 (referred to in various sections of this note, and *infra* in this section), the maxim has been held a valid defense under the employers' liability act of 1890. It is impossible to assert with any show of logic or reason that it should absolve the master from the consequences of the violation of the comprehensive duties imposed on him by the general terms of that statute, but that it is not a protection where he has violated a statute which simply requires the adoption of certain specified safeguards in the use of particular instrumentalities.

Most of the American decisions indulge in no refinements upon the subject, and treat the knowledge of the servant as pointing to the same conclusions, whether the defendant was or was not guilty of a breach of a positive enactment requiring the adoption of certain precautions.

Thus, in *New York* the maxim was held to be available as a defense where the servant had entered and remained in an employment knowing that his master had not complied with the provisions of the factory act (Laws 1890, p. 756, chap. 898, § 12), requiring the guarding of cog-wheels. *Kniesley v. Pratt* (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986.

The court adopted unreservedly the reasoning of the supreme court of Massachusetts in *O'MALNEY v. SOUTH BOSTON GASLIGHT CO.*, and said: "The rule as to the risks of the service, or ordinary risks, is entirely distinct from the rule of obvious risks, and if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of this statutory duty, resulting in injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks." This case was followed (as to same act) in *Graves v. Brewer* (1896) 4 App. Div. 327, 38 N. Y. Supp. 566; also in *Horton v. Vulcan Iron Works* (1897) 13 App. Div. 508, 48 N. Y. Supp. 699 (act requiring set-screws in shafts to be guarded); and in *DeYoung v. Irving* (1896) 5 App. Div. 499, 38 N. Y. Supp. 1089 (clause forbidding cleaning of machinery in motion by women under twenty-one years of age).

That the maxim, considered as an embodiment of the principle that a plaintiff is debarred from recovery if his own negligence contributed to his injury (see VIII. *infra*), constitutes a valid defense, even where the duty violated is statutory, was settled in England by the ruling that a person who, while lawfully on the premises of another, wrongfully sets machinery in motion, and is injured owing to its being uncovered, cannot take advantage of a statute requiring such machinery to be fenced. *Caswell v. Worth* (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116.

In Illinois the same doctrine has been laid down. "If," said the court, "a person knows that another is violating the law, he cannot base an action of negligence upon such presumption," that other persons will comply with the law. *Swift v. Fue* (1896) 66 Ill. App. 651 (provision requiring the guarding of machinery).

The cases bearing upon the significance of the 47 L. R. A.

fact that the action was brought for the breach of a duty presented by one of the employers' liability acts remain to be considered.

In *Weblin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, it was ruled that the employers' liability acts had taken away the general defense that the servant assumed the risks of his employment.

This view was adopted by Lord Esher in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, where he expressed his views as follows: "The first thing to consider is, What is the true construction of the employers' liability act 1890? It has been suggested that this act has only the effect of doing away with the doctrine of the immunity of the master from damages arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defense. It was no doubt held that a servant could not sue a master for injuries arising from the negligence of a fellow servant, but it was also held that a man who went into any employment undertook to take all the ordinary risks incident thereto, unless they were concealed or were known to the master, and not to the servant. It seems to me clear that the act has taken away that defense from the master. I can see no difference between contracting to take a risk upon oneself and undertaking an employment to which risk attaches. No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on a footing with other persons that defense of the master is gone. The case is reduced, therefore, to a personal action founded on negligence."

But, by the opinions of Bowen, L. J., and Fry, L. J., in the same case, it was definitely settled in England that, whether this theory of Lord Esher was correct or not, the servant's action might be barred, under appropriate circumstances, by the principle of the maxim, and the only controversy since then has been as to the circumstances which should let in this defense. The provision specially relied upon by those who contended that the statute had qualified this defense is subs. 3 of § 2, depriving the servant of the right to maintain an action where he discovered a defect and failed to notify the master. In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 666, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, this provision was thus discussed by Lopes, L. J.: "Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, deals with that clause. He says (at p. 698): 'The object of that clause is to limit the employers' liability, not to enlarge it.' I read it thus: Although, under § 1, the workman, with certain exceptions, is to be placed in a position as advantageous as, but not better than, the rest of the world who use the master's premises in his business, the workman is not to have this advantage if, knowing of any defect or negligence, he does not inform the employer as provided in that section. The object of this is to give the employer the opportunity of remedying the mischief. In fact the workman is not to have the advantages of the act unless he performs the condition precedent of making the master aware of his cause of complaint. This leaves the employers' defense of *Volenti non fit injuria* untouched by the act if he can prove it. It is said that such a construction would make the act merely a dead letter. But this is not the case. In all cases where the workman is

ignorant of the defect or negligence, and is injured by a fellow workman's negligence, 'common employment' is no longer a defense for the master in the cases specified in § 1, as it would have been before the passing of the act. It is said that the object of the act was to exclude in the specified cases the two legal inferences which were before the act to be drawn against a workman from the mere fact of his employment, *viz.*,—first, the inference that he accepted the risk of his fellow servant's negligence; and secondly, the inference that he accepted the risks which were involved in the execution of his employer's orders, 'if he in fact ran them rather than refuse to do so and thereby incur the risk of dismissal. I agree that it was the object of the act to exclude the first inference, and in the specified cases to destroy the defense of 'common employment.' But what authority there is for the contention that it was intended to extinguish the second inference, I fail to be able to discover."

The same doctrine is now established in the states where a similar statute is in force.

Lord Esher stated his views as follows: "It is very difficult to give a sensible construction to subs. 3 of § 2. The workman who discovers the defect is to give notice of it or he cannot recover. From that I infer that if he does give notice, and the defect is not remedied, he may recover. When is he to give notice? And what if the defect is not immediately remedied? Is the workman at once to refuse to incur the risk and quit the employ? That is a dilemma to which it never could have been intended to reduce the workman. I cannot help thinking that it is clearly enacted in the 3d subsection of § 2, that, if the workman gives notice of the defect, and the employer fails to remedy it, the workman's claim for compensation is valid unless he is brought clearly within the maxim *Volenti non fit injuria*."

In Massachusetts it is fully settled that the maxim constitutes a valid defense under the employers' liability act of 1887, as at common law. *O'MALEY v. SOUTH BOSTON GASLIGHT CO.*; *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100.

There is, however, the same conflict of opinion in this state as in England with regard to the question whether the mere fact of the continuance of work with knowledge of an extraordinary risk debars the servant, as a matter of law, from recovering damage, or whether such continuance merely raises a question of fact, which is primarily for the jury. The decisions bearing upon this question have been cited under appropriate heads in the general discussions in other parts of this article.

In Alabama it was held, soon after the passage of the act of 1885, that the defense of assumption of risks, as based upon the maxim, was not available, the court saying: "If it was intended in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, to apply the maxim *Volenti non fit injuria* to the case of a defect of which the employer was aware, and negligently failed to remedy, we are not willing to adopt such construction of the statute." *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146.

But these decisions were overruled in *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8, where the maxim was held to bar recovery on the ground that the servant had gone on working for a year after learning of a defect. To the same general effect, see *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547; *Louis-*

ville & N. R. Co. v. Stutts (1894) 105 Ala. 363, 17 So. 29.

This ruling was followed in *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357, where it was declared that a proper implication from the provision in the last paragraph of § 2590 of the Code of 1886, pronouncing the master not to be liable if the servant knew of a defect and failed to notify the master thereof in a reasonable time, was that contributory negligence could not be imputed to a servant merely because he continued in the service after discovering a defect, and that this consequence could be predicated only of cases in which there was also a failure to give notice of the defect in a reasonable time.

L. Necessity of proving consent to particular risk.

In *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, Lindley, L. J., said: "If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it; nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered."

In *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 680, we find Lord Halsbury also reasoning upon the same lines (p. 336 of Law Reports): "For my own part I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, 'I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents my looking out for myself.'" So, also, in a later passage of his opinion (p. 338 of Law Reports) the same learned judge remarked: "I am of opinion, myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself. It is manifest that if the proposition I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury

happened to him, and his consent, therefore, was out of the question. As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct."

This principle is sometimes important in determining the construction to be placed on a finding by a jury. A recent Canadian decision turned on the effect of an affirmative answer by the jury to the question: "Did the deceased, knowing the danger, voluntarily accept the risk of shunting?" The court said: "This at first sight might seem opposed to the answers finding negligence, because if it were to be inferred therefrom that the deceased had absolved the defendants from any duty towards him of taking care in the management of the shunting engine, then there was no breach of duty on their part, no negligence of which he or the plaintiff could complain. The defendants do not assert that the deceased was guilty of contributory negligence, which assumes or admits negligence in the first instance on their part. Their defense is rested on the application of the maxim *Volenti non fit injuria*. The deceased, they say, was assenting to all risks of shunting incident to his situation in the car, even to those incurred by their negligent or improper management of it; in other words, that they were entitled to conduct their operations without regard to the fact that he was in the car. But the answer of the jury, in my opinion, does not go as far as this. It can only be understood as affirming that the deceased assumed or accepted the risks incident to shunting, so far as the operation, when performed with reasonable care, would be intrinsically dangerous to a person in his situation, not that he assented to their managing it just as if he were not in the car. Given that the shunting was performed without unnecessary violence, such an occurrence as the shifting of the lumber was not inevitable, and here it was the unnecessary force used which produced that result, and thereby caused the death of the deceased. It is a question of fact in every case in which the maxim is invoked, what risks were accepted, and it ought to be very clearly made out that that of negligence was one of them. See Pollock's Law of Torts, 3d ed. p. 154. There is no evidence here that it was, and the jury have not said so; the question and answer must therefore be rejected as irrelevant." *Hurdman v. Canada Atlantic R. Co.* (1895) 22 Ont. App. Rep. 292.

1. Circumstances indicating master's acceptance of the responsibility.

In some instances the evidence may justify the inference that it is the intention of the master to make himself answerable for any injury that the servant may receive. Under such circumstances the legal situation is simply that the master is deemed to have surrendered any right he might otherwise have had to protect himself by the maxim.

Thus, nonvoluntary action may be properly inferred by a jury if it is proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, per Lindley, L. J.

Such an acceptance of the responsibility may sometimes be implied from the conduct of the master, as where he directs the servant to perform labor to which he is not accustomed, af-

ter the foreman of the work has sent him back for the reason that he is not deemed sufficiently strong. *Alberts v. Bache* (1890) 32 N. Y. S. R. 1014, 10 N. Y. Supp. 639.

VIII. Negligence of the servants of a person other than the plaintiff's employer not a risk assumed.

Since a servant who is working in a place where he is exposed to the risk of injury from the negligence of the servants of another person can very rarely be ignorant of the peril thus incurred, it would seem that, upon a strictly logical application of the doctrine discussed in the preceding sections, it should always, in a case where an injury results from this cause, be considered at least an open question of fact, whether, by virtue of the principle expressed in the maxim *Volenti non fit injuria* he assumed the risk of such an injury.

This consideration has been allowed its full weight where the servant is seeking indemnity from his own master.

Thus, it has been held that the servant of a railway company assumes, as one of the ordinary perils of his employment, the risk of injury through the negligence of the servants of another company which is operating trains upon the same line under a lease. In such a case the fact that there is no common employment is not material. *Clark v. Chicago, B. & Q. R. Co.* (1870) 92 Ill. 48 (action against lessor).

But in cases where the servant is suing one who is not his own master, the courts have viewed the rights of the parties from another standpoint, the accepted doctrine being practically this, that the fact of a plaintiff's being in the position of a servant, and engaged upon the same work as the servants of the defendant, is not a sufficient ground for putting him upon a footing different from that upon which any other stranger would stand in an action against the same defendant for injuries caused by the negligence of his servants; that is to say, as the mere general knowledge that the servants of a person with whom a stranger is brought into contact in the transaction of everyday life may act negligently has never been considered to involve the corollary that he accepted the risks of the situation, so the rule is now well settled, both in this country and in England, that "unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the defense of common employment is not open to him." *Johnson v. Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, *Reversing L. R. 23 Q. B. Div. 508.*

The decision in *Wiggett v. Fox* (1856) 11 Exch. 832, 25 L. J. Exch. N. S. 188, 2 Jur. N. S. 955, was disapproved in so far as it might be held to have countenanced a different doctrine, but was explained as being intended to rest upon the ground that the control exercised by the defendant over the plaintiff was such as to make the latter his servant. *Woodhead v. Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. (4th Ser.) 469 (see *infra*), in which it had been categorically held that, in cases of common employment under different masters, each master is exempt from liability for injuries inflicted upon the workmen of other masters by the negligence of his servants, was overruled.

In other words, the doctrine of common employment "applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed." *Smith v. New York & H. R. Co.* (1859) 19 N. Y. 127, 132, per Selden, J.

To the same effect, see *Chicago, St. P. & K. C. R. Co. v. Chambers* (1895) 68 Fed. Rep. 148, 82 U. S. App. 253, 15 C. C. A. 327; *Cleveland, C. C. & St. L. R. Co. v. Kernochan* (1896) 55 Ohio St. 308, 45 N. E. 531; *Poor v. Sears* (1891) 154 Mass. 539, 28 N. E. 1046; *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101; *Reagan v. Casey* (1894) 160 Mass. 374, 36 N. E. 58; *Svenson v. Atlantic Mail S. S. Co.* (1874) 57 N. Y. 108; *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. (3d Ser.) 282; and the cases cited in the note to *Hardy v. Shedden Co.* (1897; C. C. A. 6th C.) 37 L. R. A. 33.

Indermaur v. Dames (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 248, has also been said to have decided that, as between the owner of machinery and those who are sent by their masters to repair it, there is no implied contract that the workmen so sent take upon themselves the risk of injury from the negligence of the servants of the owner of the machinery. *Blackburn, J.*, in *Smith v. Steele* (1875) L. R. 10 Q. B. 125, 44 L. J. Q. B. N. S. 60, 32 L. T. N. S. 195, 23 Week. Rep. 388.

The principles upon which this rule rests have been variously explained, as the following passages show:

In *Swainson v. North-Eastern R. Co.* (1878) L. R. 3 Exch. Div. 348, 47 L. J. Exch. N. S. 372, 38 L. T. N. S. 201, 26 Week. Rep. 413, Lord Bramwell said: "We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relationship has been established between the person who complains and the master of the person who does the injury."

This passage was referred to with approval by Lord Herschell in *Johnson v. Lindsay* [1891] A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644, whose point of view is further indicated by the following extract from his opinion: "It is obvious that, if the exemption [i. e., that created by the doctrine of common employment] results, as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has more than once been laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servant's negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative, and to be implied from the relation of master and servant created between the parties."

In the same case Lord Watson stated his views as follows: "I am also unable to assent to the legal doctrine which found favor with the divisional court, and was pressed upon us in the argument for the respondents. I do not agree with Baron Pollock, that the rule which exempts a master from liability to his servant for in-

juries negligently occasioned by a fellow servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. The master's responsibility for his servant's acts has its origin in the maxim *Qui facit per alium facit per se*, which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master."

The following passages from the dissenting opinion in the Scotch case of *Woodhead v. Gartness Min. Co.* (see *supra* and *infra*) are also worthy of notice, since, as already noted, the judgment of the majority of the court was overruled by the House of Lords.

"When servants work under the same master, they are working in one interest, and for the benefit of the same man. They are appointed and paid by the same man, and the same man is responsible for them. I take it that this element in a common contract of service lies at the root of the exception based on it. The same person is responsible for the conduct of the servants towards third parties, and he is also responsible to his own servants that each shall be chosen with reasonable care. In common service each servant represents the same master. But when two persons enter into a contract for the execution of work to be done either by the servants of both or by the servants of one, there is no such identity of relations or interest. Each party to the contract is liable for his own servants, but he is not liable for the servants of the other. The servants of each work for the interest of their own master, and represent him only. As neither selects the servants of the other, neither can have any responsibility as to their qualifications. And thus it is fixed, first, that neither is liable for the neglect of the servant of the other party to the contract, and, secondly, that each is liable for the neglect of his own servant if the servant of the other is thereby injured. . . . When two persons enter into a mutual independent engagement that a certain operation shall be performed either by both jointly, or by one on the premises of the other, and that for a valuable consideration, neither can complain against the other of the accidental consequences of the act, for they have both agreed that it shall be done. But each is bound to the other that his part of the contract shall be carefully and skilfully performed, and is, of course, liable for negligent and unskilful performance; and this liability is incurred to everyone who is lawfully engaged in the execution of the contract for the behoof of the other party to it. The negligence of one of the parties to the contract in its execution is not an intident of the contract, but a breach of it. The law on this head is clearly settled."

"The ground of exemption of the master in all these cases [i. e., where the servant is suing his own master] is the privity of the contract between him and the person injured, from which the law presumes an agreement between them, for a compensation equal to the risk or peril of the service. If, therefore, the plaintiff in this case was not, in any legal sense, the servant or employee of the defendants, but was the servant or employee of another, and there was no privity between him and the defendants, the decisions referred to do not apply, and the defendants must be liable, upon the general rule,

to the plaintiff, the same as to any other stranger. The defendants can claim no benefit or exemption from a contract made between the plaintiff and another party, whatever risks he may have assumed, as between himself and his employer." *Young v. New York C. R. Co.* (1859) 30 Barb. 229, 235.

"The general rule is responsibility by the master for the negligence of his servant in the performance of his work from which injury results to another. This liability does not arise from contract, but springs from a breach of that duty which each member of the community owes to each other member. It may, it is true, be limited by contract; and where one enters into the service of another the contract of service is held to imply a release under certain circumstances of responsibility by the master for the negligence of fellow servants. But what room is there for the application of this rule as between parties who do not stand in any contractual relation? Or why should a fanciful and imaginary contract be made and supplied by the courts to relieve from liability? That an occupation is dangerous does not make it unlawful; nor is negligence lawful because occurring in a dangerous enterprise. If my business calls me to cross a dangerously crowded street, the circumstances under which I am placed demand a greater care and the exercise of greater watchfulness to avoid danger, falling in which I may be denied an action against another who has also been guilty of the same negligence. But suppose I do exercise all the prudence which my situation requires. Shall I then, who am innocent, be ridden down by one who is negligent, and when appealing to the law for redress be answered that I took the chances of injury? And if I may recover against the person by whom the injury is inflicted, why may I not hold to a like responsibility him whose servant inflicted it? It devolves upon those who advance this view to show some rule of law which relieves the master of the negligent servant, and if any such rule exists it has not been pointed out in a single case to which we have been referred. We understand the law to be that one who engages in a dangerous enterprise assumes the risk of such injuries as he may receive provided they are not caused by the negligent, and therefore unlawful, act of another. But dangerous occupations demand a correlatively greater care on the part of all persons engaged in them, and one guilty of a want of that care which the law imposes on him, and resulting in injury to an innocent person, cannot escape the obligation of making reparation to the innocent by showing that the service in which he was engaged was in itself of a dangerous character, for *non constat* that the injury would have resulted in the dangerous service if the defendant himself had used that care which the very danger required him to observe. But it is said, by engaging in a common work the servants of the employer and those of an independent contractor, or the servants of two independent contractors, become fellow servants. This is a pure, simple, and arbitrary assertion; a fanciful doctrine, invented to subvert some supposed public policy or to limit the operation of a well-recognized rule which judges have thought in particular cases it would result in some hardship to enforce. Suppose the plaintiff, Conroy, had gone to the defendant company and said to it: 'Your engineer is a careless and negligent man; I am unwilling to serve with him, and I ask you to discharge him?' Would not the reply have been 'We have nothing to do with you; we did not engage you; we cannot discharge you; you are not liable under any contract to us; we are not responsible for you nor to you?' 47 L. R. A.

The plaintiff would have then gone to McDonald, who had employed him, and made the same complaint. McDonald would have replied, and properly: 'I have nothing to do with the engineer; I did not select him; I cannot discharge him; I do not control him; I am not responsible for him.' The relationship seems to begin just where the master invokes it for his protection, and ends just where the servant invokes it for his. It has no foundation in justice, reason, or the analogies of the law; it screens the guilty and denies to the innocent reparation for unlawful injury." *Louisville, N. O. & T. R. Co. v. Conroy* (1886) 63 Miss. 562, 573, 56 Am. Rep. 835.

In *Zeigler v. Danbury & N. R. Co.* (1885) 52 Conn. 543, where it was contended that the servants of two railway companies used the same line, the court said: "No consideration of public policy will sustain this defense, because the public are not at all interested in the question as they are in questions concerning inn-keepers and common carriers. They are only interested to have the law justly and fairly administered. No considerations of justice will sustain it, because the plaintiff had no relation whatever to the negligent conductor. It was not his duty to observe his conduct, he had no opportunity to do so, and no opportunity to guard against the consequences of his negligence."

In Illinois the reason assigned for denying that the doctrine applicable to cases in which one servant is injured by the negligence of a co-servant has any pertinence where the action is against a person other than the common employer of the two servants, is that, if the injury was caused by the co-servant, that is simply equivalent to saying that he was not injured by the negligence of the defendant. *Chicago & E. I. R. Co. v. O'Connor* (1887) 119 Ill. 586, 9 N. E. 263.

To the same effect, see *Pennsylvania Co. v. Backes* (1890) 133 Ill. 255, 24 N. E. 563 (servant of mill company loading freight on cars of railroad company), denying the significance, in this connection, of the fact that one of the risks of his employment was exposure to such injury.

A situation which, as regards parties, is exactly the reverse of that presented by the above cases arises when the action is brought against a stranger and the defense is that the injury was partly caused by the negligence of the plaintiff's own fellow servants. Cases of this type are usually discussed with reference to the doctrine of imputed negligence, the accepted theory of late years being that the defense in question is not a bar to the action, for the reason that the negligent servant is not the agent of the injured servant in such a sense that the latter can be made responsible for the defaults of the former. *Adams v. Glasgow R. Co.* (1875) 3 Sc. Sess. Cas. (3d Ser.) 215; *Chicago, St. P. & K. C. R. Co. v. Chambers* (1895) 32 U. S. App. 253, 68 Fed. Rep. 148, 15 C. C. A. 327; *Abbott v. Lake Erie & W. R. Co.* (1895; Ind.) 40 N. E. 40; *Poor v. Sears* (1891) 154 Mass. 539, 28 N. E. 1046; and the cases cited in the note to *Hardy v. Shedden Co.* (1897; C. C. A. 6th C.) 37 L. R. A. 33.

But a similar result has also been arrived at by reasoning which is quite similar to that employed in the cases referred to in this section of the present note.

Thus, in *Perry v. Lansing* (1879) 17 Hun, 34, where the pilot of a steamer who was injured by its coming into collision with another steamer, owing to the negligence of both crews, was allowed to recover against the proprietor of the second steamer, we find the court saying: "The rule applicable, as between servant and master, is well known. The servant cannot recover of

the master for injuries occasioned by a coservant in the same general employment. That risk he assumes when he enters into the employment. But has this principle any application to an action for injuries against a third person not the master? Though the servant may not maintain an action against his master for an injury arising from the negligence of a fellow servant, does it follow that he may not have an action against a third person for an injury occasioned by such third person's negligence, because some coservant has been guilty of negligence contributing to the injury? No such rule can be found so far as I have been able to discover. Between the master and servant there is an implied contract that the servant shall assume the risks of the employment. For this reason the liability does not exist. But there is no such relation between the servant and a stranger. As between them, the servant has not waived his remedy if a coservant has been guilty of contributory negligence. The proximate cause of the injury is the act of the stranger. Why should he be shielded from damages because some person, no way related to him, has failed to exercise the requisite care to prevent plaintiff's injury?"

The English employers' liability act of 1880, being intended merely to remove a defense which is based on the assumption that the relation of master and servant exists between the plaintiff and defendant, has no application to a case where that relation does not exist, as between the employer of a contractor and the contractor's servants. *Robertson v. Russell* (1885) 12 Ct. of Sess. Cas. (4th Ser.) 634.

The principles established by the foregoing cases may fairly be described as an arbitrary limitation upon a rule which is itself based on nothing more substantial than a purely fictitious implication. Considering the intolerable amount of injustice produced by the defense of common employment, it is far from being a subject of regret that the courts should have restricted that defense to cases where the negligent and the injured servants are hired by the same master. But it is impossible to deny that the situation would logically be far more satisfactory if the exception thus ingrafted on the main doctrine had been referred immediately to what is, in the last resort, the only solid foundation which can be suggested for the doctrine itself, *viz.*, public policy. *Chicago M. & St. P. R. Co. v. Ross* (1894) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184. Even supposing,—and that is by no means a necessary concession,—that the theory of an implied agreement is inapplicable, simply and solely because the action is one between a plaintiff and a defendant between whom there is no privity of contract, there are no apparent reasons, apart from such as may be deduced from public policy, why the principle expressed in the maxim *Volenti non fit injuria* should not be allowed, under appropriate circumstances, to constitute a valid defense. It is a manifest inconsistency to allow that principle to operate as a bar in such cases as *Woodley v. Metropolitan Dist. R. Co.* (see VII. b, *supra*) and to deny it that effect, where the risk is as obvious as it was in *Johnson v. Lindsay* (see *supra* in this section) and similar cases.

The present writer has offered some remarks upon the inherent weakness of the position taken up by the courts on this subject in the note to *Hardy v. Shedden Co.* (1897; C. C. A. 6th C.) 87 L. R. A. 33, 37, and also in an article on the application of the maxim *Volenti non fit injuria* published in the *American Law Review*. From the latter the following passage is extracted (Vol. 32, pp. 64-66): "This uncertainty [i. e., whether it is referable to contract or to the

maxim] concerning the foundation of the doctrine of the acceptance of risks is usually of slight importance; for in most instances the use of the maxim must necessarily lead to the same conclusions as those which would be reached through the conception of an implied contract. But to this rule there is one notable exception which has not received so much attention as it deserves. As a result of following out the doctrine that an assumption of risks is a matter of contract, a principle which could never have found acceptance,—at least in the shape we now find it,—if the courts had referred their decisions to the maxim alone, is now firmly imbedded in the law of master and servant. The rule is well settled, both in England and in the United States, that the defense of common employment is not open to the employer of a servant who by his negligence has injured another person occupying the position of a servant and engaged upon an enterprise inuring to the benefit of such employer, but working, at the time of the accident, under the control of another master. The narrow ground taken is that, to let in this defense, there must be, not only a common employment, but a common master, and the language of the judges shows quite clearly that it has resulted from dealing with the assumption of risks, solely from the standpoint of an implied contract, and ignoring the possible applicability of the maxim which is obviously suggested by most cases of this type, inasmuch as the servant, whenever he is exposed to danger from this source, can scarcely ever be unaware of the fact. Here there is no difficulty in conceding that no implied undertaking to learn the risks arising from the negligence of the servants of the person can be imputed to an employee whose only contractual relations are with another person. But unless the pertinence of the maxim in such cases is to be wholly denied,—and there is no apparent reason why it should be,—the consideration relied upon is not necessarily conclusive. As long as cases like *Woodley v. Metropolitan Dist. R. Co.* (1877) L. R. 2 Exch. Div. 384, 46 L. J. Exch. N. S. 521 (see VII. b, *supra*), where the wider rule embodied in the maxim was permitted to defeat the action of a contractor's servant who claimed damages from the contractor's principal, the reason assigned being that the plaintiff continued to work with a full knowledge of the dangers to which he was exposed, are not explicitly disapproved, the law stands in this curious position—that, where a servant is injured by the negligence of one who, though a stranger, stands in such a relation to the servant's master that his negligence will not improbably augment the risks of the employment, the defendant is at least entitled to go to the jury on the issue whether the plaintiff's action is barred for the reason that he fully appreciated the perils to which the possibility of such negligence exposed him; while, on the other hand, it is a rigid rule that the most complete appreciation of the danger to which he is exposed by the negligence of the employees of that stranger will not debar him from recovering damages for injuries caused by the negligence of one of them."

How little there really is to choose, upon purely logical grounds, between the accepted and rejected doctrines is shown in a very striking manner from the following extracts from the opinions of eminent English and Scotch judges.

In *Johnson v. Lindsay* (1889) L. R. 23 O. B. Div. 508, 518, 58 L. J. Q. B. N. S. 581, 38 Week. Rep. 119, Fry, L. J., whose views differed from those of the other members of the court of appeal, but were those which prevailed in the House of Lords (see above), propounded the question, "What is the duty of a master who

does not personally execute the work towards a workman not in his employ, but who, as the servant of another master, is to take part in the common enterprise?"—and proceeded thus: "I know of no authority which answers that question. But I find that in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 332, Lord Cairns has indicated a difference between the duty of a master to the general public and to a servant. In the case of the workman there is the element of free will; in the public there is not. Lord Cairns says: 'At all events a servant may choose for himself between serving a master who does, and one who does not, attend in person to his business.' So, a man may choose between taking part in an enterprise in which there is the co-operation of masters who employ servants, and not taking part in such enterprise. If he do voluntarily take part in such an enterprise he cannot complain of the master who does all he can, who chooses competent servants, and supplies them with fitting materials and appliances. This view would have presented itself to me if there had been no decisions before me but *Wilson v. Merry*. But it is, so far as I know, to be found in no other authority, and it is obvious that to adopt it would have far-reaching consequences, and would, I think, overrule some old cases, such as *Bland v. Ross* (1860) 14 Moore, P. C. C. 210. I do not, therefore, feel at liberty to adopt it."

In *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. (3d Ser.) 282, it was argued that the defense based on common employment should, on principle, be applied to circumstances where though the parties are not fellow servants, their work is such that risk from injury to one from the negligence of the other is a natural and necessary consequence of the employment. This contention did not prevail, as the court felt itself bound by the authorities, and therefore not in a position to settle the question on purely scientific grounds. But the following extract from the opinion of Lord Moncrieff indicates clearly the trend of judicial thought in Scotland at that time.

"In this case, the plea of the defender entirely repudiates the idea of contract between master and servant, as the ground of immunity. He says that the rule does not rest on an implied contract on the part of the servant, but on a wider principle, which renders the master in a much larger class of cases only liable for his own acts, and the selection of proper persons to do the work. Whatever I may think of the ground on which the rule has been rested, or however willing I might be to see the exemption of the master placed on a more general footing, I can find no authority which has laid down any such rule for our guidance. It might have been sounder to measure the liability of the master by the proper legal incidents of his own position rather than by an artificial and rather fanciful implication of a tacit contract, which hardly affords a solid foundation for the result deduced from it. That a workman undertakes the risks of the employment is only true in the sense in which it is true that everyone who contracts takes the ordinary risks incident to the fulfilment of his contract. He does not thereby engage to liberate others from their legal liability to him. He does not engage to free the master from the consequences of his own neglect, nor is it easy to see why he should be supposed to intend to liberate him from the consequences of acts which the law assumes to be his. It is true also of the master in his contract with his workmen; and he who employs twenty workmen may be justly said to know and take the risk of his liability for the negligence of each of them. That is truly an ordinary risk of the employment 47 L. R. A.

of laborers. But under color of the phrase an "ordinary risk" there has been spelt out the contract of service a special contract of liberation or indemnity under which the workman is held not so much to undertake a risk as to free from responsibility those whom otherwise the law would have made liable to him. But the more artificial the rule, the more necessary it is that we should strictly adhere to it; and if we were once to decide that this implied contract was not the foundation of the rule, I do not see that we could stop short of what would be a more scientific rule, liberating the master in all cases in which he had been guilty of no personal neglect." *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. (3d Ser.) 282.

Eight years later came *Woodhead v. Gartness Min. Co.* (1877) 4 Sc. Sess. Cas. (4th Ser.) 469, overruled by *Johnson v. Lindsay* (1891) A. C. 371, 65 L. T. N. S. 97, 55 J. P. 644 (see *supra*), and in the interval the judges had gathered sufficient courage to disregard the authorities and treat the question upon what they deemed a scientific basis. The considerations which led the court to the conclusion that, in cases where the servants of different masters are co-operating in the execution of the same work, each master is exempt from responsibility for injuries inflicted upon the servants of other masters by the negligence of his servants, will be apparent from the following extracts from the opinions:

"As a result of the whole of the authorities," said Lord Ingles, "it appears to me that one of the conditions subject to which every man must become a member of one of these great organisations (for mining or manufacturing purposes) is that he shall take on himself all the perils naturally incident to the work he undertakes without looking to anyone else to guarantee him against or indemnify him for injury sustained from the occurrence of such peril. This does not interfere with the principle of personal liability for the consequences of personal wrong or negligence, but it excludes all notions of what, for the sake of distinction, I shall call secondary responsibility."

"If two miners are employed and paid by the same master, and, while they are hewing at one working face, the one by negligence injures the other, the master is not answerable because it is said they are engaged in a common employment—that is to say, they are engaged in the same work as servants of the same master. But if the legal principle were applicable to this case only it would cease to be a principle and degenerate into a mere artificial and arbitrary rule. It is not because the wrongdoer is in a technical sense the servant of the same master that the master is not answerable. It is of no moment to the injured workman whether his injury be caused by a servant of the same master or by one who has undertaken some function in the mine upon what is called an independent contract. The injury in either case is the same. The personal liability of the wrongdoer is the same. But the mine owner is freed from responsibility, not because the injured and injurer are both his own hired and paid servants, but because he is not personally in fault and has not warranted the injured workman against the perils of the work.

"The whole persons engaged in a mine form one organisation of labor for one common end (however different their functions may be), and are all subject to one general control, exercised by the mine owner or those to whom his authority is delegated. . . . To such a community as this, and to its individual members, the mine owner is under certain well-defined obligations, but to hold that his obligations and liabilities to the individual workmen depend on

whether they are technically his servants employed by a contractor for piece work in some limited portion of the mine, while it would be inconsistent with legal principle, would also, I think, introduce great confusion where it is desirable that everything should be as clear as possible."

"If a committee of the British Association," said Lord Moncrieff, "choose to go down a mine, they must take the safeguards of the mine as they find them. It would be an entirely different thing if the owner had engaged, for ordinary professional remuneration, the services of a medical man to visit the pit periodically. The distinction manifestly lies in the element of contract and valuable consideration. I do not say, and the reverse has been held, that the moral obligation implied in invitation or encouragement may not amount in special cases to legal obligation. But that requires some element equivalent to a direct undertaking. It is apparent that the principle of presumed acceptance of the risk which obtains in the case of fellow servants has a much wider application. But it has no place in cases of onerous contract."

This decision was followed in *Wingate v. Monkland I. Co.* (1884) 12 Sc. Sess. Cas. (4th Ser.) 91 (where an apprentice of a firm of mining engineers was injured by an explosion due to the negligence of a servant of the mine-owner), and in *Maguire v. Russell* (1885) 12 Sc. Sess. Cas. (4th Ser.) 1071, overruled by the House of Lords (where a workman in the employ of one who had contracted to do the plumbing work of a building was held to be engaged in the same work, and therefore to be the fellow servant of a workman hired by a firm to lay the cement flooring in the same building).

In the former of these two cases the court took the broad ground that the rule as to an implied assumption of a risk is not restricted in its application to the case of fellow servants, but is a bar to recovery in the case of a member of a master's family, or of a friend who may be driving with him, or of any person who places himself by contract or otherwise voluntarily in such a relation to the master that he must be held to have taken upon himself the risks incidental to the position.

The supreme court of Pennsylvania has held that the question whether the negligence of the mate of a ship which is being unloaded by a stevedore is one of the risks assumed by a laborer working under a stevedore is a question for the jury, the answer to which depends upon what shall be ascertained to be their relations to each other, the extent to which they are brought into contact, and to which they are engaged in a common employment, and the connection of the duties of each with the duties of the other. *Mullan v. Philadelphia & S. Mail S. S. Co.* (1875) 78 Pa. 25, 21 Am. Rep. 2.

In *Michigan C. R. Co. v. Leakey* (1862) 10 Mich. 193, the court was equally divided on the question whether the servant of a contractor assumed the risk of the negligence of the servants of the contractor's employer. That there is no such general rule as to isolated acts of negligence may now be taken as settled, though the principle may undoubtedly be applied to cases where the contractor's servant has gone on working with a knowledge of some special danger to which he is continuously exposed from the want of proper precaution on the part of the contractor's employer. In the *Michigan* case the agents of the company knew of the conditions which threatened to cause injury, and the contractor's servant did not.

So, it has been held in Arkansas that a person engaged in the service of a railroad company

as car inspector, with a full knowledge of the dangers incident to the service, who is injured while in discharge of his duties by an engine of another company running over the same tracks at the station for making up its trains, by lease from his employer, through the negligence of the engineer of the lessee company in running the engine, cannot recover damages from the company employing him. *Bauer v. St. Louis, I. M. & S. R. Co.* (1885) 46 Ark. 388.

IX. Relation of the maxim to the defense of contributory negligence.

The older authorities construe the maxim as covering the defense of contributory negligence as well as assumption of risks. *Griffiths v. Gidlow* (1858) 8 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404; *Senior v. Ward* (1859) El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; *Caswell v. Worth* (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116; *Byam v. Bullard* (1852) 1 Curt. C. C. 100, Fed. Cas. No. 2,262. See also *Broom's Legal Maxims*, *268.

The same view seems to have been adopted by Lord Watson in the passage quoted in III. *supra*.

Compare also the language of Channell, B., in *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 180, 27 L. T. N. S. 125, 20 Week. Rep. 525, 41 L. J. Exch. N. S. 99 (as reported in the latter only), and the statement that it is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence. *Indianapolis & St. L. R. Co. v. Watson* (1887) 114 Ind. 20, 15 N. E. 824.

One of the most eminent of modern English judges, however, has recently enunciated a different theory. In *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 697, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 85 Week. Rep. 555, 51 J. P. 516, Bowen, L. J., after referring to the principle expressed by the maxim as being "outside the principle of contributory negligence altogether," explained his position as follows: "Contributory negligence arises when there has been a breach of duty on the defendant's part, not where *ex hypothesi* there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that, under the old form of pleading, the defense of contributory negligence was raised in actions based on negligence under the pleading of 'not guilty.' It was said, and said rightly, in *Weblin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, that in an inquiry whether the plaintiff has been guilty of contributory negligence the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of *Volenti non fit injuria* stands outside the defense of contributory negligence, and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only

on a subsequent investigation into contributory negligence."

The present writer ventures to think that, in this argument, the learned judge has shown less than his usual acumen and clearness of legal insight. In the case he was discussing the finding which negated contributory negligence had reference merely to the conduct of the plaintiff at the time the accident occurred. But manifestly this is not the only description of contributory negligence which constitutes a possible factor in the determination of the right of parties to such actions. Want of care may be shown, not only by a failure to observe the precautions appropriate to be taken at the moment when the injury was received, but by the fact that the plaintiff remained in a situation in which there was a probability of his being, sooner or later, injured, owing to the existence of a certain known peril, although he might be in the exercise of due care at the moment when an immediate necessity for avoiding that peril arose. If the probability of being thus injured was so great that a prudent man would have declined to expose himself to the danger, the supposed case is evidently one in which the injured person would be guilty of contributory negligence and chargeable with the legal consequences of that kind of culpability. Here we have voluntary and deliberate action,—“intelligence choice,” in fact, to use the very words of Lord Justice Bowen,—and no sound reason can be suggested why the maxim should not be held applicable under such circumstances. With all deference, therefore, it is submitted that this distinguished jurist has fallen into an error, and that his error is accounted for by his having failed to take into account one of the possible aspects under which the evidence before him might have been viewed.

Other eminent authorities seem to have made a similar mistake.

“Independently of any relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care. In other words, it may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so when the danger arises from the known or apprehended neglect or carelessness of others.” *Miner v. Connecticut River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994. There the action was to recover damages for the death of a horse which was frightened by a moving locomotive while standing in a railway yard, and backed itself and a wagon over the edge of an unprotected embankment. The court held that where there is evidence that a plaintiff’s employee knew and appreciated the danger which caused the injury complained of it is error to refuse a ruling that, if the jury should find, independently of any question of contributory negligence, that the plaintiff’s employee with full knowledge voluntarily assumed the risk, or intentionally took it upon himself, the verdict should be for the defendant. “The principle,” said the court, “that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances.”

47 L. R. A.

In his work on Negligence (§ 182) Wharton lays it down that “negligence . . . necessarily excludes a condition of mind which is capable either of designing an injury to another or of agreeing that an injury should be received from another.”

As to the former of the alternatives here presented, it is submitted that the learned author misconceives the situation. The true theory, we take it, is that, in cases where design can be proved the question whether the actor was imprudent or not is wholly immaterial and does not appear as an element in the problem. A similar remark applies to the latter alternative. A plaintiff naturally chooses what he considers to be the surest ground upon which to found his action, and if he can establish a specific agreement by the defendant, it will clearly be a gratuitous piece of folly to desert this vantage ground and allow the controversy to be fought out with reference to the vague standards which are alone available for determining whether an act is negligent or not.

The present writer is still of opinion that the connection between the maxim and the defense of contributory negligence and assumption of risks is that which was thus suggested by him in the article already referred to more than once (see p. 58): “This theory [i. e., that which separates the defense given by the maxim from that of contributory negligence] clearly finds no warrant in the words of the maxim themselves, for the idea underlying them is simply that of voluntary action which incapacitates the actor from maintaining a suit for damages in a court of law against some person who would otherwise be amenable to such suit. No other quality is predicated of the disabling action than that it should have followed an unconstrained exercise of the actor’s will. Nor can such a theory be made to harmonize with any juristic concept of negligence; for a want of care, although it may, merely as a matter of abstract metaphysics, be predicated of an action induced by coercion, cannot, without doing violence to one of the fundamental doctrines of all systems of law, be recognized as a factor in the practical determination of legal rights, unless the negligent person was a free agent.”

Thus, it is held that negligence cannot be predicated of the act of a sailor in obeying without remonstrance the order of his superior to operate a dangerous uncovered winch, where disobedience of the orders would, under the ship’s rules, subject him to punishment, and would also, under the law of the forum, subject him to imprisonment and forfeiture of wages. *Eldridge v. Atlas S. S. Co.* (1892) 134 N. Y. 187, 32 N. E. 66. In the opinion of the majority it was said: “The defendant insists that the command to operate this dangerous winch was not lawful, and therefore the plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that plaintiff’s obedience was negligence. For, whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff ‘was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined.’ Grant that the plaintiff had been so learned in the law as to know that the courts would ultimately decide the command was unlawful, and disobedience to it lawful, he could know no way of escape from the ship’s punishment of his disobedience, for there was none. The jury found in effect that he was coerced,

through fear of punishment, into obedience. If the command was unlawful, the defendant's case is not improved by the fact that the punishment it would visit upon disobedience was also unlawful. In any event the plaintiff was in a dilemma. He had to choose between present punishment with a possible hope of remote justification, and customary obedience to orders with the hope that by care he would escape injury. Grant that he made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury upon consideration have refused to do so. We cannot hold that their refusal was error." The dissent was on the ground that it was not necessary to consider whether the servant was or was not negligent in obeying the specific order which led to his being injured, as an assumption of the risks incident to the use of his master's appliances in the condition in which they were might be implied from his acceptance of the service.

Compare with this case the rulings in which the injured person's will is destroyed by actual terror (*Wells & F. Co. v. Gortorski* (1893) 50 Ill. App. 445); or a servant with much experience undertakes a dangerous duty, after persistent urging on the part of a superior servant coming within the description of vice principal (*Shadd v. Georgia, C. & N. R. Co.* (1895) 116 N. C. 968, 21 S. E. 554); or a servant is absolved from contributory negligence on the ground that his capacity for intelligent choice was destroyed by confusing orders (*Williams v. Church* (1884) 137 Mass. 243, 50 Am. Rep. 804, where the court, while accepting the principle, held that the evidence did not justify its application). See also, generally, the cases cited in VI. *supra*.

"It has been thought by some that the maxim properly covers those cases alone in which deliberation precedes action, while contributory negligence implies that the plaintiff has acted without deliberation. [This theory seems to be the basis of the following ruling: A plaintiff who not only carelessly seeks and remains in a place of danger, but remains there in disobedience to directions given him and despite of warnings which he received, consents to any injury he may receive. Such a case goes beyond the operation of the rule on the subject of contributory negligence, and comes within the scope of the maxim. *Aufdenberg v. St. Louis, I. M. & S. R. Co.* (1896) 132 Mo. 565, 34 S. W. 485 (a case of a passenger riding on top of a box car)]. A very little consideration, however, will show that the defenses cannot be differentiated upon this footing. A man may bestow the most anxious thought upon the solution of the question whether he will encounter a certain risk, and yet if his ultimate action in electing to expose himself to that risk would be pronounced imprudent by the average sense of the community, the law certainly charges him with the guilt of negligence. The present writer ventures to think that the *rationale* of these two defenses, so far as the maxim is concerned, is simply this—that, where the maxim is relied on, the plaintiff's mental condition prior to the adoption of the course of conduct which proved hurtful to him is the particular matter upon which his right of recovery is made to depend, while the plea of contributory negligence brings into the foreground the more special consideration that the course of conduct so adopted, or some particular act done after the plaintiff had committed himself to that course of conduct, was of such a character as to show that he was wanting in due care, and that this carelessness was the true proximate cause of the accident. In other words, the maxim stops with the pre-

liminary question whether the plaintiff's will was exercised freely and without constraint, while the defense of contributory negligence concerns itself rather with the subsequent question, whether the behavior of the plaintiff, in the situation in which he placed himself by the exercise of his will, was or was not that of a prudent man. As, however, the law takes no account of a mental attitude, except in so far as it may express itself in overt acts, it is evident that, although the freedom of the will is the point emphasized by the maxim, the inquiry, whether it is applicable in the premises, really projects the view forward to the same circumstances as those which suggest the farther inquiry whether the plaintiff was negligent. Add to this the fact already alluded to, that, in the practical administration of justice, negligence can only be predicated of a voluntary agent, and it will be apparent that, for the purpose of gauging the servant's rights, the defense that his action was voluntary and the defense that it was negligent should rather be regarded as the expression of two conceptions which are both comprehended under the maxim, than referred to two distinct ideas, one of which does, and the other of which does not, lie within its scope. A circumstance which goes very strongly to support this view of its effect is that any state of facts which suggests its availability as a defense will usually be such that the pleader may rely either upon a general acceptance of the risks of the situation, or upon the theory that the conduct of the plaintiff, in continuing to expose himself to those risks, or in doing that particular thing from which his injury resulted, was guilty of contributory negligence." 32 Am. L. Rev. pp. 58-60.

X. *Bearing of the servant's knowledge upon the question whether he was negligent.*

The legal significance of evidence that a servant went on working with a knowledge of the abnormally dangerous conditions which caused his injury is necessarily not the same where the defense is a voluntary assumption of the risk as where the defense is contributory negligence. In the one case the essential factor in the problem is the mental condition of the plaintiff himself at the time of his making a choice between the alternatives of remaining in and quitting the service. In the other case the question to be determined is whether a prudent man would, under the circumstances, have gone on working or done the particular thing which eventuated in disaster. According to the theory universally accepted, the latter issue is one which is exclusively for the jury in every instance in which the evidence is susceptible of two constructions. It is for this reason rather than the metaphysical one assigned by Bowen, L. J., in the passage quoted from his opinion in the preceding section, that knowledge is not conclusive evidence of negligence on the servant's part. The proper tribunal to decide whether a plaintiff's conduct, in this or in any other instance, attained or fell short of the standard supplied by what it may be supposed that the typically careful man would have done under the circumstances, is obviously one composed of a reasonably large body of representative members of the community.

The situation is explained by Lord Esher in the following passage, which, it will be noticed, brings out with great precision the distinction, which seems to have escaped the other members of the court, between negligence in continuing to work and negligence in failing to ascertain the nature of the particular peril to be encountered, or in doing the particular act which

caused the injury: "I cannot see, therefore, that the knowledge of the plaintiff absolves the defendant from any duty. It is put in argument that the duty of the master is either to take reasonable care that there shall be no defect or to tell the servant that he does not mean to do so. To me it seems an unnatural doctrine that merely telling the servant of the defect should absolve the master from liability, and unless there is some authority that binds me to accept it I cannot do so. Is it true to say that the mere knowledge of the servant that the master is not going to take care that there is no defect or danger makes the continuance of the servant at the work evidence of negligence on his part? Are there not innumerable instances which negative this, as, for instance, if the servant, in spite of the danger, does any act tending to save life or to the protection of his master's property? I protest against its being said that a jury are bound to find that there is negligence in such case on the part of the man who runs a risk. The knowledge of the plaintiff of the want of care of the defendant is not conclusive against the former, though it is a material fact for the consideration of the jury in determining whether under all the circumstances the plaintiff was guilty of contributory negligence. The case of *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, has been often observed upon, but it has never been overruled, and it seems to me to be this case. It is binding on us, and, moreover, it is, in my opinion, rightly decided, and in each of the judgments I find it laid down that knowledge is only a fact in the case to be taken into consideration by the jury with all the other facts and circumstances in determining the question whether the plaintiff has himself helped to bring about the accident in respect of which he seeks to charge the defendant." *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 689, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

That contributory negligence is not necessarily to be inferred from the fact that the servant voluntarily took some risk, see also *Lawless v.*

Connecticut River R. Co. (1883) 136 Mass. 1 (brakeman coupled car to locomotive, knowing that drawbar was too low); *Mahoney v. Dore* (1892) 155 Mass. 513, 30 N. E. 366.

The practical result of this difference in the points of view which must be taken according as one or the other defense is relied upon has been that, owing to the mere accident that defendants have often preferred to protect themselves by the plea of contributory negligence, many cases are to be found in the books in which plaintiffs have been allowed to recover upon evidence which, if it had been interpreted with reference to the doctrine of assumption of risks, would have been deemed to show conclusively that he could not maintain his action. A single illustration of this anomalous clashing of principles will suffice for present purposes. No American court has more rigidly upheld—at least until quite recent times—the rule that a servant who continues work with a full appreciation of the risk is, as matter of law, debarred from recovering. Yet in *Snow v. Housatonic R. Co.* (1864) 8 Allen, 441, 85 Am. Dec. 720, where the evidence showed such appreciation, the court refused to say, as matter of law, that the plaintiff was negligent, the reason assigned being that the continuance of his work did not "necessarily and inevitably expose him to danger." This consideration would plainly be immaterial in a case where the defense is that the servant elected to take the risk.

To discuss in detail all the questions suggested by these distinctions between the two defenses would carry us beyond the scope of the present note. It is enough to point out that, whether the defense of contributory negligence is referred directly to the maxim, or is treated according to the more usual theory, as an application of the doctrine of proximate cause, its evidential basis must be the same. For specific rulings as to the effect of a servant's knowledge of a risk the various treatises on the law of Negligence and of Master and Servant must be consulted.

C. B. L.

WASHINGTON SUPREME COURT.

Olivia COLE, *Respt.*,
v.

UNION CENTRAL LIFE INSURANCE
COMPANY of Cincinnati, Ohio, *Appt.*

(.....Wash.....)

1. A provision of an insurance policy to the effect that "none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company," never became binding or effective on the assured, who made his contract with the general agent and manager of the insurance company within the state before the policy was written, when he did not assent to this provision, had no knowledge of it, and

was not informed that the policy to be issued would contain any such provision.

2. A receipt for part payment of the premium on an insurance policy, which is wholly in writing, must control the printed terms of an application which conflict with it, when the delivery of the application and the giving of the receipt are to be regarded as contemporaneous acts.

3. An agreement between the general agent of a foreign insurance company and a person who takes a policy, by which the latter is given credit for a part of the first premium in ignorance of any stipulation contained in the policy thereafter issued, which denied the right of the agent to make such contract, estops the insurance company to deny the acts of the agent, or to assert the invalidity of the agreement.

(January 2, 1900.)

NOTE.—As to waiver of condition that the first premium must be paid before policy will take effect, see also *Stewart v. Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147.

For power of insurance agent to bind company, see *Davidson v. Old People's Mut. Ben. Soc.* (Minn.) 1 L. R. A. 482, and *note*; *German Ins.* 47 L. R. A.

Co. v. Gray (Kan.) 8 L. R. A. 70, and *note*; *Hoose v. Prescott Ins. Co.* (Mich.) 11 L. R. A. 340, and *note*; *Goode v. Georgia Home Ins. Co.* (Va.) 30 L. R. A. 842; and *John E. Davis Lumber Co. v. Hartford F. Ins. Co.* (Wis.) 37 L. R. A. 181.

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover the amount alleged to be due on a life-insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. John E. Humphries, William E. Humphrey, and Harrison Bostwick, for appellant:

Parol evidence will not be received to vary the terms of a written contract, in the absence of fraud or mistake or ambiguity.

Haskins v. Dern, 19 Utah, 89, 56 Pac. 953; *Commercial Union Assur. Co. v. Norwood*; 57 Kan. 610, 47 Pac. 529; *Union Nat. Bank v. German Ins. Co.* 34 U. S. App. 397, 71 Fed. Rep. 473, 18 C. C. A. 203; *Gurney v. Morrison*, 12 Wash. 456, 41 Pac. 192; *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977; *Gliok v. Weatherwax*, 14 Wash. 560, 45 Pac. 156; *Warren v. Phoenix Ins. Co.* 47 N. Y. S. R. 421, 19 N. Y. Supp. 990; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5.

The admissions of an agent, made subsequent to the time of entering into the contract, with reference to the subject-matter of the contract, are inadmissible in evidence.

Wicktorovits v. Farmers' Ins. Co. 31 Or. 569, 51 Pac. 75; *East Tennessee Teleph. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171; *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979; *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34.

If it was a part of the application and contract for insurance that any policy which might be issued under the application should not be valid until the first premium was paid to the company or its authorized agent, and the receipt countersigned by the agent and delivered during the lifetime of the deceased, and no receipt for the premium was countersigned by the company or its authorized agent, and delivered during the lifetime of the deceased, then plaintiff cannot recover.

Home Ins. Co. v. Favorite, 46 Ill. 263; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414, 39 N. W. 571; *Hill v. London Assur. Corp.* 26 Abb. N. C. 203, 12 N. Y. Supp. 86; *Kohen v. Mutual Reserve Fund Life Assn.* 28 Fed. Rep. 705; *Fowler v. Preferred Acci. Ins. Co.* 100 Ga. 330, 28 S. E. 398; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205.

All oral negotiations were merged in the written contract, no fraud or mistake being alleged or attempted to be proved.

Haskins v. Dern, 19 Utah, 89, 56 Pac. 953; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Te Pool v. Shutt*, 57 Neb. 592, 78 N. W. 288; *Kleis v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674.

The agent, Edward Newbegin, and special agent R. Cooper Willis, had no power or authority to enter into any other or different contract than set forth in the application,

and they had no right to give any credit or make any other terms than the terms contained in the written application.

Brown v. Massachusetts Mut. L. Ins. Co. 59 N. H. 298, 47 Am. Rep. 205; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414, 39 N. W. 571; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 285; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 601, 19 Am. Rep. 305; *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125.

In an action on an insurance policy, a pleading which sets up that the party failed to perform the conditions in the policy because of ignorance of such conditions, but which fails to allege fraud, misrepresentation, or concealment, is insufficient as a defense.

Morrison v. Insurance Co. of N. A. 69 Tex. 353, 6 S. W. 605; *Weinberger v. Merchants' Ins. Co.* 41 La. Ann. 31, 5 So. 728; *Imperial L. Ins. Co. v. Glass*, 96 Ala. 568, 11 So. 671; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425; *Egan v. Westchester F. Ins. Co.* 28 Or. 289, 42 Pac. 612; *Hill v. London Assur. Corp.* 26 Abb. N. C. 203, 12 N. Y. Supp. 86; *New York L. Ins. Co. v. McMaster*, 57 U. S. App. 638, 87 Fed. Rep. 67, 30 C. C. A. 532.

The certificate issued by R. Cooper Willis, taken in connection with the application, means that the policy which is binding on the company from the date of the receipt is the policy introduced in evidence.

Eureka Ins. Co. v. Robinson, 56 Pa. 256, 94 Am. Dec. 65; *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Home Ins. Co. v. Favorite*, 46 Ill. 263.

The receipt and the application, taken together, refer to a five-year-term policy in use by the defendant.

Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305; *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 285.

Cole agreed with the defendant that the application and the policy should constitute the contract.

Marvin v. Universal L. Ins. Co. 85 N. Y. 282, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 9; *Egan v. Westchester F. Ins. Co.* 28 Or. 289, 42 Pac. 612; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414, 39 N. W. 571.

For the purpose of this case the deceased saw similar policies, and knew exactly what kind of a policy he was contracting for.

Hill v. London Assur. Corp. 26 Abb. N. C. 203, 12 N. Y. Supp. 86; *Kohen v. Mutual Reserve Fund Life Assn.* 28 Fed. Rep. 705; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205.

The application constituted a part of the contract; the policy constituted the other part of the contract; all oral negotiations were merged in the written contract.

Kleis v. Niagara F. Ins. Co. 117 Mich. 469, 76 N. W. 155; *Robinson v. German Ins. Co.* 51 Ark. 441, 4 L. R. A. 251, 11 S. W. 686;

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674.

Petition for rehearing.

The receipt contains notice to the applicant that no policy issued upon the application will be valid until, first, payment of the premium, second, receipt therefor countersigned by the agent and delivered during the lifetime of the insured. The contract is not contrary to public policy, is not void on constitutional grounds, and therefore it must be valid and binding upon the parties to it.

Marvin v. Universal L. Ins. Co. 85 N. Y. 282, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 9; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305; *New York L. Ins. Co. v. McMaster*, 57 U. S. App. 638, 87 Fed. Rep. 67, 30 C. C. A. 532.

The appellant has a right to stand upon the terms and conditions of this contract. There is no claim of any fraud, mistake, or imposition; consequently the parties are bound by the terms and conditions of the contract entered into between them.

Weinberger v. Merchants' Ins. Co. 41 La. Ann. 31, 5 So. 728; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 6 S. W. 605; *Imperial L. Ins. Co. v. Glass*, 96 Ala. 568, 11 So. 671; *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425.

A person cannot execute a contract where it was done without fraud or mistake, and avoid the terms and conditions of the contract.

Weinberger v. Merchants' Ins. Co. 41 La. Ann. 31, 5 So. 728; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 6 S. W. 605; *Stewart v. Cleveland, C. O. & St. L. R. Co.* 21 Ind. App. 218, 52 N. E. 90; *Fowler v. Preferred Acci. Ins. Co.* 100 Ga. 330, 28 S. E. 898; *Masons' Union L. Ins. Asso. v. Brockman*, 20 Ind. App. 206, 50 N. E. 493.

The policy, with all of its terms and conditions, is the exact policy contracted for without any modification or change whatever. This being true, the deceased is bound by all of the terms and conditions of the policy.

Sproul v. Western Assur. Co. 33 Or. 98, 54 Pac. 180; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Smith v. State Ins. Co.* 64 Iowa, 716, 21 N. W. 145; *Newark Mach. Co. v. Kenton Ins. Co.* 50 Ohio St. 549, 22 L. R. A. 768, 35 N. E. 1060; *Salisbury v. Hekla F. Ins. Co.* 32 Minn. 458, 21 N. W. 552; *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305; *Lipman v. Niagara F. Ins. Co.* 121 N. Y. 454, 8 L. R. A. 719, 24 N. E. 699; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 603; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 282, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Egan v. Westchester F. Ins. Co.* 28 Or. 289, 42 Pac. 612; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414, 39 N. W. 571; *Kohen v. Mutual Reserve Fund Life Asso.* 28 Fed. Rep. 705; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205; *Kleis v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155.

A contract cannot be waived by an agent when the contract itself declares that he

shall not have power to waive it, or that certain officers, which do not include him, shall have such power.

Wilkins v. State Ins. Co. 43 Minn. 177, 45 N. W. 1; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L. R. A. 222, 39 N. W. 76; *Jenkins v. German Ins. Co.* 58 Mo. App. 210; *Porter v. United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Carlson v. Metropolitan L. Ins. Co.* 172 Mass. 142, 51 N. E. 525; *Hartford F. Ins. Co. v. Small*, 30 U. S. App. 127, 66 Fed. Rep. 490, 14 C. C. A. 33; *Walker v. State Ins. Co.* 46 Kan. 312, 26 Pac. 718; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408; *Gladding v. California Farmers' Mut. F. Ins. Asso.* 66 Cal. 6, 4 Pac. 764; *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267, 54 N. W. 18; *Sprague v. Western Home Ins. Co.* 49 Mo. App. 423.

Messrs. Brady & Gay and Milo A. Root, for respondent:

This cause of action is based upon what is termed a preliminary oral contract. The policy is not the basis of the action, and is material only as showing the approval of the application by the company. However, if it were to be treated as an action upon the policy, the record abundantly justifies the judgment entered.

Hardwick v. State Ins. Co. 20 Or. 547, 26 Pac. 840, 23 Or. 290, 31 Pac. 656; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291.

The preliminary oral contract was the only one where there was a "meeting of the minds" of the parties.

Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; *Hardwick v. State Ins. Co.* 20 Or. 547, 26 Pac. 840, 23 Or. 290, 31 Pac. 656; *Wood, Ins.* §§ 30, 32; *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. 231; 1 May. Ins. §§ 20-23.

The application, signed by Cole, and the receipt, signed by Willis, both having been made out and signed at the same time and place and as a part of the same transaction, must be construed together as one instrument.

2 Parsons, Contr. 7th ed. p. 634.

The receipt showed a payment of \$3. By necessary implication, it showed a credit as to the balance. But as to how long a credit, it was silent. We therefore had the right to show by parol what this credit was.

1 Greenl. Ev. 14th ed. §§ 283-284a; *Case Mfg. Co. v. Sorman*, 138 U. S. 437, 34 L. ed. 1022, 11 Sup. Ct. Rep. 360; *Bradley v. Washington, A. & G. Steam Packet Co.* 13 Pet. 89, 10 L. ed. 72; *Waldron v. Home Mut. Ins. Co.* 16 Wash. 195, 47 Pac. 425; *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020; 2 Jones, Ev. § 461; *Hardwick v. State Ins. Co.* 23 Or. 290, 31 Pac. 656; *Gerrish v. German Ins. Co.* 55 N. H. 355.

Any person having business in this state with a foreign insurance company has a right to suppose that the general agent and manager of said company for this state has authority to bind his company touching any matter within the apparent general scope of the business which he manages for his principal.

Mesterman v. Home Mut. Ins. Co. 5 Wash. 524, 32 Pac. 458; *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84, 24 L. ed. 653; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 234, 20 L. ed. 623; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Phœnia Ins. Co. v. Doster*, 106 U. S. 32, 27 L. ed. 66, 1 Sup. Ct. Rep. 18; *Hardwick v. State Ins. Co.* 20 Or. 547, 26 Pac. 840, 23 Or. 290, 31 Pac. 656; *Bacon, Ben. Soc. § 428*; *Joyce, Ins. § 536*; *Palmer v. Phœnia Mut. L. Ins. Co.* 84 N. Y. 63; *Silverberg v. Phœnia Ins. Co.* 67 Cal. 36, 7 Pac. 38; *Wood, Ins. § 29*; *Baile v. St. Joseph F. & M. Ins. Co.* 73 Mo. 371.

Where an insurance company treats an insurance contract as in force until the death of the assured, it cannot then assert conditions or restrictions that would have terminated the contract if timely enforced, but which it has itself disregarded; such disregard being a waiver.

Hanley v. Life Asso. of America, 4 Mo. App. 253; *Robinson v. Pacific F. Ins. Co.* 18 Hun, 395; *Murray v. Home Ben. Life Asso.* 90 Cal. 406, 27 Pac. 309; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419; *Knarston v. Manhattan L. Ins. Co.* 124 Cal. 74, 56 Pac. 773; *Silverberg v. Phœnia Ins. Co.* 67 Cal. 36, 7 Pac. 38; *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 64; *Eureka Ins. Co. v. Robinson*, 56 Pa. 268, 94 Am. Dec. 65; *Home Ins. Co. v. Mears*, 20 Ky. L. Rep. 1217, 49 S. W. 31; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Blake v. National L. Ins. Co.* 123 Cal. 470, 56 Pac. 101.

Gordon, Ch. J., delivered the opinion of the court:

The defendant is a life insurance company organized under the laws of the state of Ohio, and doing business within this state pursuant to the statute. Its general agent and manager within this state at the times herein mentioned was Edward Newbegin, residing in the city of Seattle. On January 24, 1898, Thomas H. Cole applied to such general agent for an insurance policy insuring the life of him, the said Cole. Thereupon an application in writing was filled out, signed, and delivered. In the course of the proceedings Cole was introduced by Newbegin to one R. Cooper Willis, special agent of the defendant company, and we gather from the record that the transaction which occurred at that time was in the presence, and had the approval, of both Newbegin and Willis. The annual premium on the insurance sought to be effected amounted to \$12.38, and as part of the transaction Cole then and there paid the sum of \$3 and received the following receipt:

Union Central Life Insurance Company, of Cincinnati.

Office of Edward Newbegin, General Agent,
308-309 New York Building,
Seattle, Wash.

This is to certify that Mr. Thomas H. 47 L. R. A.

Cole has paid the sum of \$3.00 (three) as part payment of his policy, which is binding on the company from this date.

R. Cooper Willis, Agent,
Union Central Life Insurance Company,
of Cincinnati.

There was testimony introduced at the trial tending to show, and in contemplation of the verdict the jury must have found, that there was a credit of sixty days extended to Cole for the payment of the balance of the first annual premium, and that this credit was extended by Newbegin. In this connection it should be stated that all policies of insurance issued by said company are issued at its home office in Cincinnati, and signed by its president and attested by its secretary, and at the time of the transaction to which we now refer, the policy was not before the assured for his examination, nor does it appear that its conditions were made known to him by the agents of the company. The application for insurance contained the following stipulations printed therein in small type, viz.:

"It is hereby agreed and warranted that should the company issue a policy upon this application its interests shall not be affected by verbal statements made to its agents or others, or by the knowledge of such agent, but that it shall be affected only by the statements herein made (including those made to the medical examiner), which are hereby warranted to be true, full, and correct as facts, and they shall constitute the basis of any policy which may be issued hereon.

"I agree that any policy which may be issued under this application shall not be valid until the first premium is paid to the company or its authorized agent, and the receipt therefor countersigned by the agent, and delivered during my lifetime."

It is alleged in the reply that the provision just referred to in reference to the payment of the premium "was, by agreement of the parties at the time, modified and changed in such a way as to render the policy valid from the time of the application and the payment of the \$3 and a credit of sixty days was extended to Cole for the payment of the balance of the first payment." Also that the stipulation appearing in the application in fine print was not called to the attention of the said Cole, and that he was led to believe that there was nothing in the application contrary to, or inconsistent with, his agreement with the general agent, granting an extension of sixty days on the unpaid balance of the first premium, and "that the company ratified the act of the extension of time for the payment of the balance of the said first premium, and accepted and retained the \$3 paid on the said contract;" that neither the defendant nor its agent ever made known to Cole that there was any provision in the insurance policy to be issued that was contrary in any way to the agreement made with the company and its agent as herein set forth, and neither the plaintiff nor Thomas H. Cole ever knew of any such provision or provisions, and that

the \$3 so paid had been retained by the defendant, and no demand for the unpaid balance of the first premium ever made. On the 30th day of January, 1898, a policy was issued at the home office of the company, which contained, among other provisions, the following:

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose shall not be delegated."

The policy was sent to general agent Newbegin for delivery, but never was delivered. On the 23d day of February, Cole died at Sheep Camp District, Alaska, and up to the time of his death the balance of the premium had not been paid. After Cole's death plaintiff paid such balance to the company through Newbegin, who received it not knowing of Cole's death, and, having subsequently learned of it, offered to return the amount so received, which offer the plaintiff refused to accept. The case was tried in the superior court before a special judge selected by the parties, and from a judgment in plaintiff's favor the company has appealed.

A number of alleged errors are assigned in appellant's brief, but in the main they relate to the authority of appellant's agents to bind the company, and the action of the trial judge in permitting the plaintiff to give evidence at the trial of any agreement or contract conflicting with the written application and the policy subsequently issued upon it. The rulings of the trial judge were consistent throughout, and the points raised in the different assignments all relate to these main questions, which are presented in different phases and forms. The controversy between counsel as to whether this action is upon a written policy of insurance, or upon a preliminary contract, may be dismissed with the observation that upon the record here it is wholly immaterial which view is adopted. Adopting that theory which is most favorable to the appellant, we think the action is upon the written policy, modified by the preliminary agreement, under which the provision contained in the application in reference to the prepayment of the premium was waived, and credit given for the unpaid balance, and that the provision of the policy to the effect that "none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company" never became binding or effective, because it never received the assent of the assured, who had no knowledge of it and was not informed that the policy to be issued would contain any such provision.

This court, in the early case of *Mesterman v. Home Mut. Ins. Co.* 5 Wash. 524, 32 Pac. 458, recognizing that the authorities were conflicting, adopted the rule that "an insurance company is estopped from asserting the

invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, or the application therefor, if, at the time that it was issued, the fact of such violation was known to the company or its duly authorized agent;" and the doctrine thus announced was subsequently reaffirmed in *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213.

The delivery of the application, and the giving of the receipt, must be regarded as contemporaneous acts; and where it is apparent that there is a conflict between them we think it must be ruled that the terms of the receipt—which was wholly in writing—must control the printed terms of the application which conflict with it. Adopting that rule, and remembering that the assured here was dealing with the highest officer of the defendant within the state, concerning a matter which was within the apparent scope of the authority of such general agent or manager, and in ignorance of any stipulation contained in the policy—which was not then before him or open to his inspection—denying the right of such general agent or manager to waive statements or conditions contained in the application, it must be held that the company is estopped to deny the acts of its agent Newbegin, or to assert the invalidity of the agreement made by him with the applicant, the effect of that agreement being to waive the condition of the application and the policy subsequently issued, requiring prepayment of the premium as a precedent condition. In reaching this conclusion we decide no new principle, and the views herein expressed are fully sustained in *Mesterman v. Home Mut. Ins. Co.* 5 Wash. 524, 32 Pac. 458, and *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213, and authorities cited in the latter case.

The objection of the appellant to the introduction of a letter written by Newbegin subsequent to the transaction in question, and also to the testimony of witness Brady as to a conversation between the witness and Newbegin, became immaterial in view of the admissions contained in the pleadings and of the conclusions reached by us upon the main proposition.

The judgment is affirmed.

We concur: **Dunbar, Reavis, Fullerton, JJ.**

T. J. FLEETWOOD, *Appt.*,

v.

J. H. READ, *Respt.*

(.....Wash.....)

1. The raising of revenue by license tax is unauthorized by 1 Ballinger's (Wash.) Anno. Codes & Stat. subd. 33, § 739, authorizing licenses "for any lawful purpose,"—especially when considered with other statutory provisions which expressly authorize cities of some classes to issue li-

NOTE.—As to the limit of the amount of license fees that may be imposed, see *note to State ex rel. Tol v. French* (Mont.) 30 L. R. A. 415.

censes for purposes of revenue as well as of regulation of business.

2. An ordinance imposing a license tax on all merchants who use any stamps, coupons, tickets, cards, or other devices for the sale of goods which entitle the purchaser to procure any goods free of charge from any other firm or corporation does not impose a burden upon a portion, and not the whole, of a class of merchants in violation of the constitutional provision against granting to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens, since the ordinance applies to all who see fit to use tickets of that kind.
3. An ordinance requiring a license of \$100 for the use of trading stamps by merchants, and imposing for its violation a fine of not less than \$50 nor more than \$100, or imprisonment not exceeding thirty days, or both, is not void on the ground that it is oppressive.
4. A tax on occupation or business is not within the constitutional provision requiring uniformity of taxation.

(October 13, 1890.)

A PPEAL by petitioner from a judgment of the Superior Court for Pierce County denying a writ of habeas corpus to procure his release from custody to which he had been committed for violation of a city ordinance requiring a license from merchants using trading stamps. *Affirmed.*

The facts are stated in the opinion.

Mr. Fensley Bryan, for appellant:

There are two kinds of licenses which may be imposed by municipal governments: (1) Licenses imposed in the exercise of the ordinary police powers of the city; (2) licenses imposed for the sole purpose of raising revenue, or in the exercise of the power of taxation.

Tiedeman, Pol. Power, p. 273; *Cooley*, Taxn. p. 592.

Licenses cannot be imposed for either of these purposes unless the power has been conferred upon the municipality attempting to do so by the legislative act under which it is organized and created.

Dill. Mun. Corp. § 351; *Cooley*, Taxn. p. 597.

A grant of power to impose licenses in the exercise of the police power does not confer authority to impose a license for the purpose of raising revenue.

Dill. Mun. Corp. § 358.

The fee charged for a license under the power to regulate for police purposes must be only sufficient in amount to cover the costs of issuing the license and the incidental expenses attending the regulation of the business.

There is an entire absence of language in the ordinance putting any restraint or limitation upon the business, or in any way providing for regulating or controlling it. The one purpose expressed in the ordinance is the collection of the fee. Ordinances of this character have been held, even in cases where the nature of the business was such as to bring it within the power of the city to regulate it for police purposes, to be intended only for the purpose of raising revenue.

47 L. R. A.

St. Paul v. Traeger, 25 Minn. 251, 33 Am. Rep. 462; *New York v. Second Ave. R. Co.* 32 N. Y. 270.

A business or occupation cannot be licensed in the exercise of the police control, unless by its nature it is such that it has, or if not properly regulated and supervised it may have, some evil effect upon the public welfare.

Tiedeman, Pol. Power, p. 4; *People v. Gillson*, 109 N. Y. 401, 17 N. E. 343.

The ordinance is a tax, and not a valid exercise of the police power.

Millerstown v. Bell, 123 Pa. 151, 16 Atl. 612; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *Chicago v. Phoenix Ins. Co.* 126 Ill. 278, 18 N. E. 668.

This ordinance must be held to be enacted solely for the purpose of raising revenue.

The grant of such a power to a city, especially where there is no question of regulation involved, is always construed strictly.

Cooley, Taxn. p. 547; 13 Am. & Eng. Enc. Law, p. 530; *Cairo v. Bros.*, 101 Ill. 478; *Emmons v. Lewistown*, 132 Ill. 384, 8 L. R. A. 328, 24 N. E. 58; *St. Louis v. Bell Teleph. Co.* 96 Mo. 627, 2 L. R. A. 278, 10 S. W. 197; *Twining v. Elgin*, 38 Ill. App. 356.

A grant of power to regulate does not carry with it the power to license.

Burlington v. Bumgardner, 42 Iowa, 673.

That the giving of coupons is a perfectly legitimate transaction seems too clear for argument.

People v. Gillson, 109 N. Y. 389, 17 N. E. 343; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 22 Atl. 4.

It is not subject to police control.

The amount of the license fee is, under the circumstances, not only unreasonable, but prohibitive.

The ordinance is therefore void, for what cannot be prohibited by direct legislation cannot be prohibited by means of excessive taxes or licenses.

Cooley, Taxn. p. 598.

The ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants.

St. Louis v. Spiegel, 90 Mo. 590, 2 S. W. 839; *Nashville v. Althrop*, 5 Coldw. 554; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642.

Municipal bylaws must also be reasonable. Whenever they appear not to be so the court must, as a matter of law, declare them void.

Cooley, Const. Lim. 5th ed. p. 243; *Tugman v. Chicago*, 78 Ill. 405; *Com. v. Wilkins*, 121 Mass. 356; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Barling v. West*, 29 Wis. 307; *Kip v. Paterson*, 26 N. J. L. 298; *Ex parte Burnett*, 30 Ala. 461; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553; *Tacoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 762, 28 L. ed. 589, 4 Sup. Ct. Rep. 652.

Messrs. W. H. Fritchard and Walter M. Harvey, for respondent:

The whole scope of the legislative provi-

sions in this state must be taken into consideration in determining the nature of the grant by the legislature; and it is not only fair to presume that they had in mind the raising of revenue from the issuing of licenses, and that is the necessary implication from the language used, but it is the only reasonable construction that can be placed upon the grant.

Boston v. Schaffer, 9 Pick. 418; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Chilvers v. People*, 11 Mich. 43; *Adams Exp. Co. v. Owensboro*, 85 Ky. 265, 3 S. W. 370; *Cooley*, Taxn. 408; *Dill. Mun. Corp.* 357-360; *Cooley*, Const. Lim. § 201; *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 331.

The grant of a power to regulate does not carry with it the power to license.

Re Wanyin, 22 Fed. Rep. 701; *Burlington v. Lawrence*, 42 Iowa, 681; *Chicago Pkg. & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383; *Cincinnati v. Buckingham*, 10 Ohio, 257; *Dill. Mun. Corp.* § 291.

The ordinance is reasonable.

Ogden City v. Crossman, 17 Utah, 66, 53 Pac. 985; *Titusville v. Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 22 Atl. 893; *Davis v. Macon*, 64 Ga. 128, 37 Am. Rep. 60; *Municipality No. Two v. Du Bois*, 10 La. Ann. 56; *Re Chipchase*, 56 Kan. 357, 43 Pac. 264; *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288.

Dunbar, J., delivered the opinion of the court:

The city of Tacoma passed the following ordinance:

"Be it ordained by the city of Tacoma:

"Sec. 1. Every person, firm, or corporation within the city of Tacoma who shall use any stamps, coupons, tickets, cards, or other devices for the sale of goods, wares, and merchandise, which said stamps, coupons, tickets, or other similar devices shall entitle the purchaser receiving the same to procure from any other firm or corporation any goods, wares, or merchandise free of charge upon production of any number of said stamps, tickets, coupons, cards, or other similar devices, shall, before using the same, obtain a license therefor from the city clerk.

"Sec. 2. Before obtaining such license the person applying therefor shall pay to the city treasurer the sum of one hundred dollars; and upon such payment being made, and filing a receipt therefor with the city clerk, the city clerk shall issue to the firm or corporation making such payment a license to use, for one year, the stamps, coupons, tickets, cards, or other similar devices mentioned in § 1 of this ordinance.

"Sec. 3. That any person violating the provisions of this ordinance shall be punished by a fine of not less than fifty dollars, and not exceeding one hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment."

The appellant, Fleetwood, was charged with violating this ordinance; was tried before L. R. A.

for a justice of the peace, found guilty, and sentenced to pay a fine of \$50. In default of payment he was committed to jail, his custodian being the chief of police of the city of Tacoma; whereupon the said Fleetwood made application by petition to the Honorable Thomas Carroll, one of the judges of the superior court of Pierce county, for a writ of habeas corpus, setting forth that the only cause or pretense of his confinement and restraint was the violation of said ordinance, and that the said ordinance is void, because the said city of Tacoma had no authority or power to enact or enforce it; that said ordinance is in conflict with the Constitution of this state; that it is unreasonable, and that it requires a portion, and not the whole, of a class to pay a license for the transaction of business. So that the only question here is as to the validity of the ordinance. It is urged by the appellant that there are two kinds of licenses which may be imposed by municipal governments: (1) Licenses imposed in the exercise of the ordinary police powers of the city; (2) licenses imposed for the sole purpose of raising revenue, or in the exercise of the power of taxation; and that licenses cannot be imposed for either of these purposes unless the power has been conferred upon the municipality attempting to do so by the legislative act under which it is organized and created; and authorities are cited to show that a grant of power to impose licenses in the exercise of the police power does not confer authority to impose a license for the purpose of raising revenue. It is assumed by the appellant that it follows that, if the ordinance in question has no relation to the exercise of the police power, and is only an attempt to raise revenue by license, and the legislature has granted the city of Tacoma power to issue licenses only in the exercise of the police power, the ordinance is void. We do not think it is necessary to follow counsel for appellant in his attempt to show that the ordinance in question is an ordinance relating to the exercise of the police power, for it may be conceded, we think, that, as the term, "police power" is ordinarily used there is no police power exercised by virtue of this ordinance. It is boldly asserted, however, by the respondent, that under the power granted by the legislature not only is the city authorized to pass ordinances controlling the exercise of the police power, but it is authorized to pass ordinances for the purpose of raising revenue only. The law which authorized this ordinance, if it is authorized, is subdivision 33, § 739, 1 Ballinger's Codes & Statutes, and is as follows: "To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same." This provision is in relation to cities of the first class. We do not think the restricted interpretation urged by the appellant can be placed upon this statute. The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the

purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. Subdivision 10 of § 938—the act in regard to general powers of the cities of the third class—authorizes the city to license, for purposes of regulation and revenue, all and every kind of business; and subdivision 10 of § 1011, in defining the powers of cities of the fourth class, provides that the city shall have power to license, for the purposes of regulation and revenue, all and every kind of business. And so the power to license for purposes of revenue is especially granted to all the other classes of cities. But we do not think that the authorization in this respect of cities of the other classes is any stronger than the authorization of cities of the first class, where the power is to grant licenses for any lawful purpose, which must be held to include purposes embraced in the provisions in relation to the other cities; and, taking into consideration the whole scope of the legislative provisions in this state, as well as the language especially used in relation to cities of the first class, we think it is plain that no discrimination was intended by the legislature. The legislature probably intended by this sweeping and comprehensive provision to put at rest any legal questions which might be raised by an attempt to specify particularly the powers conferred, or the particular subjects falling within the general provision,—questions which are frequently raised under the rule that the expression of one thing excludes the others. It is true, as stated by appellant, that the language used, *viz.*, “and provide for revoking the same,” may seem to be a little awkward and unnecessary in this connection. Still a case might be conceived where it would be necessary to revoke a license even where the object of the license was to obtain revenue. But, in any event, the intervention of this seemingly unnecessary provision would not be sufficient to destroy the interpretation which, it seems to us, the broad language of the statute thoroughly warrants. We have examined all the cases cited by the appellant, but, with the exception of one or two, they do not seem to us to be in point, and those, we think, do not express the established and almost uniform law on the subject.

It is insisted, also, that the ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants. We do not think this contention is tenable. The ordinance does apply to all merchants who see fit to engage in the business of buying tickets of that kind, and the constitutional provision that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations, cannot be invoked against this ordinance. The adjudicated cases in this respect are so numerous that it is scarcely worth while to mention them here.

47 L. R. A.

The ordinance cannot be held void on account of excessive burden imposed. It is not so oppressive that it will in any way interfere with the rights of merchants. However wrong the policy may be which prompted the enactment of this ordinance, or however doubtful the propriety of passing such an ordinance, those are questions which are submitted by the legislature to the discretion of the council, and upon them it is not our province to comment. We think, without further investigation, that there is no doubt that the ordinance is warranted by legislative authority.

Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with §§ 1, 2, and 9 of article 7 of the state Constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state Constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions, and occupations is, in the absence of constitutional restriction, a matter within its absolute control, and resting entirely in sound legislative discretion.

The judgment will be affirmed.

Gordon, Ch. J., and Fullerton and Reavis, JJ., concur.

STATE of Washington *ex rel.* M. WEINBERG, *Recept.*,

v.

PACIFIC BREWING & MALTING COMPANY *et al.*, *Appts.*

(.....Wash.....)

1. The court will not dismiss a mandamus proceeding in the first instance upon its attention being called to the fact that it is not prosecuted in the name of the proper party, but will give an opportunity to amend by striking out the name of the unnecessary party and inserting the name of the party beneficially interested.
2. A mandamus proceeding is properly brought in the name of the state on the relation of the party beneficially interested, where statutes do not define the writ, or prescribe for it a form of title, or declare in whose name it shall be prosecuted but preserve the ancient method of suing out the writ, and prescribe that it must be issued

NOTE.—For note on the right to inspect the books of a corporation, see *Weihenmayer v. Bitner* (Md.) 45 L. R. A. 456.

upon affidavit on the application of the party beneficially interested.

2. A stockholder has a right to inspect and examine the books and records of the corporation at reasonable times, so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted, and his examination is made in the interests of the corporation.
4. The burden of proof that a stockholder's request for inspection of the books of the corporation is not made in the interests of the corporation is upon the corporation, when it refuses the request upon that ground.
5. The wrongful refusal of inspection of the books of a corporation, on the broad ground that the shareholder had no right to inspect them at any time or for any purpose, cannot be sustained on appeal on the ground that it was not shown that his demand was made during business hours or at the proper place, or that the person making it was his agent.

(September 27, 1899.)

A PPEAL by defendants from a judgment of the Superior Court for Pierce County in favor of relator in a proceeding to compel defendants to permit relator to inspect the books of the corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Campbell & Powell, for appellants:

The state of Washington has no interest in the proceeding. As mandamus is a civil remedy, the proceeding therefor should have been brought in the name of the party beneficially interested.

Code 1881, § 4; *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County Comrs.* 11 Kan. 66; *Taylor v. Tacoma*, 15 Wash. 92, 45 Pac. 641; *State ex rel. Nooksack River Boom Co. v. Whatcom County Super. Ct.* 2 Wash. 9, 25 Pac. 1007; *People ex rel. Livingston v. Pacheco*, 29 Cal. 210.

At common law, in order to entitle a stockholder of a private corporation to a mandamus to compel the custodian of its corporate records and documents to allow him an inspection of them, he must show that he has made a proper demand for such inspection, at a proper time and place, and for a specified and proper reason.

People ex rel. Bishop v. Walker, 9 Mich. 328; *Lyon v. American Screw Co.* 16 R. I. 472, 17 Atl. 61.

A stockholder had no absolute right to examine the books of the corporation of which he was a stockholder.

Taylor, Ev. § 1346; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Imperial Gas Co. v. Clarke*, 7 Bing. 95; *Birmingham B. & T. Junction R. Co. v. White*, 1 Q. B. 282; 2 Phillips, Ev. 314; *King v. Bank of England*, 2 Barn. & Ald. 620; *People ex rel. Bishop v. Walker*, 9 Mich. 328; *Lyon v. American Screw Co.* 16 R. I. 472, 17 Atl. 61.

He must show that he desires such inspection for some just or useful object, or to prevent some injury which he will sustain if he is not allowed to inspect them.

47 L. R. A.

People ex rel. Hatch v. Lake Shore & M. S. R. Co. 11 Hun, 1, *Affirmed in Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220.

He will then be allowed to inspect them at the proper place and on proper occasions.

People ex rel. Bishop v. Walker, 9 Mich. 328.

But only to the extent necessary for the purpose indicated.

King v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

The writ will not be granted when it is asked for mere curiosity.

People ex rel. Bishop v. Walker, 9 Mich. 328.

Or for speculative purposes.

Phœnix Iron Co. v. Com. ex rel. Sellers, 113 Pa. 563, 6 Atl. 75.

Or at the caprice of the curious or suspicious.

Lyon v. American Screw Co. 16 R. I. 472, 17 Atl. 61; *People ex rel. Field v. Northern P. R. Co.* 18 Fed. Rep. 471; *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220.

A stockholder is not entitled to mandamus upon merely alleging grounds on which the relator believes that the corporate affairs have been improperly conducted and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves or any matter then in dispute.

King v. Merchant Tailors' Co. 2 Barn. & Ad. 115.

Nor will a stockholder be allowed mandamus if there be fair grounds to believe the relator intends to make an improper use of the information he is seeking.

State ex rel. Rosenfeld v. Einstein, 46 N. J. L. 479.

Messrs. Fritchard & Haight, for respondent:

The question as to the prosecution of the writ in the name of the state is purely technical; and if this mode of prosecution be informal under the Code, leave would, of course, be given to amend.

State ex rel. Huston v. Perry County Comrs. 5 Ohio St. 497.

Mandamus is still a writ (2 Ballinger, Anno. Codes, § 5754), and therefore issues in the name of the state.

Bouvier, Law Dict. title Writ.

An application for a mandamus is not a civil action, but a special proceeding.

2 Ballinger, Anno. Codes, §§ 5738, 5776; *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 184; *People ex rel. Sheridan v. French*, 13 Abb. N. C. 413; *Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *Ohinn v. Trustees*, 32 Ohio St. 236; *Com. ex rel. Witmer v. Lancaster County Comrs.* 6 Binn. 5; *Rosenbaum v. San Francisco*, 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633.

The changes effected by the statute of Anne are not deemed to change the formal character of the proceeding, which still continues to be an application for the issuance of the writ, and therefore it is entitled in the name of the state on the relation of the party applying for the writ, against the parties to whom the writ is directed.

High, Extr. Legal Rem. 1st ed. § 1430; *State ex rel. Huston v. Perry County Comrs.* 5 Ohio St. 497; *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164; *Rider v. Brown*, 1 Okla. 244, 32 Pac. 341; *State ex rel. Levy v. Spicer*, 36 Neb. 469, 54 N. W. 849; *Van Horn v. State ex rel. Allen*, 51 Neb. 232, 70 N. W. 941; *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245; *People ex rel. Sherwood v. State Bd. of Canvassers*, 129 N. Y. 360, 14 L. R. A. 646, 29 N. E. 345; *State ex rel. Parrott v. Ohio Public Works*, 36 Ohio St. 409; *State ex rel. Green Bay & M. R. Co. v. Jennings*, 56 Wis. 113, 14 N. W. 28; *Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *State ex rel. Curtis v. McCullough*, 3 Nev. 202; *Chance v. Temple*, 1 Iowa, 179; *Moses v. Kearney*, 31 Ark. 261; *Brower v. O'Brien*, 2 Ind. 423; *Jessup v. Carey*, 61 Ind. 584; *State ex rel. Kelleher v. St. Louis Public Schools*, 134 Mo. 298, 35 S. W. 617; *Runion v. Latimer*, 6 S. C. N. S. 126; *State ex rel. Clark v. Long*, 37 W. Va. 266, 16 S. E. 578; *Ex parte Root*, 4 Cow. 548.

The statutes of the state have assimilated the mandamus proceeding to a civil action, but have not made it a civil action.

State ex rel. Dakota Hail Asso. v. Carey, 2 N. D. 36, 49 Pac. 164.

Some of the authorities declare that the proceeding must be prosecuted in the name of the state.

Chance v. Temple, 1 Iowa, 179; *State ex rel. Curtis v. McCullough*, 3 Nev. 202; *State ex rel. Parrott v. Ohio Public Works*, 36 Ohio St. 409; *Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245; *Lord v. Bates*, 48 S. C. 95, 24 S. E. 755; *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County Comrs.* 11 Kan. 66.

The practice of this state regarding the entitling of this proceeding, and especially of this court in exercising original jurisdiction to issue writs of mandamus, has uniformly been in accordance with the historical and appropriate method of entitling it adopted in this case.

State ex rel. German Sav. & Loan Soc. v. Prather, 19 Wash. 336, 53 Pac. 344; *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 53 Pac. 547; *State ex rel. Heller v. Young*, 18 Wash. 21, 50 Pac. 786; *State ex rel. Boyle v. Pierce County Super. Ct.* 19 Wash. 128, 52 Pac. 1013; *State ex rel. Fairhaven Land Co. v. Cheetham*, 17 Wash. 131, 49 Pac. 227; *State ex rel. Middlebrook v. Reid*, 17 Wash. 267, 49 Pac. 517, 17 Wash. 688, 49 Pac. 516; *State ex rel. Alladio v. King County Super. Ct.* 17 Wash. 54, 48 Pac. 733; *State ex rel. Bellingham Bay Improv. Co. v. Bridges*, 19 Wash. 431, 53 Pac. 545; *State ex rel. Smith v. McClinton*, 17 Wash. 45, 48 Pac. 740; *State ex rel. Wolf v. Moore*, 16 Wash. 350, 47 Pac. 757; *State ex rel. Puget Sound Nat. Bank v. King County Super. Ct.* 14 Wash. 686, 45 Pac. 670; *State ex rel. Alaska Packers' Asso. v. Crawford*, 13 Wash. 633, 43 Pac. 892; *State ex rel. Collins v. Snohomish County Super. Ct.* 13 Wash. 187, 43 Pac. 19; *State ex rel. Smith v. Parker*, 12 Wash. 685, 42 Pac. 113; *State*

ex rel. Bancroft-Whitney Co. v. Price, 12 Wash. 653, 42 Pac. 120.

The relator, being a large stockholder, owning nearly one fifth of the capital of the entire company, and seeking to examine the books of account only at reasonable times and on proper occasions for the purpose of learning the condition of the affairs of the company, the manner in which its business was being managed, and the value and nature of her interest in the property thereof, had a clear right to do so, which, being denied, was properly enforced by mandamus.

Huyler v. Cragin Cattle Co. 40 N. J. Eq. 392, 2 Atl. 274; *Lewis v. Brainerd*, 53 Vt. 519; *State ex rel. Martin v. Bienville Oil Works Co.* 28 La. Ann. 204; *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669, 12 So. 837; *State ex rel. Bourdette v. New Orleans Gaslight Co.* 49 La. Ann. 1556, 22 So. 815; *Ranger v. Champion Cotton-Press Co.* 51 Fed. Rep. 61; *Deaderick v. Wilson*, 8 Baxt. 108; *State ex rel. Doyle v. Laughlin*, 53 Mo. App. 542; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Re Steinway*, 31 App. Div. 70, 52 N. Y. Supp. 343; 4 Thomp. Corp. § 4418; *Swift v. Richardson*, 7 Houst. (Del.) 338, 32 Atl. 143; *State ex rel. Spinney v. Sportsman's Park & Club Asso.* 29 Mo. App. 326.

Fullerton, J., delivered the opinion of the court:

The Pacific Brewing & Malting Company is a corporation organized under the laws of, and doing business within, the state of Washington, and William Virges is the treasurer of, and is entitled to and has possession and custody of the books of account of, said corporation. The respondent is a stockholder of the Pacific Brewing & Malting Company, owning 803 of the 5,000 shares in which the capital stock of the corporation is divided, the par value of each share being \$100. On August 10, 1898, the respondent applied to the court below for a writ of mandamus to compel the appellants to permit her to inspect the account books of the corporation. As a cause for the issuance of the writ, she alleged: "That relator, as such stockholder, has for some time been desirous of learning the true condition of the affairs of said company, and of the management of its business, and of the value and nature of relator's interest and property therein as such stockholder, and of the manner and skill and fidelity with which relator's interests as stockholder as aforesaid are and have been attended to and protected, and to that end has sought to inspect and examine, at proper and convenient times, and without interruption or embarrassment to said company, or to the management or transaction of the business thereof, the books of account of said corporation, and has requested and demanded of said respondents permission, access, and opportunity to so examine said books of account, but said respondents, and each of them, have always refused, and still refuse, relator such permission, access, and opportunity." The lower court caused an alternative writ to issue directing the appellants to permit the respondent to inspect the books.

or show cause, on a date named, why a peremptory writ commanding them to do so should not issue. On the return day the appellants appeared, and moved the court to quash the proceedings, for reasons which are hereafter noticed; and, on their motion being overruled, demurred, reciting the grounds contained in their motion, and the further ground that the alternative writ of mandate, and the affidavit on which it was based, did not state facts sufficient to constitute a cause of action, or to entitle the court to issue the writ, and that the respondent had a plain, speedy, and adequate remedy in the ordinary course of law. The demurrer was also overruled; whereupon the appellants took issue upon the facts alleged, upon which a trial was had before the court without a jury, resulting in a judgment in favor of the respondent, and an order that a peremptory writ of mandate issue. From the judgment and the several orders and the rulings of the court this appeal is taken.

1. The motion to quash and dismiss is based on the ground that the proceeding is not prosecuted in the name of the real party in interest, and is wrongly entitled. The contention is that in all special proceedings, where the state has no direct interest, it cannot be made a party, and its name should not be used in the title of such proceedings; that the proper way to entitle such a cause is in the name of the interested party as plaintiff, and the adverse party as defendant, after the manner required in an ordinary civil action. In support of this, the appellants cite subdivisions 1 and 2 of § 4753, and §§ 4824, 5738, and 5775, of Ballinger's Annotated Codes and Statutes. Conceding the construction put upon the statute by the appellants to be the proper one, the result contended for by them would not necessarily follow. The court will not in the first instance, on its attention being called to this character of defect, quash the writ and dismiss the proceeding, but will first grant the applicant an opportunity to amend by striking out the name of the unnecessary party, and inserting the name of the party beneficially interested in the writ, and will only dismiss when its order in this respect is disobeyed. But treating the motion to quash as, in effect, a motion to require the applicant to amend, should it be allowed? At common law, as formerly adjudicated in the courts of England and in some of the courts of this country, the writ of mandamus was regarded as purely a prerogative writ, issuable not of right, but only at the pleasure of the sovereign or state, and hence only in his or its name and as an attribute of sovereignty. Now, in this country, it is generally, if not universally, regarded as a writ of right, issuable as of course upon proper cause shown, and it would seem there could be no very satisfactory reason given why the proceedings should not be conducted as in an ordinary civil action for the protection of private rights; that is, in the name of the actual parties in interest as plaintiff and defendant, without introducing the state as the prosecutor, unless issued in behalf of the state.

47 L. R. A.

Yet it is evident that the statute regulating the procedure did not contemplate this change. It still preserves the ancient method of suing out the writ prescribing that it "must be issued upon affidavit on the application of the party beneficially interested." Neither does the statute define the writ, or prescribe for it a form of title, nor declare in whose name it shall be prosecuted; and it is evident that the statute, when it speaks of the writ, must refer to the writ as it was known and defined at common law. The weight of authority, also, seems to be against the appellants. As sustaining their contention, our attention is called to the cases of *People ex rel. Livingston v. Pacheco*, 29 Cal. 210, and *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County Comrs.* 11 Kan. 66. These cases, with others that might be cited from those states, hold with them. In California, however, in the subsequent case of *People ex rel. Ferguson v. San Francisco City & County Supers.* 36 Cal. 595, it was said, speaking of this contention: "We are not inclined to extend the principles adjudicated in *People ex rel. Livingston v. Pacheco*, on this point, beyond the facts of that case." It would seem, too, that in applying the principles announced in the cases cited to subsequent cases, the courts of those states have not been entirely consistent. If it be error to join the state as prosecutor in a case where only a private prosecutor is interested, it ought to be equally so to join a private prosecutor with the state where the writ is prosecuted on behalf of the whole people,—where the state alone is interested,—yet this is constantly being done in both California and Kansas. Turning to the decisions from other states having statutes similar to, and equally liberal with, our own, the method of procedure adopted by the respondent in this instance is generally approved. In *State ex rel. Levy v. Spicer*, 36 Neb. 477, 54 N. W. 852, it is said: "The right of the relator to bring an action by mandamus in the name of the state has been recognized from the earliest period of our history as a state, and may be regarded as a settled rule, which, if changed, it should be done by the legislature." In *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164, a case where the attorney general appeared and moved to dismiss because the proceeding was not prosecuted in the name of the real party in interest, the court, citing the statute of that state, which declared that "every action must be prosecuted in the name of the real party in interest," held that this section applied only to remedies formerly had by action at law or by suit in equity, and was not intended to include special proceedings, such as mandamus, etc., saying: "We can see no good likely to result from changing the established practice in this respect, and, on the other hand, a change not based on a new and well-considered statute would, in our opinion, tend to much confusion in the practice, and thereby greatly impair the usefulness of the writ." In *State ex rel. Huston v. Perry County Comrs.* 5 Ohio St. 497, it is said: "The question as

to the prosecution of the writ in the name of the state is purely technical, and, if this mode of prosecution be informal under the Code, leave would, of course, be given to amend. But we incline to think this mode of proceeding in mandamus proper. The writ is, from its very nature and definition, 'a command issuing in the name of the sovereign authority.' Bouvier, Dict. Blackstone says: 'It is a command issuing in the King's name.' In the United States it has always been issued in the name of the sovereignty by which it has been authorized. We apprehend the Code does not contemplate an essential change in the character of the writ or the proceedings under it. From the nature of the remedy, this suit, then, is properly prosecuted in the name of the state." *Collet v. Allison*, 1 Okla. 42, 25 Pac. 516; *State ex rel. Curtis v. McCullough*, 3 Nev. 202; *Chumaseo v. Potts*, 2 Mont. 242; *Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *State ex rel. Parrott v. Ohio Public Works*, 36 Ohio St. 409; *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245. In all the numerous applications for this writ made before this court, and before the superior courts and brought here on appeal, the proceedings have been, with perhaps one exception, prosecuted in the name of the state on the relation of party beneficially interested, and, as is stated by the counsel for appellants in their brief, "it is believed that this is the first time that the question of practice presented by the case at bar has been submitted to this court for its decision." It is proper to add that this practically uniform construction of the statutes relating to this subject by the learned and distinguished counsel who appear before the bar of this court is entitled to great weight in determining what is the proper practice, and that when a practice is once established radical innovations are to be avoided, especially where no real evil is corrected by the change. We conclude, therefore, that this proceeding is properly brought in the name of the state, on the relation of the party beneficially interested.

2. Another question is, Has the respondent shown facts sufficient to authorize the court to direct that a writ of mandamus issue? The stockholders of a corporation have at common law, for a proper purpose and at reasonable times, a right to inspect any or all books and records of the corporation. While this right is universally recognized, the courts disagree as to what is a proper purpose, or, rather, as to what facts are sufficient to warrant the court in directing by mandamus permission to inspect, where the stockholder has been refused such by the officers of the corporation. In the early case of *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115, this question received consideration by the court of the King's bench in England, on which the several judges expressed opinions. The rule to show cause why a writ of mandamus should not issue was, obtained upon the affidavits of certain liverymen and freemen of the company, who alleged, among other things, that the attention of the de-

ponents had for a considerable time been called to the affairs of the company by reports, which they believed to be well founded, that the revenues of the company were misemployed through malpractices on the part of those members who had the management of the company's affairs; that the fine for admitting freemen to the livery had been recently twice raised, without any corresponding increase, as deponents were informed and believed, in the pensions and charitable disbursements of the company; that a lavish expense had taken place, unsanctioned by the majority of the members of the company; that a clerk of the company had, as deponents had heard and believed, misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen by which they could learn the amount of such defalcation, nor could they ascertain, unless allowed to look at their charters, by-laws, books, muniments, and documents, whether such their common funds were properly applied and accounted for or not; that they had no other wish in desiring the inspection of the books than to see, on behalf of a body of the members, by whom they were authorized, how their joint funds were disbursed, and that the legal rights and privileges of the members were enjoyed agreeably to their charters. On motion to discharge the rule, the judges were unanimous in the opinion that no sufficient cause was shown to warrant the court in issuing the writ. It was held that before the writ could issue some distinct cause or purpose affecting the applicant personally must be shown, and that a desire to examine the books for the purpose of ascertaining whether the company's affairs were being properly managed was not sufficient cause. Passing upon the motion, Littledale, J., said: "The master and wardens, who have the care of the documents in question, are bound to produce them, if a proper occasion is made out, in a matter affecting the members of the corporation. But I think the members have no right, on speculative grounds, to call for an examination of the books and muniments, in order to see if, by possibility, the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged, and then the question will arise whether or not the court will grant a mandamus." Taunton, J., said: "There is no express rule that, to warrant an application to inspect corporation documents, there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute between members, or between the corporation and individuals in it. There must be some controversy, some specific purpose, in respect of which the examination becomes necessary." Patteson, J., said: "I am far from saying that there may not be particular instances in which a corporator may apply for a mandamus to inspect documents, or some of them, of the kind here mentioned, if he can show a specific ground of application, and that the granting of it is

necessary to prevent his suffering injury, or to enable him to perform his duties. But he must state a definite object, and here that is not done."

The principle announced in this case has been followed by some of the courts of this country, in so far, at least, as to hold that the mere benefit of knowledge to be derived from the books as to the proper conduct of the business is not a sufficient cause for the issuance of the writ to compel the corporate officer to grant an inspection, but that something more must be shown; as that a controversy is depending, or that some question or interest is involved with reference to which the contents of the books may be applicable. Of this class of cases, the following are illustrative: *People ex rel. Hatch v. Lake Shore & M. S. R. Co.* 11 Hun, 1; *People ex rel. Bishop v. Walker*, 9 Mich. 328; *Com. ex rel. Sellers v. Phoenix Iron Co.* 105 Pa. 111; *Lyon v. American Screw Co.* 16 R. I. 472, 17 Atl. 61. The injustice of the rule, when applied in all its strictness, has been so keenly felt that in England, and in many of the United States, the right of inspection of corporate books is now guaranteed to the stockholders by statute, and such statutes seem to be generally held not to be innovations in, but declaratory of, the common law. The tendency of the modern decisions, also, is towards holding that a stockholder, as such, has a right to inspect the books and other documents of the corporation, where his sole object is to inform himself as to the manner in which the business of the corporation is being conducted. In *State ex rel. Doyle v. Laughlin*, 53 Mo. App. 542, the facts were that the relator was a stockholder in a banking corporation, and as such stockholder requested of the directors and officers of the bank the privilege of examining the books of the bank for the sole purpose of acquainting himself with the condition of its affairs and how the bank was being managed. On the request being refused, he brought mandamus to compel the officers to allow such inspection. The court said: "The right of a stockholder to examine and inspect all the books and records of a corporation at all reasonable times, and to be thereby informed of the condition of the corporation and its property, is a common-law right. . . . It is quite obvious, therefore, that the relator has a clear right to examine the books of the bank in question; and, though the relator in his application for the alternative writ took the precaution to state the purposes for which he sought to exercise the right of inspection, this, upon principle, we think was unnecessary. If the right of inspection of the corporate books exists, whether under the statute or at common law, the purpose of the exercise of the right is immaterial. *State ex rel. Spinney v. Sportsman's Park & Club Asso.* 29 Mo. App. 326. Because the right may be made the subject of abuse does not prove that it does not exist. The manner in which it may be exercised might well be regulated by the by-laws of the corporation. Such regulations would, of course, have to be reasonable. The right could not

be regulated out of existence." In *State ex rel. Bourdette v. New Orleans Gaslight Co.* 49 La. Ann. 1556, 22 So. 815, the court said: "No better way of safeguarding the interests of the public can, perhaps, be devised, or one that may be so easily and readily applied, as the right to the frequent, sudden, and speedy examination of the books of corporations in the stock or shares of which investors and speculators are invited to trade. The recognition of this fact attests alike the wisdom and purpose of the framers of the Constitution. The question here presented was virtually passed upon in *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669, 12 So. 837, and adversely to the pretensions of defendant corporation herein. See also *State ex rel. Martin v. Bienville Oil Works Co.* 28 La. Ann. 204; *Cockburn v. Union Bank*, 13 La. Ann. 289. In the United States, the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the management. *Morawetz, Priv. Corp.* § 473. This doctrine obtains with all the more force in this state, by reason of its recognition in the Constitution itself." In *Lewis v. Brainerd*, 53 Vt. 519, an action brought under a statute to recover a penalty fixed by the statute for refusing to permit a stockholder to examine the books, the court, on affirming a judgment recovered for such refusal, said: "The shareholders in a corporation hold the franchise, and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation, at all reasonable times, and to be thereby informed of the condition of the corporation and its property. Our statute provides the method of securing and enforcing such rights. The statute is remedial. It was enacted to secure rights, and suppress fraud and wrong, and should be so construed and enforced as effectually to carry out the purpose of the legislature and remedy the evil sought to be prevented." In *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392, 2 Atl. 274, it is said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times. . . . And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders." See, further, *Cockburn v. Union Bank*, 13 La. Ann. 289; *State ex rel. Martin v. Bienville*

Oil Works Co. 23 La. Ann. 204; *Ranger v. Champion Cotton-Press Co.* 51 Fed. Rep. 61, 62; *Deaderick v. Wilson*, 8 Baxt. 108; Boone, Banking, § 235; Cook, Stock, Stockholders, & Corp. Law, 3d ed. § 511; 4 Thomp. Corp. §§ 4406 *et seq.* In § 4418, the author in the last work cited quotes from the English cases announcing the rule that the right to inspect the books of a corporation will not be enforced unless there is a defined, distinct dispute, and adds: "It should be carefully added, however, that this theory has gained no considerable footing in America, nor is it based upon any foundation of sense. Subject to the convenience of the others, or of the common agency which acts for all, it is the right of every proprietor to know how the business in which he has embarked his money is being carried on, whether there is any dispute about it or not. Nor can this principle have any application where the right is given by statute." In § 4407 the same author says: "In corporate management or mismanagement, no more frequent or more aggravated species of outrage exists than the refusal of those in possession of the corporate books to disclose to the stockholders the written evidences of their stewardship; and in many cases nothing short of severe pecuniary forfeitures, followed by imprisonment as for crime, will afford an adequate protection to minority stockholders." Corporations, owing to the ease with which they can be formed under the liberal provisions of the statute, and affording, as they do, a limited liability for investors, have become a favorite means for the combination of capital, and are now engaged in almost every variety and character of business. In fact, they have largely superseded partnerships. Not having behind them the personal responsibility and fortunes of the promoters, or that of those who may have invested in their capital stock, the interests of the public at large require, and especially that part of the public dealing with them, that the courts adopt the rule which will most largely conduce to honesty in their management. We believe that these interests will be better protected by the holding that a stockholder of a corporation has the right, at reasonable times, to inspect and examine the books and records of such corporation so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the corporation, and, when it is charged to be otherwise, the burden should be on the officers refusing such request or the corporation to establish it. The argument that, under this rule, the managers of a rival concern may acquire stock in the corporation, and use the privilege for the purposes of benefiting the rival concern, to the detriment of the corporation, is not more forceful than the other, that, under the restricted rule, a combination can be made by persons holding the majority of the stock, by which the corporation is 47 L. R. A.

managed for their own interests, to the exclusion and detriment of the minority holders and injury to the public dealing with it.

3. It is contended that the writ should have been refused because it is not shown that the demand for an inspection was made during business hours, or at the place of business of the corporation, or that the person making the demand was the agent of the respondent, or had any lawful right to represent her in the transaction. These objections would come with more force had the refusal to permit an inspection on the part of the officer in charge of the books been based upon some one or all of these grounds. But the refusal was made upon the broad ground that the respondent, as such shareholder, had no right to inspect the books of the company at any time or for any purpose, and the main dispute in the court below seems to have been as to the existence of this right. The evidence, also, upon these points, is contradictory, and, as the court found the facts in favor of the respondent, we do not feel disposed to disturb its findings.

The judgment is affirmed.

Gordon, Ch. J., and Reavis and Dunbar, JJ., concur.

NORTH SPRINGS WATER COMPANY,
Appt.,

v.

City of TACOMA, Respnt.

(.....Wash.....)

1. The grant of power to a city by charter to construct, or authorize others to construct, waterworks, is not in the alternative so as to preclude the city, after granting a franchise which is not exclusive, from subsequently constructing waterworks of its own.
2. A grant of a franchise to a water company, without any words of exclusion or of limitation upon the right of the city, does not preclude the city from subsequently establishing waterworks of its own, although the result may be to destroy the value of the franchise.

(October 9, 1899.)

NOTE.—As to the power of a city to construct waterworks of its own while a waterworks company is exercising a franchise to supply water, see also *White v. Meadville* (Pa.) 34 L. R. A. 587; *Skaneateles Waterworks Co. v. Skaneateles* (N. Y.) 46 L. R. A. 687.

As to right of city to take plant of private water company by condemnation, see *Re Brooklyn* (N. Y.) 26 L. R. A. 270.

As to claim that city must obtain its water supply from existing company, or else buy its plant, see *Helena Consol. Water Co. v. Steele* (Mont.) 37 L. R. A. 412.

As to enforcing contract of city to purchase plant, see *National Waterworks Co. v. Kansas City* (C. C. App. 8th C.) 27 L. R. A. 827.

As to enforcing contract against water company, see *Bristol v. Bristol & W. Waterworks* (R. I.) 32 L. R. A. 740.

A PPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of defendant in a suit to enjoin defendant from extending water mains in violation of plaintiff's rights. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles S. Fogg, for appellant:

The building of waterworks is not a municipal function.

Dill. Mun. Corp. 4th ed. § 27.

The city has no power to contract away any of its legislative functions, the exercise of which may be necessary in the future to protect the public health. But this would not prevent it from engaging not to enter into the business of constructing and operating a system of waterworks.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

A right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of this service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it.

Ibid.

The franchise was assignable.

Detroit v. Detroit City R. Co. 56 Fed. Rep. 882; *Commercial Electric Light & P. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592.

The city is estopped to question the assignment.

Seattle v. Columbia & P. S. R. Co. 6 Wash. 379, 33 Pac. 1048; *Spokane Street R. Co. v. Spokane*, 6 Wash. 521, 33 Pac. 1072; *Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878; *Commercial Electric Light & P. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592.

The city's choice exhausted its powers. The power of a municipal corporation to construct waterworks, or to authorize the construction of the same by others, is such only as has been delegated to it by the legislature of the state.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. Rep. 29.

In this case the grant is in the alternative. Both methods cannot be employed at the same time.

If another is first authorized to construct waterworks, and such grantee proceeds to act upon the grant, lays out the necessary capital, and puts the system in operation, and the municipality subsequently proceeds to construct a system of its own, this will be "equivalent to confiscation" of the plant of the city's grantee.

Walla Walla Water Co. v. Walla Walla, 60 Fed. Rep. 957; *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 695; *Metzger v. Beaver Falls*, 178 Pa. 1, 35 Atl. 1134; *Welsh v. Beaver Falls*, 186 Pa. 578, 40 Atl. 784.

The municipality is just as much bound to act justly as anyone else.

47 L. R. A.

15 Am. & Eng. Enc. Law, p. 1083; *Seattle v. Columbia & P. S. R. Co.* 6 Wash. 379, 33 Pac. 1048.

There need not be a physical taking in order that property may be damaged within the meaning of the Constitution. It is sufficient if the proposed action will seriously reduce the rental and the selling value of plaintiff's property.

Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; *Shepherd v. Baltimore & O. R. Co.* 130 U. S. 426, 30 L. ed. 970, 9 Sup. Ct. Rep. 598.

Due process of law includes compensation, where private property is taken under the plea of public good.

Scott v. Toledo, 36 Fed. Rep. 385, 1 L. R. A. 688; *Lawrence County v. Deadwood & G. Toll-Road Co.* 11 S. D. 74, 75 N. W. 817.

Messrs. W. H. Pritchard and Walter M. Harvey, for respondent:

The city had the right to build and construct its own works, and the franchise granted to the private corporation, although it had been acted upon and large sums of money expended under the authority thereby given, could not be urged against the right which the city had to construct or acquire otherwise its own gas works.

State ex rel. Hamilton Gas & Coke Co. v. Hamilton, 47 Ohio St. 52, 23 N. E. 935; *Hamilton Gaslight & Coke Co. v. Hamilton*, 37 Fed. Rep. 832, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Westerly Waterworks Co. v. Westerly*, 80 Fed. Rep. 611; *Thompson Houston Electric Co. v. Newton*, 42 Fed. Rep. 723; *Colby University v. Canandaigua*, 69 Fed. Rep. 671; *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913; *Re Millvale*, 162 Pa. 374, 29 Atl. 641; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381.

A franchise or privilege of this character is deemed to be personal, and not assignable, unless it is clearly manifested, by the legislative body, that the quality of assignability is intended to be attached to the franchise.

Brunswick Gaslight Co. v. United States Gas, Fuel, & Light Co. 85 Me. 532, 27 Atl. 525; *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 326, 37 Pac. 1042.

Reavis, J., delivered the opinion of the court:

Bill in equity by the North Springs Water Company, a corporation, against the city of Tacoma, a municipal corporation, to enjoin the city from extending its water system in that part of the city of Tacoma situated in sections 24 and 25, and in what is known as "Old Tacoma," and where the plaintiff owns a plant and has its mains and pipes, and is supplying water to the inhabitants, or most of them, of the area designated. The facts are substantially as follows: Plaintiff (here appellant) is the owner of certain springs of fresh water in the northwestern part of Tacoma, and owns and operates a system of waterworks, by means of which it conveys the water flowing from the springs

to the city, and to its inhabitants living in that vicinity. This system was constructed and operated by plaintiff and its grantors under franchises granted by the respondent city. The construction of the works was begun in 1890, and the franchise or right is claimed under Ordinance No. 350 of the city of Tacoma, approved September 8, 1890. The material portions of the ordinance are as follows: "Section 1. That R. B. Mullen and his assigns are hereby granted the right, privilege, and authority of erecting and maintaining waterworks in that part of the city of Tacoma, in the county of Pierce, and state of Washington, which is known and described as sections twenty-four (24) and twenty-five (25), in township twenty-one (21) north, of range two (2) east of the Willamette meridian, and of supplying that part of said city and its inhabitants with pure and fresh water, for which the said R. B. Mullen and his assigns are hereby authorized to charge the consumers thereof reasonable rates. Sec. 2. That for the purpose aforesaid the said R. B. Mullen and his assigns are hereby granted the right, liberty, and privilege of laying down, relaying, connecting, disconnecting, and repairing such and so many pipes along, through, and under the avenues, streets, lanes, alleys, and public highways and public parks and ground of said part of said city of Tacoma as may be necessary, proper, and convenient for supplying the said part of said city and the inhabitants thereof with pure and fresh water, and for that purpose to make connections between the street mains and pipes and the dwellings or other buildings or structures of the consumers." "Sec. 5. The city council hereby reserves the right to regulate by ordinance and fix the charges of said company to the consumers for the water privileges. Sec. 6. The council reserves the right to amend this ordinance any time in its judgment it deems it necessary." "Sec. 8. The rights, privileges, and authority granted in this ordinance shall continue for twenty-five years." Sections 3 and 4 relate to the method of laying the mains and pipes under the regulations of the city. By section 7 the city council reserves the right to order mains where in its judgment it is deemed necessary. The above ordinance (No. 350) was amended by Ordinance No. 308 on the 11th day of October, 1890, by repealing sections 5 and 8 thereof, and amending section 5 to read as follows: "Sec. 5. The city council of the city of Tacoma hereby reserves the right to regulate by ordinance and fix reasonable charges which said company may charge to the consumers for water privileges,"—and amending section 8 to read as follows: "Sec. 8. The right, privilege, and authority granted in this ordinance shall continue for thirty years." On the 18th of October, 1890, a charter was adopted and officers thereunder elected by the city of Tacoma under the act of the state legislature entitled, "An Act to Provide for the Government of Cities Having a Population of Twenty Thousand or More Inhabitants and Declaring an Emergency to Exist," approved on 47 L. R. A.

the 24th day of March, 1890. Section 52 of the charter provides: "To provide for erecting, purchasing, appropriating, or otherwise acquiring waterworks, gas works, or electric-light plants, within or without the corporate limits of said city, to supply said city and its inhabitants with water and light, or to authorize the construction of same by others, and to regulate and control the use and price of the water or light so supplied." Section 203 of the charter contains the following provision: "The city shall have the right to condemn and appropriate any waterworks, gas works, electric plant, street railway, for the purpose of managing, operating, and controlling the same by the city, and all such appropriations shall be made as provided in this article, except that, before passing the resolution provided for, the city council shall first submit to the qualified electors of the city the proposition so to appropriate or condemn said property, and if a majority of votes cast be in favor of appropriation and not otherwise, such resolution shall be passed and such proceedings taken; said vote to be taken at a general or special election." Section 218 provides as follows: "When water is supplied by any person or corporation to said city or to any department, it shall not be paid for at more than the rate established by the city council." The city charter under which the franchise to appellant was granted was enacted by the legislative assembly of Washington territory on the 4th of February, 1886. Subdivision 5 of § 48 thereof contains, among other things, in defining the powers of the city government, the following: "To purchase or condemn, enter upon and take any lands, waterworks, or gas works within the corporate limits for public use and for public squares, streets, wharves, docks, parks, commons, cemeteries. . . ." Subdivisions 7 and 8 are as follows: "Seventh—Waterworks. To erect and maintain waterworks within or without the city, or to authorize the erection of the same for the purpose of furnishing the city with a sufficient supply of water; but no such works shall be erected by the city until a majority of the voters of the city, at a general or special election, assent thereto, and have power to and are hereby authorized to condemn and appropriate so much private property that shall be necessary for the construction and operation of said gas works or waterworks within the city limits, the appropriation to be made as provided by chapter twelve of this charter. Eighth. Franchises—Length of. When the right to build and operate such works is granted private individuals or incorporated companies by said city, they may make such grant inure for a term of not more than fifty years, and authorize such individuals or company to charge and collect from each person supplied by them such water rents as may be agreed upon between said person and corporation so building said works; and said city is authorized and empowered to enter into a contract with the individuals or company constructing and operating said works to supply said

city with water for such purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties. Nothing herein contained shall be construed to interfere or abridge the right and powers of the city council to regulate and fix the rate of compensation as provided by subdivision 25 of section 48 of this charter." Authority was also given to regulate and fix from time to time rates of compensation which might be charged and collected by any person or corporation for water or gas furnished within the city limits. Section 8, art. 1, of the Constitution of Washington, in effect in 1889, is as follows: "No law granting irrevocably any privilege, franchise, or immunity shall be passed by the legislature;" and § 12 of the same article declares: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." On the 12th of November, 1875, the legislative assembly of Washington territory passed a special act incorporating the city of Tacoma, which is now a part of the city respondent, and on the 5th of November, 1893, an ordinance (No. 26) was passed by said city of Tacoma granting to one Fuller the right and privilege of conducting water into the city of Tacoma (Old Tacoma), and through the streets and alleys thereof, for the purpose of supplying said city and its inhabitants with pure, fresh water. The charter of said city contains the following provision,—the authority under which said ordinance was adopted: "Sec. 6. The board of trustees shall have power to make such by-laws and ordinances not inconsistent with the Constitution of the United States and the laws of this territory, as they may deem necessary to carry out the purposes of this act. They shall have power to prevent and remove nuisances; to prohibit disorderly conduct; to provide for licensing public shows and lawful games; to regulate and establish markets; to construct pumps, aqueducts, reservoirs, or other works necessary for duly supplying the city with water; to lay out, name, alter, keep open, and repair the streets and alleys of the city; to provide such means as they deem necessary to protect the city from injury by fire." It does not appear that Fuller took any action under the rights and privileges granted him by the ordinance, but on the 27th of June, 1891, he executed to appellant's grantor "the right and privilege of conducting water into the city of Tacoma [Old Tacoma], and through the streets and alleys thereof, for the purpose of supplying said city and its inhabitants with pure, fresh water, and other purposes," and licensed and empowered his grantee, the grantor of appellant, to lay water pipes and conduct water through and along the streets and alleys of a certain portion of the city of Tacoma for the purpose of supplying the city and its inhabitants with water and other purposes, and empowered appellant's grantor to use the fran-

chise granted by Ordinance No. 26; and under this franchise appellant now furnishes water to another district in the respondent city, of limited area, commonly called "Old Tacoma." But the territory of the present respondent city was all embraced within one charter under the above act of the legislative assembly of Washington territory on February 4, 1886, and all ordinances not inconsistent therewith were continued in force. By Ordinance No. 32, approved June 9, 1884, the city of Tacoma granted the right and franchise of supplying the city with water and light—to said city and its inhabitants—to the Tacoma Light & Water Company, a corporation; and during a part of the year 1893, and prior thereto, this corporation supplied certain portions of the city of Tacoma, including the business part and a majority of the settled portions of the city, with water by means of a water system and plant owned and operated by the said Tacoma Light & Water Company. During the year 1893 respondent city purchased from the said Tacoma Light & Water Company its water plant and system, and the water company conveyed to the city of Tacoma, by deed, describing all of its real estate, reservoirs, machinery, water, and water rights, and also its franchises granted to it by the city under Ordinance No. 32; and since said purchase the respondent city has operated and carried on the business heretofore carried on by the Tacoma Light & Water Company. The appellant company has at all times since the construction of its works under Ordinance No. 350, above mentioned, operated and supplied the people in the district mentioned in the ordinance, and at all times possessed and enjoyed the privileges of the streets and alleys where its mains and pipes were placed; and said appellant has paid the municipal, county, state, and school taxes regularly assessed upon its property. It has also supplied from time to time the respondent city with water for city purposes in such district, and been paid therefor. It was also found by the superior court "that the quantity of water supplied in said district by the plaintiff and its assignors has been and is inadequate and insufficient for the use of the inhabitants in that portion of the city of Tacoma hereinbefore described, in which plaintiff's water plant is situate, and has been and is insufficient for use by the city for extinguishment of fires and other municipal purposes." The twenty-fifth finding of fact made by the superior court is as follows: "That the defendant now proposes and has decided to extend its water mains and water system into the said territory, more particularly described in finding 26, now occupied and supplied with water for domestic and other purposes and uses by plaintiff herein, and is about to locate, lay down, and operate its water mains side by side on the same streets now occupied by plaintiff's said water mains, and to make the same accessible to each householder in said territory, and to furnish water for domestic and other purposes to the inhabitants of said territory in competition with the water so

furnished by this plaintiff." Appellant has, from first to last, invested about \$40,000 in its water system for supplying the people of the district mentioned with water.

1. Appellant maintains that the operation of the city's water system within the district that appellant has been supplying will injure, and may destroy, the value of its property; and that the franchises under which it is operating are contracts made with the city, and that the city, by its intended extension of its own water system, will become a competitor of appellant, and that such competition is a violation of the contract contained in the franchises granted by the city; and it invokes the protection of the state Constitution and of the Federal Constitution (§ 10, art. 1, and § 1, art. 14). It may be observed that Ordinance No. 350, granting the franchise to appellant's grantor, Mullen, was under the authority of the legislative charter of the territory of February 4, 1886, and also that the state Constitution was in effect at the time the ordinance was made. It would seem that the charter adopted by the freeholders of the city of Tacoma in 1890 has but little bearing upon the controversy. It is conceded by the learned counsel for appellant that the city was without power to grant any exclusive franchise to appellant; that, after appellant received its franchise, the same rights and privileges could be granted to any other person or private corporation. Indeed, it appears from the record that at the time appellant's grantor, Mullen, obtained the franchise to supply water in the certain district mentioned and in the city, a franchise to supply water and light to the city had theretofore been granted to the Tacoma Light & Water Company. Thus, at any rate, it was understood by all parties when Mullen obtained his franchise that he might meet the competition of other private water companies. The power granted to the city under the act of February 4, 1886, was to purchase or condemn waterworks or gas works within the corporate limits for public use; and subdivisions 7 and 8 of § 48 also authorized the city by ordinance to erect and maintain waterworks, or to authorize the erection of the same, for the purpose of furnishing the city with a sufficient supply of water. But no works could be erected by the city until a majority of the voters had assented thereto. When the right to build and operate such works was granted private individuals or companies by the city, the grant was limited to a term of not more than fifty years.

It is contended with much earnestness by counsel for the appellant that the grant to the city was to construct waterworks, or to authorize the construction of the same by others, that it was empowered to pursue either method in obtaining waterworks, and that the grant was in the alternative. Both methods, however, could not be employed at the same time. The same contention was made in the case of *Thomas v. Grand Junction*, before the court of appeals of Colorado. 13 Colo. App. 80, 56 Pac. 665. There the

General Statutes (§ 3312, subd. 67, as amended in 1893) authorized the city to purchase or erect waterworks, or to authorize the erection of the same, and, in effect, are similar to the charter of respondent city. The court observed: "The contention of the plaintiff is that the word 'or,' as it appears in subdivision 67, is used in the disjunctive and alternative sense, and that, the city having elected to authorize the construction of waterworks for the supplying of water to the city and its inhabitants, its power in the premises was exhausted, and it has no power to construct waterworks of its own. The defendant city insists that the word is not used in such a sense, and that, if the contention of plaintiff be allowed, it would defeat the evident intent and purpose of the act, and would render it obnoxious to § 11, art. 2, of the state Constitution, which provides that 'no law making any irrevocable grant of franchises, privileges, or immunities, shall be passed by the general assembly.' It further contends that, to carry out the obvious purpose and legislative intent, the word 'or' should read 'and,' and that the judicial construction and interpretation should be that the city should be entitled to exercise all of the powers therein granted. We think that the contention of defendant is correct, and that it is fully sustained by reason and authority. It is a well-settled rule of statutory construction that all words and phrases used in a statute shall be understood and construed according to the approved and common usage of the language, and that some meaning shall be given to every word used. . . . It is equally, however, a well-settled rule of construction that, if no sensible meaning can be given to a word or phrase, or if it would defeat, manifestly, the real object of the enactment, it should be eliminated; also, that, for the same reason, words may be rejected as surplusage; also, to carry out the intention of the legislature, another word may be read for the word 'used,' where the word 'used' would manifestly defeat the legislative intent, and the substitution of the other would carry it out. These may be said to be exceptions to the general rule as above announced, but the exceptions, as will be seen by an examination of the authorities, are almost, if not quite, in as general use as the rule itself. Especially with reference to the words 'or' and 'and' has it been frequently necessary to invoke this latter rule. As said by Mr. Sutherland: 'The popular use of "or" and "and" is so loose, and so frequently inaccurate, that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their accurate meaning is more readily departed from than that of other words, and one read in place of the other, in deference to the context.' Sutherland, Stat. Constr. § 252. Mr. Endlich says: 'To carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other. (Indeed, these words are said to be

convertible into each other, as the sense of the enactment and the necessity of harmonizing its provisions may require.)' Endlich, Interpretation of Statutes, § 303." In *Thompson Houston Electric Co. v. Newton*, 42 Fed. Rep. 723, the facts were very similar to those in the case at bar. The complainant, a private corporation, obtained the right to erect, maintain, and furnish lights to private citizens, and also, by contract with the city, to furnish lights for the streets and public places of the city; and, while so performing its obligations under the franchise, the city determined to establish and maintain electric-light plants, to be owned and operated by the city. The laws of Iowa (Acts 22d Gen. Assem. chap. 11) enacted "that cities should have power to establish and maintain electric-light plants, or to authorize the erection of the same;" and the contention was there made that the city had the option given it, and that it could originally have erected its electric-light plant, but, having elected to authorize private parties to do so, it was estopped from afterwards entering the field as a competitor, and, while the light company did not have an exclusive right under its agreement with the city, yet the city should not be allowed to compete with a private company. Mr. Justice Shiras said: "It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chance as to future competition. . . . The statute confers the right so to do upon the city, and I can see no ground justifying the court in interposing by injunction, and preventing the city from establishing its proposed plant." It will be noted that the cases referred to above each answers the argument of the appellant. A case which also has much that is similar in the discussion is that of *State v. Hamilton*, 47 Ohio St. 52, 23 N. E. 935, and also *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90. Analogous reasoning is found in *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Colby University v. Canandaigua*, 69 Fed. Rep. 671. While it is true that supplying water to the inhabitants of the city and to itself does not originate in an exercise of the ordinary police powers of a municipal corporation, yet in this state, since the territorial organization, and it may be also said that generally in this country, municipal charters very generally confer this power upon cities. The respondent city was authorized, under its charter of 1886, to supply itself and its inhabitants with pure, fresh water. In the exercise of this power, it could exercise a choice of modes. It could purchase or con-

demn any existing system, or it could grant the right to any person or corporation to lay mains and pipes and furnish water, or it could erect a system itself. There does not seem to be any prescription in its charter of the method, and there is no cogent implication that the city is restricted in its power to build and operate waterworks to any specific method. It would seem, therefore, that the city council could not absolutely bind the city in the future so that it could not exercise one of its specifically granted powers under its charter; and the well-known and accepted rule, that in grants of this character doubts must be resolved in favor of the public, requires more than mere negation to infer that the council has attempted to estop the city from the fair exercise of such granted power. The familiar rule that a privilege creating a monopoly cannot be given without the grant from the sovereign, the legislature, has been extended in this state, and that power taken from the legislature by the Constitution; and § 8 of article 1 of the Constitution, *supra*, is also pertinent in considering the general policy of the state. We do not think the grant of the power to construct, or authorize others to construct, works to supply water to a city and its inhabitants, is in the alternative; but the original grant authorized it to provide water for the city, without limitation of the manner in which it may be done. It was observed by the Supreme Court of the United States in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90: "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties." Again, it was observed by the same authority in *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." Commenting upon this the court, in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90, says: "If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants susceptible of two constructions must receive the one most favorable to the public." So, if it be conceded that the respondent city was authorized by the terms of its charter to make a contract that it would not itself supply water to the inhabitants in the lim-

ited district where the appellant's mains and pipes were placed, it did not make such agreement. There are no words of exclusion in the privilege granted appellant by the ordinance. There are no words of limitation upon the right of the city. There apparently is no plain inference that can be raised from the ordinance that such was the intention of the parties. If such intention existed, it would doubtless have been expressed in the contract.

2. Counsel for appellant relies upon two cases,—one of them *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 695. But this case is readily distinguished from the one under consideration here. There, under the corporation act, water companies were authorized to supply cities with water; and provision was made for the purchase by the cities so supplied, at their option, after twenty years, of the plant of the company, at a price regulated by its net cost. Another act which the court construed *in pari materia* gave cities exclusive right to supply themselves with water, or to contract with any company for the erection of a water plant, and give it the exclusive right to furnish water to the city. Thus, the legislative grants authorized an exclusive contract between the city and the water company. The court observed, after citation and construction of the statutes: "Here, then, plainly, were two distinct methods by which the municipality could supply its citizens with water; by putting either method in operation the same end was accomplished.

. . . The primary grant was the power to supply; the secondary one, the grant of two distinct methods of exercising the power, either of which might be adopted. There was no grant of power to put both methods in operation at the same time." It was also observed that the water company, by the terms of its charter, was authorized to make an exclusive contract. The other authority is an eminent one, and, upon the construction of the principle of the Federal Constitution invoked by appellant, controlling: *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. But the facts before the court there are substantially variant from those in the case at bar. The special charter of the city of Walla Walla, by act of the territorial legislature, invested the city with power "to provide a sufficient supply of water," and "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years," provided "that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the said rights to others." It was also provided that the city of Walla Walla should have power to erect and maintain waterworks within or without the city limits, or to authorize the erection of the same, for the purpose of furnishing the city with a sufficient supply of water, and to enact all ordinances necessary to carry

the power conferred into effect, but no waterworks should be erected by the city until a majority of the voters should vote for the same. It was also given power to purchase or condemn waterworks already erected, or which might be erected. Under the powers contained in its charter, on March 15, 1887, the city, by ordinance, granted, under certain restrictions, to the water company, for the period of twenty-five years from the date of the ordinance, the right to lay, place, and maintain all necessary water-mains, pipes, connections, and fittings in all the highways, streets, and alleys of the city for the purpose of furnishing the inhabitants thereof with water, and reserved the right to maintain as many fire hydrants as it should see fit, and all reasonable and necessary control of the water for the extinguishment of fires. The ordinance also provided that the city should pay to the water company for the matters and things enumerated in the ordinance, quarter yearly, \$1,500 per annum, for the period of twenty-five years after the date of the passage of the ordinance. The city was to have the right to flush any sewer it had constructed or might thereafter construct. It was further provided: "Sec. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good, wholesome water, at reasonable rates, to consumers, at all times during the said period of twenty-five (25) years; and this contract shall be voidable by the city of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain, or become interested in any waterworks, except the ones herein referred to, save as hereinafter specified. Sec. 8. Neither the existence of said contract nor the passage of this ordinance shall be construed to be, or be, a waiver of or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said waterworks of the said Walla Walla Water Company." After this ordinance had been in force for about six years the city undertook to provide for the construction of a system of waterworks of its own for the purpose of supplying the city and its inhabitants with water. The water company filed a bill in equity to enjoin the city from proceeding to construct and operate these works. It was maintained by the complainant water company that the contemplated action of the

city violated the contract contained in the ordinance granting to the water company the right to supply water. It was concluded by the court that the contract was not an exclusive one, and did not grant a monopoly, and it was observed: "Particularly is this so when taken in connection with a further stipulation that the city shall not erect waterworks of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise." And it was observed further: "Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied in § 8 of the contract with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking §§ 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith." The controlling consideration seemed to be that the city was within its powers in making the contract with the water company; that it was incidental to the main power given the city to supply water; and from this conclusion it is apparent from the terms of the ordinance itself that the intended action of the city was a violation of the contract. In a case where the facts are closely analogous to those at

bar (*Westerly Waterworks Co. v. Westerly*, 80 Fed. Rep. 611), where the grant was made to a water company to use the highways so long as the inhabitants should be reasonably supplied with water, exempting it from taxation twenty-five years, and exacting an obligation to supply water to the town and sell its works to the town, the town was not excluded from the right to construct waterworks of its own; and the court observed: "We think, therefore, that a sound distinction can be made between a grant or a contract which absolutely excludes all competition, and one which merely excludes the competition of the town until it shall make due compensation to the company." And referring to the case of *Walla Walla Water Co. v. Walla Walla*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, as reported in 60 Fed. Rep. at page 957, it is said: "The city in explicit terms agreed not to erect, maintain, or become interested in any other waterworks. . . . It is also stated that the city had bound itself to take over the plant and render just compensation whenever it did elect to furnish water by means of works owned by it. In the present case there is no express agreement that the town will not compete, nor that, in case it should elect to compete, it will purchase the works. Such agreement must be deduced from construction, and, in view of the rule that all doubt in the construction must be resolved against the company and in favor of the public, there is great difficulty in inferring such agreement." As before observed, the city of Tacoma, in the ordinance which conferred the franchise upon appellant, did not expressly or by necessary implication agree not to erect its own waterworks, and the circumstances surrounding the parties at the time were not such as to impel the inference that such contract was in contemplation by them.

The judgment is affirmed.

Gordon, Ch. J., and Dunbar and Fullerton, JJ., concur.

WISCONSIN SUPREME COURT.

Leopold GOLDBERG *et al.*, Appts.,

v.

AHNAPPEE & WESTERN RAILWAY
COMPANY, Resp't.

(.....Wis.....)

1. A carrier may be charged as insurer for baggage delivered at the station before the starting of a train, only when it was delivered within the time reasonably necessary for obtaining the ticket, checking the baggage, etc.

NOTE.—As to liability for baggage after reaching destination, see *Kansas City, Ft. S. & M. R. Co. v. McGahey* (Ark.) 36 L. R. A. 781, and note.

47 L. R. A.

2. A rule that baggage will not be checked more than thirty minutes before train time cannot be held unreasonable as matter of law, nor can it be thus held to be reasonable to leave baggage in the evening for a train at six in the morning.

3. An objection to parol proof of the substance of a rule printed on a card and tacked up in a railroad depot is obviated by proof that the card had been destroyed in the burning of the station.

(November 24, 1899.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Door County in favor of defendant in an action brought to recover the value of baggage destroyed while

in defendant's possession for transportation. *Affirmed.*

Statement by **Dodge, J.:**

One of the plaintiffs, a traveling man, sent his trunks, containing merchandise, and not baggage, to the station of the defendant railway company at about 5 o'clock on the evening of January 27, 1897, intending to check them as baggage the next morning on a train leaving about 6 o'clock. During the night they were destroyed by fire, without fault or negligence of the defendant. Suit was brought for their value, and verdict found for the defendant on instructions not excepted to, from judgment on which this appeal is brought. Plaintiff moved to set aside the verdict as against the evidence. There was evidence tending to show that the contents of the trunk were not properly baggage, but merchandise; that the plaintiff Leopold Goldberg sent the trunks to the station the night before because it would be inconvenient and more expensive in the morning; that they were delivered in the freight house by his drayman without the knowledge of the defendant or its station agent; that, though the trunks were noticed when the freight house was shut up in the evening, the agent had no knowledge of their ownership, or the purposes for which they had been so left; that the rules of the defendant company prohibited the checking of baggage until a half hour before train time, which plaintiff knew. There was conflict as to some of the facts stated above, and as to other facts, which it is unnecessary to mention.

Messrs. Felker, Doe, & Felker, and Y. V. Drentser, for appellants:

Where a railroad company receives a trunk as baggage, upon the express or implied understanding that the owner is to become a passenger, it is liable for the loss of such baggage before transit, although the owner has neither purchased a ticket nor paid fare at the time of the loss.

Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20.

If, notwithstanding a rule to the contrary, it receives a person's trunk as baggage, trusting to his honesty to purchase a ticket, it will be liable for his loss, whether that loss occurs before or after the arrival and departure of the train, or before or after the purchase of a ticket.

Green v. Milwaukee & St. P. R. Co. 41 Iowa, 410; *Hickox v. Naugatuck R. Co.* 31 Conn. 281, 83 Am. Dec. 143; *Hutchinson, Carr. § 100*; *Camden & A. R. & Transp. Co. v. Belknap*, 21 Wend. 354; *Rogers v. Long Island R. Co.* 56 N. Y. 620.

Where baggage reaches its destination after 6 P. M., and a passenger calls for it at 7 the next morning, he calls within a reasonable time, and the carrier is liable as such if it has been lost in the meantime.

Burget v. New York C. & H. R. R. Co. 69 Hun, 479, 23 N. Y. Supp. 415; *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, 14 Am. Rep. 716; *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Hoeger v. Chicago, M. & 47 L. R. A.*

St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; *Berry v. Southern R. Co.* 122 N. C. 1002, 30 S. E. 14; *Hutchinson, Carr. § 100*; *Camden & A. R. & Transp. Co. v. Belknap*, 21 Wend. 354.

Goods and samples constituting a commercial traveler's outfit are to be considered personal baggage, where carrier and passenger contract with a full understanding of the nature of the property, and that it does not consist of ordinary wearing apparel and things carried for use on a journey.

Dison v. Richelieu Nav. Co. 15 Ont. App. Rep. 647.

Messrs. Greene, Vroman, Fairchild, North, & Parker, for respondent:

These trunks and contents were not baggage at the time of their destruction, but clearly freight.

Stimson v. Connecticut River R. Co. 98 Mass. 83, 93 Am. Dec. 140; *Collins v. Boston & M. R. Co.* 10 Cush. 506; *Alling v. Boston & A. R. Co.* 126 Mass. 130, 30 Am. Rep. 667; *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398, 34 Pac. 1054; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711.

There was no obligation on the part of the defendant, legal or otherwise, to transport these trunks as baggage, or to receive them as such.

Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435.

So long as something remains to be done by the consignor of goods before they can be intelligently started on the route to their destination, the strict responsibility of a common carrier does not arise.

Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126; *O'Neill v. New York C. & H. R. R. Co.* 60 N. Y. 138; *Hutchinson, Carr. §§ 88, 94, 100*; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132; *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 513; *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335; *Watts v. Boston & L. R. Corp.* 106 Mass. 466; *Van Gilder v. Chicago & N. W. R. Co.* 44 Iowa. 548; *Judson v. Western R. Corp.* 4 Allen, 520, 81 Am. Dec. 718; *Basnigh v. Atlantic & N. C. R. Co.* 111 N. C. 592, 16 S. E. 323.

Dodge, J., delivered the opinion of the court:

1. The liability of a carrier for ordinary baggage while in its possession for carriage as such is very different from the liability while the same articles are in storage with it. In the first case it is an insurer; in the latter, liable only as a bailee for ordinary care. The exact point at which the possession for carriage begins and ends is not easy to define, but it is not such as to exclude some reasonable time at stations before and after actual transportation. After transportation the higher liability continues only for such time as is reasonably necessary to present duplicate checks and to remove the baggage. *Hoeger v. Chicago, M. & St. P. R. Co.* 63 Wis. 100, 53 Am. Rep. 271, 23 N. W.

435. No reason is apparent why the same rule should not apply to the delivery for transportation, so that the owner has the right to deliver at the station such time before starting of train as may be reasonably necessary for obtaining ticket, checking the baggage, etc., and that he cannot impose this extreme liability by earlier delivery without the consent of the carrier. *Green v. Milwaukee & St. P. R. Co.* 38 Iowa, 100; *Goodbar v. Wabash R. Co.* 53 Mo. App. 434. This defendant had, by a rule known to plaintiff, prescribed thirty minutes before train time as such reasonable time. It certainly cannot be said, as matter of law, that such limit is unreasonable, nor that twelve hours is reasonable, or was rendered reasonably necessary by the circumstances. The submission of that question to the jury was not an error of which plaintiff can complain. As to whether defendant assented to such delivery, and accepted plaintiff's trunks for carriage as baggage, with knowledge of their contents, was a disputed ques-

tion of fact, and a finding in the negative has abundant support in the evidence.

2. The overruling of the objection to the testimony of defendant's agent, Reitzel, that there was no advantage to the company in having the trunks delivered the night before, was without prejudice; for it appeared by plaintiff's own testimony that the agent was prohibited from checking baggage until half an hour before train time, and that the convenience of the company obviously could not be enhanced by delivery of baggage earlier than that time.

3. Parol proof of the substance of the rules, printed on a card and tacked up in the depot, prohibiting checking until within half an hour of train time, could not have prejudiced plaintiff, for he testified that he had knowledge of such a rule. Further, any objection to parol testimony as to the contents of such card was obviated by proof that it had been destroyed in the burning of the station.

We find no reversible error in the record.
Judgment affirmed.

IOWA SUPREME COURT.

STATE of Iowa
v.
James HOSKINS, Appt.

(.....Iowa.....)

1. The publication of charges against a candidate for the office of judge is not privileged when the charges are published outside the judicial district for which the judge is to be elected.
2. A belief in the truth of the charge is not a defense in a criminal prosecution for libel, where the publication is not shielded by any privilege.
3. Proof made by an original book of records cannot be prejudicial merely because the proof should have been made by certified copy.
4. Testimony of a witness that a certain person was county auditor at a certain time is not inadmissible on the ground that it is a conclusion.

(December 13, 1899.)

APPEAL by defendant from a judgment of the District Court for Buena Vista County convicting him of publishing a libel concerning F. H. Helsell, a candidate for the office of district judge. *Affirmed.*

The facts are stated in the opinion.

Mr. T. H. Chapman, for appellant:

If the defendant in good faith believed the statements in the article to be true, and published the same for justifiable ends, without malice, and in this case for the purpose of enlightening the voters, it is a proper and sufficient defense.

Mott v. Dawson, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *State v. Conable*, 81 Iowa, 60, 46 N. W. 759.

Libel is defined to be "the malicious defamation of a person, made public by any printing, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of public confidence and social intercourse," etc.

Code, § 5086.

A defendant may show, as a matter of defense, that he believed the article to be true when he published it, that he published it without malice, in good faith, and for justifiable ends.

State v. Conable, 81 Iowa, 60, 46 N. W. 759; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *Mott v. Dawson*, 46 Iowa, 533.

It should be left to the jury to determine, under the whole evidence, whether the defense was interposed in good faith under an honest belief that it was true.

Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; *Distin v. Rose*, 69 N. Y. 122; *Townsend, Slander & Libel*, § 400, pp. 435, 659; *Allen v. Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532; *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274.

The intention of the publisher, and every circumstance attending the act, must be cognizable by the jury as questions of fact.

People v. Crowswell, 3 Johns. Cas. 364, Appx.

If the libelous matters complained of are in the way of comments openly made upon the acts and conduct of public officers or

NOTE.—For truth as a defense to libel, see note to *Warner v. Clark* (La.) 21 L. R. A. 502.

As to libel of candidates or officials, see *Sillars v. Collier* (Mass.) 6 L. R. A. 680, and note; *Randall v. Evening News Assn.* (Mich.) 7 L. R. A. 47 L. R. A.

A. 309; *Belknap v. Ball* (Mich.) 11 L. R. A. 72; *Augusta Evening News v. Radford* (Ga.) 20 L. R. A. 533; *Upton v. Hume* (Or.) 21 L. R. A. 498; and *Smith v. Utley* (Wis.) 35 L. R. A. 620.

candidates for office of public trust, and if they are within the limits of a fair and honest criticism, and are not inspired by actual malice, they are privileged by the occasion, and are therefore not libelous.

Folkard's *Starkie, Slander & Libel*, 4th ed. p. 311, § 256; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102.

The only limit to the privilege is that the comments shall be within the limits of a fair and honest criticism, and without actual malice.

Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360.

The existence of the privilege does not depend upon the truth of the statements made.

King v. Root, 4 Wend. 113, 21 Am. Dec. 102.

The question of malice is exclusively for the jury whenever express malice, not legal malice, must be proved.

Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360.

The occasion that makes a communication privileged is when one has an interest in a matter or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance.

Van Wyck v. Aspinwall, 17 N. Y. 190; *Klinck v. Colby*, 46 N. Y. 431, 7 Am. Rep. 360; *Sunderlin v. Bradstreet*, 46 N. Y. 191, 7 Am. Rep. 322.

In an action for libel it is for the court to determine whether the alleged libel was a privileged communication; but the questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury.

Hamilton v. Eno, 81 N. Y. 116; *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785.

A privileged communication is not confined to some certain limit or territory.

The communication becomes privileged because published on a proper occasion, from a proper motive, and upon reasonable or probable cause and a belief of its truth.

Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513; *Nesb v. Hope*, 111 Pa. 145, 2 Atl. 568.

Messrs. Milton Remley, Attorney General, *Charles A. Van Vleet*, and *Carr & Parker*, for appellee:

In a criminal case on a plea of justification, practically the defendant is acquitted if he can prove that there exist probable grounds to believe the publication true, for this is sufficient to generate a reasonable doubt of the defendant's guilt.

Dove v. State, 3 Heisk. 367; *Coffee v. State*, 3 Yerg. 283, 24 Am. Dec. 570.

A candidate for office, when he becomes such, does not thereby surrender his private rights, nor is he without the pale of the protection of the law.

Where the defendant publishes an article accusing a candidate of a crime, and the article purports to state facts, the defendant cannot excuse himself without proving the truth of the charge.

Bronson v. Bruce, 59 Mich. 467, 60 Am. 47 L. R. A.

Rep. 307, 26 N. W. 671; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Levis v. Few*, 5 Johns. 35; *Hamilton v. Eno*, 81 N. Y. 116; *Duncombe v. Daniell*, 8 Car. & P. 222; *Bourreesau v. Detroit Evening Journal Co.* 63 Mich. 425, 30 N. W. 376; *Upton v. Hume*, 24 Or. 420, 21 L. R. A. 493, 33 Pac. 810; *Smith v. Tribune Co.* 4 Biss. 477, Fed. Cas. No. 13, 118; *Smith v. Burrus*, 106 Mo. 94, 13 L. R. A. 63, 16 S. W. 881; *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *Brewer v. Weakley*, 2 Overt. 99, 5 Am. Dec. 656; *Sweeney v. Baker*, 13 W. Va. 183, 31 Am. Rep. 757; *Rearick v. Wilcox*, 81 Ill. 77; *Com. v. Wardwell*, 136 Mass. 164; *Usher v. Severance*, 20 Me. 9, 37 Am. Dec. 33; *Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Reid v. McLendon*, 44 Ga. 156; *Benton v. State*, 56 N. J. L. 551, 36 Atl. 1041; *Townshend, Slander & Libel*, 255, p. 486; *Root v. King*, 7 Cow. 613; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *McDonald v. Woodruff*, 2 Dill. 244, Fed. Cas. No. 8,770; *Staub v. Van Benthuyssen*, 36 La. Ann. 467, 17 Rep. 588; 18 Cent. L. J. p. 418; 22 Cent. L. J. p. 422, notes; 21 Cent. L. J. p. 86, notes; *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Cooley*, Torts, 201.

Waterman, J., delivered the opinion of the court:

Defendant is the editor and publisher of a newspaper printed in the county of Buena Vista, one of the counties composing the fourteenth judicial district of this state. The article upon which this prosecution is founded was written by one Bruce, and published by defendant in his paper, at a time when one F. H. Helsell was a candidate for the office of judge of the district court in and for said district. The article charged Helsell with fraudulently altering a public record. No claim is here made that the charge was true. It is, however, insisted by defendant that if he published the article in good faith, believing it to be true, and actuated by justifiable motives, he cannot properly be convicted. A determination of the question thus presented will dispose of several of the assignments of error.

In order to make plain our reasons for the conclusion at which we have arrived, it will be necessary to consider, to some extent, the common law relating to this subject. First, let us say there have always been some material distinctions preserved between civil actions, in which damages were sought for this offense, and criminal proceedings. In a criminal proceeding at common law, the defenses were but two,—a denial and a plea of privileged communication. The truth of the matter charged could not be given in evidence by a defendant. It was a maxim that "the greater the truth the greater the libel." A prosecution for this offense was founded on the thought that a publication of a libel was likely to provoke a breach of the peace, and the fact that it was true tended rather to increase the probabilities of such a result. 1 Kent, Com. 621. But, in a private action for pecuniary recompense, the truth of the charge could always be shown in justifica-

tion or in mitigation of damages, since, as it is said, a man is entitled to no better reputation than his actual character would warrant. 1 Greenl. Ev. § 421; *J'Anson v. Stuart*, 1 T. R. 748, 2 Smith, Lead. Cas. 986, note. In course of time, the rule was adopted in many of the states of the Union allowing the truth of the charge to be shown as a defense. In our own state this principle is embodied in the Constitution. Article 1, § 7. But with us it is qualified. The truth can be shown only when the publication is made "with good motives and for justifiable ends." Except as thus modified, the common law relating to libel governs in this state. Without the constitutional provision mentioned, the truth itself would be no defense. There is no little uncertainty in the books on the question of what constitutes a privileged communication, or rather what publications are protected as such. There are cases which hold that a charge of crime made against one who is a candidate for public office may be the subject of privilege. *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513. The contrary is held by many courts of high standing. See *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671, and cases cited. We need not determine between these conflicting authorities, for reasons which will presently appear. An absolute privilege is a complete defense. No legal complaint can be founded upon words spoken or written under its protection. Of this nature are proceedings in legislative assemblies, and generally in judicial tribunals. A qualified privilege is where the communication is made in the discharge of some duty, social, legal, or moral. Such a defense may be rebutted by a showing of actual malice. To establish a qualified privilege, it must be shown that defendant believed the charge to be true, and published it in the discharge of some duty, and we may assume that it was a duty on his part to make known to the electors of the fourteenth judicial district the true character of a candidate for the office of district judge. But, if this duty was in any way transcended, the good faith of defendant ceased to be material. Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege. It appeared in this case, from defendant's own testimony, that he voluntarily published the charge, not only outside the fourteenth judicial district, but outside the state; thus making it known to persons who were in no way interested in the judicial election. We have been cited to no case, and know of no principle of law, that would sustain the claim of privilege, under these circumstances. In *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, on a state of facts quite similar to those here involved, the court said: "The evidence showed that the newspaper in question circulated in adjoining counties and cities outside of the county of Winnebago, and outside of the plaintiff's senatorial district. To claim that there was any duty, public or private, resting on the 47 L. R. A.

defendant to publish such a charge against the plaintiff in these localities is to demonstrate the absurdity of the claim. There was not only no duty, but there was certainly no tangible interest in the subject-matter on the part of the people outside of the plaintiff's district. Thus, it is very plainly seen that the publication, even if it could be considered as privileged when made to a citizen of Oshkosh, who might be said to be interested in the subject-matter, could not be made broadcast to the world, and preserve its privileged character. The publication is excessive. It must be confined to people to whom defendant owes a duty to speak, or who have an interest with the defendant in the subject-matter." See also *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555.

We have, then, this question, somewhat narrower than discussed by appellant's counsel, presented: Where the publication of libelous matter is shielded by no privilege, can a defendant in a criminal proceeding exonerate himself by showing a belief on his part in the truth of the charge? We know of no authority in support of the affirmative of this proposition. In all the cases where evidence of the good faith of the defendant has been admitted, it was not as a direct defense, but only as tending to establish one essential element of a qualified privilege. *Mott v. Dawson*, 46 Iowa, 533, *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785, and *State v. Conable*, 81 Iowa, 60, 46 N. W. 759, relied on by defendant, go no further than this. For the reasons stated, we think the evidence of defendant's good faith was inadmissible. What we have said sufficiently indicates, also, our reasons for holding that the court properly refused the instructions asked by defendant. The charge as given we regard as a concise, clear, and correct exposition of the law governing the case. We think, too, that the ground has already been stated upon which we sustain the trial court's action in striking out the testimony upon which exceptions were reserved, and which is discussed in the third division of the argument for defendant, and also the matter complained of in the fifth division thereof. The various questions there raised rest upon defendant's right to show his good faith as a defense.

2. An original book of records from Pocahontas county was introduced in evidence on a certain point. It is claimed there was no authority for bringing an original record from another county; that the proof should have been made by certified copy. If defendant's position is correct, we can see no just ground of complaint on his part. He certainly suffered no prejudice.

3. A witness was allowed to say what person was county auditor at a certain time. It is argued that this was a conclusion, and inadmissible. All that was sought was to show who was acting as county auditor. This could be done without producing his commission. 1 Greenl. Ev. § 83. What the witness stated was a fact, and not a conclu-

sion. No other matters not covered by what we have already said are presented. Some question is made by appellee as to the sufficiency of the exceptions to raise some of the matters passed upon. We have not investigated this claim, but, for reasons that

seemed to us sufficient, have passed upon the merits of the case presented.

Affirmed.

Robinson, Ch. J., taking no part. Gramger, J., not sitting.

NEW HAMPSHIRE SUPREME COURT.

James Hopkins SMITH *et al.*,
v.

Henry H. FURBISH.

(.....N. H.....)

1. A right of flowage, which a deed by the proprietor of lands on both sides of a river, conveying one side of it, reserves as part of a mill privilege for the benefit of a mill to be operated by water to be raised by a dam, is to be deemed appurtenant to the land of which the mill and dam will be a part, and not merely an easement in gross.
2. The bed of the river between the middle of the stream and the abutting land belongs to the owner of the latter, under an exception in a deed of a piece of land fronting on a river, "12 rods in length on the bank of said river, and extending back far enough, same width, to comprise 1 acre of land."
3. The right of location belongs to the grantor under a deed of land on one side of a river, from which he reserves the right to build a dam at any point against the land, with the right of flowage resulting therefrom, and also reserving or excepting an acre of land fronting on the river in the immediate vicinity of the dam.
4. The uncertainty of a reservation or exception of the right to build a dam at any point against lands conveyed, with the right of flowage and also 1 acre of land in the immediate vicinity of the end of the dam, does not render the provision void, as the exercise of a right of election by the grantor will remove the uncertainty.
5. A forfeiture of a right to timber on land given by a deed does not result from a neglect to remove the timber for an unreasonable time.
6. A forfeiture of a grantor's rights in land excepted from a deed, but not distinctly located, does not result from his failure to exercise his power of selection in a reasonable time, where the other party has not been damaged by the delay.
7. A tenancy in common is created by a deed in which the grantor makes an exception of a part not distinctly located, and continues until he exercises his right of election.
8. An exception, and not merely a reservation, is created by a deed of land on one side of a river, "reserving" to the grantor the right to build a dam across the river at any point against the land, with the right of flowage caused by the dam, and also an

acre of land in the immediate vicinity of the dam, as the effect of the provision does not depend upon the choice of the particular word, but upon the nature and effect of the provision itself.

9. The law does not resort to fictions without a motive, or for any other purpose than a compliance with the requirements of justice.
10. The use of the word "heirs" is not necessary to create a title in fee, in New Hampshire, when there is an unqualified grant or reservation of land.
11. The estate reserved to a grantor is not a life estate only, where in a deed of land on one side of a river he reserves the right to build a dam against it, with the accompanying right of flowage, and also to an acre of land in the immediate vicinity of the end of the dam, although his language is "reserving to myself," without using any words of inheritance.
12. A right of election belonging to a grantor who has reserved or excepted out of his grant a piece of land and the right to build a dam and the accompanying right of flowage, without defining the location by the deed, does not terminate by his failure to exercise it during his own life, but continues to his heirs.

(Chase, J., dissents.)

(July 27, 1894.)

ACTION to enforce title to a portion of a tract of land which complainants' grantor had conveyed to defendant's grantor with a reservation of the portion sought to be recovered in this action. *Judgment for plaintiffs.*

Moses T. Cross, being in possession of lot 4, in the tenth range of lots in Berlin, conveyed to defendant's grantor, Wilson, a portion thereof described as follows: "A certain piece of land, being all that part of lot numbered 4 . . . lying on the east side of the Androscoggin river; reserving to myself the right of building a dam across said river at any point against said land, together with the right of flowage of said land at any and all times caused by said dam when constructed; also, reserving a piece of land fronting on said river in the immediate vicinity of the east end of said dam, 12 rods in length on the bank of said river, and extending back far enough, same width, to comprise 1 acre of land; said Wilson to have the timber on said acre of land."

Plaintiffs claimed under the reservation in said deed.

Further facts appear in the opinion.

Mr. Ossian Ray, for plaintiffs:

The reservation of the right to build a

NOTE.—As to exceptions and reservations of easements, see *Hagerty v. Lee* (N. J. L.) 20 L. R. A. 631, and *note*.

As to easements in gross and the right to assign or transmit them, see *Fisher v. Fair* (S. C.) 14 L. R. A. 333.
47 L. R. A.

dam and flow is not confined to the life of the grantor, Cross, but operates for the benefit of his heirs and assigns in fee.

Emerson v. Mooney, 60 N. H. 315; *Cole v. Lake Co.* 54 N. H. 242; *Wilcox v. Wheeler*, 47 N. H. 488; *Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, 41 Me. 314.

Mr. William L. Foster also for plaintiffs.

Messrs. Ladd & Fletcher, for defendant:

The clause contained in the deed is clearly a reservation, and not an exception.

Tiedeman, Real Prop. § 843; *Bouvier*, Law Dict. title *Reservation*; *Goy v. Walker*, 36 Me. 54, 58 Am. Dec. 734; *State v. Wilson*, 42 Me. 9; *Moulton v. Faught*, 41 Me. 298; *Craig v. Wells*, 11 N. Y. 315; *Ives v. Van Auker*, 34 Barb. 566.

A reservation must contain words of limitation to enable it to extend beyond the life of the grantor.

Kister v. Reeser, 98 Pa. 1, 42 Am. Rep. 608; 1 Devlin, Deeds, § 222, and authorities cited; *Bean v. French*, 140 Mass. 229, 3 N. E. 206; *Curtis v. Gardner*, 13 Met. 457; 3 Washb. Real Prop. 5th ed. p. 465, *641; *Green's Appeal* (Pa.) 12 Cent. Rep. 559, 13 Atl. 972.

In the case at bar the reservation is "reserving to myself." A reservation thus restricted and qualified has been held to be a reservation for the life of the grantor only.

Barnes v. Burt, 38 Conn. 541; *Bean v. French*, 140 Mass. 229, 3 N. E. 206; *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672.

Wherever there is any ambiguity in the language of a deed the construction is to be, always, most favorable to the grantee.

Darling v. Crowell, 6 N. H. 421; *Leavitt v. Towle*, 8 N. H. 96; *Ococheo Mfg. Co. v. Whittier*, 10 N. H. 305.

Every exception or reservation in deeds of conveyance is to be construed most strictly against the grantor, and most beneficially for the grantee.

Wyman v. Farrar, 35 Me. 64.

The reservation of the land is so general, uncertain, and indefinite that the court must hold it void for uncertainty.

1 Devlin, Deeds, § 222; *Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54; *Darling v. Crowell*, 6 N. H. 421; *Bailey v. White*, 41 N. H. 337; *Massey v. Belisle*, 24 N. C. (2 Ired. L.) 170; *Andrews v. Todd*, 50 N. H. 565; *Morse v. Stockman*, 73 Wis. 89, 40 N. W. 679; *Gaston v. Weir*, 84 Ala. 193, 4 So. 258; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. 665; *Butcher v. Creel*, 9 Gratt. 201.

The purpose of the clause in the deed from Cross to Wilson, "reserving to myself the right of building a dam across said river," was to give the grantor the easement of maintaining a dam and flowing the land.

But "an easement cannot be created by way of exception from a grant of land, because an easement, not being any specific part of the subject of grant, like timber or minerals, is not properly a subject of exception."

47 L. R. A.

Leake, Land Laws, part iii., p. 265; *Durham & S. R. Co. v. Walker*, 2 Q. B. 940.

Whether an estate of inheritance has been created in the easement depends upon whether the technical word "heirs" has been used, or, if not, whether the court is able to say that "the intention of the grantor to convey a fee simple is clearly shown by other words in the deed."

Cole v. Lake Co. 54 N. H. 242.

The intention of the grantor, the ascertainment of which will constitute the interpretation of the clause in question, is, in the nature of the case, not his real, unexpressed intention, but his intention as expressed in the deed.

Hawkins, Construction of Wills, p. 1; *Wigram*, Construction of Wills, § 9; *Rice v. Boston Port & Seaman's Aid Soc.* 56 N. H. 191; *Cram v. Cram*, 63 N. H. 31.

Doe, Ch. J., delivered the opinion of the court:

Lot 4 of range 10 in Berlin is under and on both sides of the Androscoggin river, which flows in a southerly direction. Between these claimants of water power, it is a matter of importance that the bed of the river is a part of the lot, and that every acre, bounded easterly or westerly by the river, extends to the center of the stream. While the portion of the lot on the east side may be conveniently called the east section, and the other portion the west section, the thread of the river is in this case an immaterial line, except at the points where it has become a boundary of adjoining owners. Where both banks and the bed belong to the plaintiffs, no light is thrown on their rights by dividing the bed into two parts, or drawing a line between it and the bank on each side. Their channel and their adjoining upland are one tract. Their right to build a dam on it and flow their own territory is an element of their title. Their right to flow the defendant's part of lot 4 is presumed to be an appurtenance of their land. "Though an easement . . . may be created by grant in gross, as it is called, or attached to the person of the grantee, this is never presumed when it can fairly be construed to be appurtenant to some other estate." Washb. Easem. *28; *Spensley v. Valentine*, 34 Wis. 154, 160; *Kuecken v. Voltz*, 110 Ill. 264, 268, 269; *McMahon v. Williams*, 79 Ala. 288, 291. It is a natural inference of fact that the plaintiffs' right of flowage, expressly reserved by deed, was intended to be attached to the soil on which by the terms of the same deed the dam was to be built. "The right of flowage . . . caused by said dam when constructed" was evidently reserved as a part of a mill privilege, for the benefit of a mill to be operated by water to be raised by the dam, and is fairly construed to be appurtenant to the land of which the mill and dam will be a part. Cross, being the owner of lot 4, conveyed a part of the east section to Wilson. The deed is clear, full, and precise. The grant is of "a certain piece of land, being all that part of lot numbered 4, in the 10 range of lots in said Berlin, lying

on the east side of the Androscoggin river; reserving to myself the right of building a dam across said river at any point against said land, together with the right of flowage of said land at any and all times caused by said dam when constructed; also, reserving a piece of land fronting on said river in the immediate vicinity of the east end of said dam 12 rods in length on the bank of said river, and extending back far enough same width, to comprise 1 acre of land; said Wilson to have the timber on said acre of land." This conveyance was made in 1865. In 1888, Cross being dead, the plaintiffs, as his successors in title, surveyed an acre according to the description given in the reservation, marked it on the ground, informed the defendant, the successor of Wilson, that they intended "to locate a dam there," and requested him to remove the timber. This suit is a writ of entry for that acre. The defendant contends that the reservation of an acre was void for uncertainty, and that in "the right of building a dam" and "the right of flowage" Cross reserved only a life estate.

1. A deed of a lot of land in Manchester, describing it as "fronting westerly on Merrimack river and easterly on Elm street, 12 rods in length on the bank of said river and 12 rods on said street," would convey the grantor's title from the middle of the river to the middle of the street. An intent that the soil in the river and street shall be owned by a person who does not own the abutting land is so improbable that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage to limit the title of the grantee to the edge of the street and the edge of the river. 3 Kent, Com. 428; Wallace's note in *Dovaston v. Payne*, 2 Smith, Lead. Cas. 4th Am. ed. 189; dissenting opinion of Redfield, J., in *Buck v. Squires*, 22 Vt. 484, 494; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642, 27 N. W. 606; *Proprietors of Claremont v. Carlton*, 2 N. H. 369, 371; *State v. Gilmanton*, 9 N. H. 461, 463; *Greenleaf v. Kilton*, 11 N. H. 530, 533; *State v. Canterbury*, 28 N. H. 195, 216; *Woodman v. Spencer*, 54 N. H. 507, 512, 514, 516; *Sleeper v. Laconia*, 60 N. H. 201, 202, 49 Am. Rep. 311; *Taylor v. Blake*, 64 N. H. 392, 10 Atl. 698; *Kent v. Taylor*, 64 N. H. 489, 490, 13 Atl. 419; *Capron v. Kingman*, 64 N. H. 571, 14 Atl. 868. Such a limitation in the case of a street would be contrary to universal practice (3 Kent, Com. 433), and the presumed intent is the same whether the boundary is a street or a fresh-water river. On the question of fact whether certain phrases or circumstances are sufficient evidence of a different intent (*Gould v. Eastern R. Co.* 142 Mass. 85, 89, 7 N. E. 543; *Gaylord v. King*, 142 Mass. 495, 503, 8 N. E. 596; *Holloway v. Southmayd*, 139 N. Y. 390, 401, 412, 34 N. E. 1047, 1052; *Tiedeman*, Real Prop. §§ 833, 837), there has not been a unanimity of opinion in all jurisdictions, but the presumption is regarded as an established rule; and in this state it is settled (in cases before cited) 47 L. R. A.

that such terms as those used in Cross's reservation do not prove an intent to sever the channel of the river from the riparian estate of which it is presumed to be a part. If a Manchester lot, abutting on Merrimack river and Elm street, were described in a deed as extending northerly from a given line far enough to comprise 25 acres, or 25,000 square feet, the quantity of measured land would be less than the area of the granted premises. Whether the price were a lump sum, or \$1,000 an acre, or \$10 a foot the east half of the river and the west half of the street would not be included in the measurement. The law takes notice of the fact that the bank of the Merrimack is a more convenient place for monuments than the center of the stream. *Gouverneur v. National Ice Co.* 134 N. Y. 355, 365, 18 L. R. A. 695, 31 N. E. 865. In material elements of utility and value, the river and street differ from ordinary land in which the owner has a right of exclusive occupation. *Lord v. Sydney Comrs.* 12 Moore, P. C. C. 473, 497; *Woodman v. Spencer*, 54 N. H. 507, 513. The usage and understanding of the community (judicially noticed as evidence of the meaning of a deed), and the character of the use generally made of a river and street, would show that the half of each which passes by a conveyance of an abutting lot is not within the specified dimensions. *Gouverneur v. National Ice Co.* 134 N. Y. 355, 365, 18 L. R. A. 695, 31 N. E. 865; *Holbert v. Edens*, 5 Lea, 204, 40 Am. Rep. 26; *Jones v. Pettibone*, 2 Wis. 308; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 286, 287, 19 L. ed. 74, 78; *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 196, 33 L. ed. 872, 878, 10 Sup. Ct. Rep. 518; *Hardin v. Jordan*, 140 U. S. 371, 380, 381, 35 L. ed. 428, 432, 433, 11 Sup. Ct. Rep. 808, 838, and cases there cited; *Salisbury v. Great Northern R. Co.* 5 C. B. N. S. 174, 209; *Berridge v. Ward*, 10 C. B. N. S. 400, 402, 408, 411, 414, 415; *Pryor v. Petre* [1894] 2 Ch. 11. The erroneous rule, that a line described as running "on the bank" of a river disproves an intent to make the river the boundary, is supposed to have been adopted in the unreported case of *Alcock v. Little*, decided in 1815, and was recognized as sound in a dictum in *Riv v. Johnson*, 5 N. H. 520, 523, 524, 22 Am. Dec. 472. In *Daniels v. Cheshire R. Co.* 20 N. H. 85, 88, a deed from the plaintiff to the defendants named the bank of Connecticut river as the western boundary, and described the premises as situated between the river and a given line. Cold river passed through the premises, but was not mentioned in the deed. In a written contract, reciting the conveyance, the defendants promised to pay for "said land lying on both sides of Cold river, accurately measured, . . . at the rate of \$100 per acre, except so much thereof as is highway." The suit was assumpsit for the agreed price. It was held that the deed conveyed the bed of Cold river, and that the grantees were not bound to pay the agreed price per acre for the bed of either of the rivers. It was wrongly held that the deed conveyed no part

of the bed of the Connecticut. In determining the sum for which the plaintiff was entitled to judgment, it was not material whether the deed conveyed the whole bed (*Proprietors of Oornish Bridge v. Richardson*, 8 N. H. 207, 210; *State v. Canterbury*, 28 N. H. 195, 219, 221; *Crosby v. Hanover*, 38 N. H. 404, 413; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286), or only the east half of it, or none of it. A provision in the contract excepting from measurement the Connecticut highway (*Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 377, 13 L. R. A. 826, 21 Atl. 1090) would have been as superfluous as the clause excepting so much of the granted premises "as is highway." *Firmstone v. Spaeter*, 150 Pa. 616, 25 Atl. 41, is in conflict with our law. When the banks and bed of a brook are a part of a conveyed lot, the bed is generally included in the measurement. But a sale of a number of acres or square feet bounded by the Connecticut, the Merrimack, the Androscoggin, or a street, is understood here not to require a measurement of the river or street, and a price per acre or foot is understood not to be the price per acre or foot of river or street. The price of the title which the purchaser acquires in the bed of the river or the street is a part of the agreed price of the measured land.

2. The rule that a deed is "taken most strongly against him that is the agent or contractor, and in favor of the other party, . . . being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail." 2 Bl. Com. 380. "The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." 2 Kent, Com. 557. "Where all other rules of exposition fail" is a description (less appropriate now than formerly) of the situation of a case in which there is no preponderance of evidence in favor of either party. When the evidence is not exactly balanced, there is no opportunity to use the rule *contra proferentem*. "If the sense of the words be in *equilibrio*, the rule of law will apply." Bayley, J., in *Love v. Pares*, 13 East, 80, 86. It cannot be applied in this case, where there is no equilibrium. Whether it is ever useful where intent is a question of probability and the law of the burden of proof is duly observed, is no part of the present inquiry. "Where a word having a technical as well as a popular meaning is used in the Constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense." *Weill v. Kensfield*, 54 Cal. 111; *Sprague v. Norway*, 31 Cal. 173. Words used in a Constitution should be construed in the sense in which they were employed. They must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers, and by the people 47 L. R. A.

who adopted it. . . . It . . . owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.' *Manly v. State*, 7 Md. 135." *Miller v. Dunn*, 72 Cal. 462, 465, 14 Pac. 27. The same natural mode of construction is applicable to wills and deeds. When a word appears to be used in a technical or peculiar sense, its apparent meaning is its legal meaning. But there is no legal presumption that all testators and contracting parties are lawyers, or that their understanding and use of language is peculiar. *Verba intentioni debent inservire. Benigne interpretamur chartas propter simplicitatem laicorum.* Co. Litt. 36a. Therefore the construction must be "reasonable and agreeable to common understanding." 2 Bl. Com. 379. "The terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense." 1 Greenl. Ev. § 278; Chitty, Contr. 79, 81; *Perkins v. Mathes*, 49 N. H. 107, 110. "It is the office of judges to take and expound the words which common people use to express their meaning, according to their meaning." *Hill v. Grange*, 1 Plowd. 164, 170; Williams, J., in *Doe ex dem. Winter v. Perratt*, 6 Mann. & G. 314, 336. "The bulk of mankind act and deal with great simplicity; and on this is founded the rule that *benigne faciendas interpretationes chartarum propter simplicitatem laicorum*. Words are to be taken in their popular and ordinary meaning, unless some good reason be assigned to show that they should be understood in a different sense. . . . *Si nulla sit conjectura quae doceat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu.*" 2 Kent, Com. 555. "An agreement or contract shall have a reasonable construction, according to the intent of the parties." Comyns, Dig. *Agreement* (C). Their agreement is enforced "according to the sense in which they mutually understood it at the time it was made. . . . The construction shall be reasonable, . . . as near the minds and apparent intents of the parties as the rules of law will admit. And it is essential to consider the subject-matter of the agreement in affixing a meaning to the terms used therein. . . . Every contract is to be construed with reference to its object, and the whole of its terms; and accordingly the whole context must be considered in endeavoring to collect the intention of the parties, even although the immediate object of inquiry be the meaning of an isolated clause." Chitty, Contr. 74, 83. The whole instrument is to be read, and applied

to the subject-matter, to ascertain the primary and leading purpose of the parties; and an ambiguous word or phrase is to be construed, if it reasonably may be, so as best to promote and accomplish that purpose. *Warren v. Merrifield*, 8 Met. 93, 96; *Bellows v. Denison*, 9 N. H. 293, 295; *New Hampshire Bank v. Willard*, 10 N. H. 210, 213; *Sherburne v. Goodwin*, 44 N. H. 271, 275; *Salmon Falls Mfg. Co. v. Portsmouth Co.* 46 N. H. 249, 254, 255; *Corwin v. Hood*, 58 N. H. 401, 402; *Blanchard v. Ames*, 60 N. H. 404, 406.

3. The primary and leading purpose of Cross's reservation was to leave in him the title of a mill privilege which was situated under and on both sides of the river, and which Wilson did not buy or pay for. The integral and exclusive character of the water rights which Cross did not convey is obvious. While he retained the west section, an acre of the east section, a right to build a dam across the river, and a right to flow the east section, he conveyed to Wilson no right to flow the west section. The quantity of both sections to be flowed depends upon the location and height of the dam, and is to be determined by the owner of the privilege electing where and how high the dam shall be. *Goodrich v. Longley*, 1 Gray, 615. The price paid by Wilson for what he bought was not fixed on the basis of his right to destroy the value of the reservation by locating the dam and the acre where they would be worthless for the purposes of a mill. The construction that gives effect to the intent of the parties is that the right of location belongs to the owner of the reserved property. It is not necessary to examine the correctness of the view that gives him the election, because he is the party who ought to do the first act, *vis.*, to build the dam and use the water power and the acre. *Heywood's Case*, 2 Coke, 35, 37; Co. Litt. 145a; Comyns. Dig. *Election* (A1), (A2); 1 Benjamin, Sales, Am. ed. 1884, § 489. If the reservation had been of a mill site, with no specification of locality or quantity, it would have retained in Cross and his assigns as much land as was reasonably necessary for building and carrying on the business of a mill at any place in lot 4, on the left bank of the river, that he or they might select. *Jackson ex dem. Hasbrouck v. Vermilyea*, 6 Cow. 677, 678. If the parties in interest disagreed as to the quantity, the question of reasonable necessity could be determined on a bill in equity brought by any of them against the others. A similar question is considered in those cases in which it is held that a quantity of land, reasonably necessary for the use of a mill, house, rope walk, or wharf, is conveyed by a deed of the structure, with no metes or bounds, and no express mention of land. *Blake v. Clark*, 6 Me. 436, 439, 440; *Gibson v. Brookway*, 8 N. H. 465, 471, 31 Am. Dec. 200; *Bean v. Brackett*, 34 N. H. 102, 119; *Winchester v. Hees*, 35 N. H. 43, 47, 48; *Davis v. Handy*, 37 N. H. 65, 71; *Marston v. Stickney*, 58 N. H. 609, 610; *Doane v. Broadstreet Asso.* 6 Mass. 332; *Allen v. Scott*, 21 Pick. 25, 32 47 L. R. A.

Am. Dec. 238; *Forbush v. Lombard*, 13 Met. 109, 114; *Johnson v. Rayner*, 6 Gray, 107; *Blaine v. Chambers*, 1 Serg. & K. 169, 172, 174; *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.* 143 U. S. 596, 613-615, 36 L. ed. 277, 282, 283, 12 Sup. Ct. Rep. 479. The form of the acre reserved by Cross is definitely described in the deed. The river is its western boundary, and the acre and the dam are to be in the immediate vicinity of each other. The uncertainty of the reservation is not an equitable or a legal reason for denying to the owner of the reserved estate the protection of the remedial law applicable to cases in which the quantity as well as the locality of conveyed or reserved land depends upon a reasonable necessity, determinable as a judicial question when the parties do not agree, or the owner refuses to make a location in due time.

Under the stipulation of the deed that Wilson should "have the timber on said acre," he could cut it as soon as the deed was delivered. If Cross selected and marked the acre, and Wilson obstructed the erection of a mill upon it by neglecting for an unreasonable time to remove the timber, this wrong would not operate as a conveyance of the timber to Cross. *Plumer v. Prescott*, 43 N. H. 277; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. In *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, the plaintiff conveyed land to the defendant "excepting and reserving the timber on the said land, . . . for the removal of which the said party of the second part agrees . . . that he . . . will give two years from the date hereof." "If the contention of the defendant is right," says Beasley, Ch. J., delivering the opinion of the court (p. 205, 32 Am. Rep. 195), "then this timber continued to be the property of the plaintiff up to the running out of the two years, and then, by its nonremoval, it became forfeited and passed to the defendant; and it is entirely obvious that such a condition is not favored in law, and that it will not be raised up by implication, unless by the force of demonstrative indication. Looking at the terms of the present agreement and its subject-matter, I can see no mark, certainly no decisive mark, signifying that it was the intention of these parties that by the plaintiff's neglect to remove the timber it should be forfeited to the defendant. Such a purpose, it is certain, is not contained in any part of the language of the instrument, for it nowhere says that in any event the title to the timber is to pass to the grantee. . . . If the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not, in law, to work a forfeiture of title." When chattels are wrongfully left by their owner on another's premises, the landowner's remedies do not include "the exorbitant method of a forfeiture."

The system of law that furnishes ample procedure for the protection of rights, and does not impose the penalty of forfeiture for

a neglect to remove timber in a reasonable time (when that remedy would be inordinate), did not inflict upon Cross, his heirs or assigns, the forfeiture of an acre of land, or a right to an acre, as a remedy for the fault of not exercising the power of selection in a reasonable time. It does not appear that any owner of the Wilson interest has been damnified by such fault, or would suffer any loss or inconvenience if the acre were not located for one hundred years, or that any owner of the Cross interest has had notice, or reason to believe, that location was desired by anybody. In this state of things, it is by no means clear that twenty-three years exceeded the limit of reasonableness. But there is no occasion to examine this point.

Any delay, of which a well-grounded complaint could be made by Wilson, his heirs, or assigns, could be speedily ended on a bill in equity brought by him or them. If Cross, his heirs or assigns, did not exercise the power of location in a reasonable time, it could be exercised by a judicial tribunal. *Starkie v. Richmond*, 155 Mass. 188, 197, 29 N. E. 770; *Gardner v. Webster*, 64 N. H. 520, 522, 523, 15 Atl. 144; *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 390-392, 13 L. R. A. 826, 21 Atl. 1090. The parties might disagree on the question whether high or low water mark was the line from which the acre was to be measured. Various questions might arise, as to location and measurement, which the plaintiffs were not bound to decide at their peril, and which could be determined on a bill in equity. Selection was division. Before severance, the granted and reserved premises were held as an undivided estate. Between it and land owned in common there was no difference that exempted the east section from the legal process of partition, or deprived the reserved property of the security which a tenant in common has (*Campbell v. Campbell*, 13 N. H. 483; *Clark v. Wood*, 34 N. H. 447, 453; *Perkins v. Eaton*, 64 N. H. 359, 361, 10 Atl. 704; *Leach v. Beattie*, 33 Vt. 195; *Holley v. Hawley*, 39 Vt. 525, 531; *Fairclaim ex dem. Empson v. Shackleton*, 5 Burr. 2604; *Tiedeman*, Real Prop. §§ 251, 700) against his cotenant's acquisition of title by prescription. *Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54, 66-69, is not overlooked. Location, measurement, and other forms of specific adjustment may be needed in many cases, and such procedure may be invented and used as justice and convenience require. *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 449, 451, 13 Am. Rep. 72; *Boody v. Watson*, 64 N. H. 162, 171, 173, 178, 179, 9 Atl. 794; *Holt v. Antrim*, 64 N. H. 284, 287, 9 Atl. 389. A limited supply of precedents and an inadequate doctrine of procedure have promoted the judicial introduction of rules of construction, and other so-called rules of law, which often conflict with rights plainly intended to be established by contracts and wills. In this state an unjust judgment cannot be based on a defect in the remedial branch of the common law, or on a formula of construction 47 L. R. A.

not enacted by legislative power, or on an unwritten rule, the reason of whose existence has ceased. "Many things that are uncertain of themselves, being reduced to certainty by such means as either the law appoints or the party himself assigns, may take effect." *Stukeley v. Butler*, Hob. 168, 174. "If a man grants twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the grantee." Bacon, Abr. *Election* (A). In a great mass of authorities, election is assumed to be a means of removing uncertainty. "If I have three horses, and I give you one, . . . the election ought to be made in the life of the parties, for, inasmuch as none of the horses is given in certain, the certainty and thereby the property begins by election. And with that agreeth *Bullock's Case*, 10 Eliz. 281. The Bishop of Sarum, having a great wood of 1,000 acres, . . . enfeoffed another of an house and 17 acres, parcel of the wood, and made livery in the house. None of the wood passed before election, and therefore his heir shall not make election. . . . If I give you one of my horses in my stable, . . . you shall have election. . . . And if one grant to another 20 loads of hazel or 20 loads of maple, to be taken in his wood of D., . . . the grantee shall have election; for he ought to do the first act, *soil*, to cut and take it." *Heyward's Case*, 2 Coke, 35-37; Co. Litt. 145a. "44 Edw. III. 43, is a good case. A prior sold his woods, excepting forty of the best oaks, at his choice, to be taken within two years. Then the prior brought an action of trespass against the vendee for selling them. He pleaded that, the plaintiff delaying his choice till the two years were almost expired, he could forbear the felling no longer, but his two years would expire, and therefore required him to make his choice, but he refused, whereupon he chose forty of the best himself, and left them standing, and took the rest. . . . The vendee . . . had no property till election or default made by the vendor, which was supplied and made certain by the vendee; and yet the vendee could not have made the choice in default of the vendor till the time incurred so near that he must needs and that must be put upon judgment of the jury or court." *Stukeley v. Butler*, Hob. 168, 174; *Palmer's Case*, 5 Coke, 24. That is sufficiently certain which can reasonably be made certain. Broom, Legal Maxims, 481. A grant, reservation, or devise of "all mill sites in lot 4," or of one "in any part of the lot," would be valid. *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Jackson ex dem. Van Valkenburgh v. Van Buren*, 13 Johns. 525; *Jackson ex dem. Saxton v. May*, 16 Johns. 184, 185; *Jackson ex dem. Hasbrouck v. Vermilyea*, 6 Cow. 677, 679, 680; *Provoost v. Calder*, 2 Wend. 517, 523, 525; *Dyggert v. Matthews*, 11 Wend. 35-37. The proposition that an unexercised right of location is too indefinite to support an

action of ejectment (*Jackson v. May*, 16 Johns. 184, 185) does not deny the right, but merely points out a defect in a form of action. A sheriff's inability to deliver possession of certain interests in land does not prevent their being ascertained and established by legal proceedings. A judgment determining the question of right is conclusive without service of process for its enforcement. *Walker v. Walker*, 63 N. H. 321, 327, 56 Am. Rep. 514. The rule that grants, reservations, and devises, reducible to certainty by such means as the law appoints, are not void for uncertainty, is not rendered inoperative by an obsolete system of deficient procedure.

Butcher v. Creel, 9 Gratt. 201, was an action of ejectment. A grantor had reserved the right to build a sawmill on an acre at a described end of a dam. "There is" said the majority of the court, "not such certainty in the description of the part intended to be excepted as to withdraw it from the operation of the deed; it is in no wise identified or distinguished from other portions of the acre. If it might be identified by entry and taking possession of so much of the land as might be necessary for the sawmill about to be erected, yet, as no such entry has been made or possession taken, a recovery cannot be had by the plaintiff." In our procedure, these objections would be unavailing. If the parties contested the existence of an unexercised right to build a sawmill and use land necessary for carrying on the business of the mill, the controversy could be determined in a real action. If the location and extent of the mill lot were in dispute, it could be laid out and set off on a bill in equity filed as an amendment of the pleadings in the action at law. Each party would be entitled to the means reasonably necessary to accomplish the objects of the grant and the reservation. *Boody v. Watson*, 64 N. H. 162, 177, 9 Atl. 794. Wrong would not be done through a failure of the law to provide the means required by justice for reducing the reserved right to certainty. In *Darling v. Crowell*, 6 N. H. 421, the plaintiff, owning land on which was a mill worked by a river, had conveyed to W., under whom the defendant claimed, a tract of 50 acres, a portion of which was flowed by the plaintiff's dam. The deed contained this clause: "Excepting one acre, and one half acre, which is reserved for the use and flowing of water for the mill." This was held void for uncertainty (p. 425), on the ground that "how much of the land it might be advisable to retain for the use of the mill, or how much for purposes of flowing, or where in such case it would be located, it is impossible to tell, and the grant or cannot elect." A literal construction of the exception would make "use" and "flowing" synonymous, and give the plaintiff, on the 50 acres, a millpond of an acre and a half, located by measurement between the edge of the water (in its natural condition) and a higher level. If this or some other reasonable construction were not satisfactory to both parties, justice could be done

47 L. R. A.

on a bill in equity (for a reformation of the deed) filed as an original petition, or as an amendment of a declaration or plea. *McShane v. Main*, 62 N. H. 4, 7, 8. Whatever else their intention might have been, it is not to be supposed that they intended the reservation should be wholly inoperative. *Bell v. Morse*, 6 N. H. 205, 209. Their understanding of it was determinable, not by rules of law, but by the balance of probabilities found in the competent evidence tending to prove the fact of intention. *Houghton v. Pattee*, 58 N. H. 326; *Morse v. Morse*, 58 N. H. 391; *Corwin v. Hood*, 58 N. H. 401; *McShane v. Main*, 62 N. H. 4, 7; *Keyser v. Covell*, 62 N. H. 283, 284; *Whittier v. Winkley*, 62 N. H. 338, 340; *Hurd v. Dunsmore*, 63 N. H. 171; *Crawford v. Parsons*, 63 N. H. 438; *Johnson v. Conant*, 64 N. H. 109, 136, 7 Atl. 116. "We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. . . . If there be ever so little reason in favor of one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator than that the whole should be void. . . . The difficulty of arriving at a conclusion, even the grave doubt which may hang around it, . . . form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great that there is not even an inclination of the scales one way. . . . The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty." Lord Brougham in *Doe ex dem. Winter v. Perratt*, 6 Mann. & G. 314, 359, 361, 362; *Harriman v. Harriman*, 59 N. H. 135, 136.

The validity of a provision of a deed, like the validity of a devise, does not depend upon the absence of all ambiguity. When its meaning is not reasonably and morally certain, the contract is not altered for that reason. However inconclusive the evidence, it is to be weighed. However doubtful the intention, a preponderance of probability is enough to establish it. In *Newsom v. Pryor*, 7 Wheat. 7, 10, 5 L. ed. 382, 383, a part of a boundary line was described as running "south 894 poles, to a stake, crossing the river." To cross the river the number of poles must have been 1,222. The validity of the grant was not affected by the uncertainty of location. The distance was controlled by the natural monument, because "it is much more probable that" the surveyor "should err in the distance than in the fact of crossing the river." There is a natural inference that a reservation of an acre and a half of land "for the use and flowing of water for the mill" was designed to retain a title or right reducible to certainty by such means as the law appoints. Whether the more probable intent was to reserve the land for a mill yard and pond, or solely for a pond, the parties must have contemplated a right of location capable of adjustment and enforcement by legal process. They

could not have understood that the reservation would be erased by a judicial inability to carry it into effect. Nothing less than an insuperable difficulty could nullify it and give the grantee a piece of the grantor's land which it is certain the grantee did not buy or pay for, and which was certainly not understood by either party to be a gift. In *Gardner v. Webster*, 64 N. H. 520, 15 Atl. 144, the defendant conveyed land to the plaintiff's grantor, "reserving the right to pass and repass" across it. The court says: "On the question whether a granted way is subject to gates and bars, their necessity or convenience to the grantor and inconvenience to the grantee may be considered. In this case there is no explicit provision on the subject, and, it being found that gates and bars are reasonably necessary, the plaintiff is entitled to maintain them. . . . The location and limits of the reserved way are not specified. It is a reservation of a reasonably convenient and suitable way. . . . The convenience of both parties is evidence of the locality of the defendant's way. . . . Its route . . . is determined, not by the sole interest of either of the parties, but by the reasonable convenience of both. If its location were contested, the controversy might not be settled by the . . . result of many actions at law. Both parties, or either of them, might need a decree in equity that would fix the route." Under an abutter's right to a reasonable use of the basin of a public water, the quantity as well as the location of a site for a wharf, warehouse, weir, or tide mill is determinable on a bill in equity. *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 19, 20, 18 L. R. A. 679, 25 Atl. 718. The principle that furnishes the means of measuring and locating reasonably convenient ways, and reasonable sites for wharves, warehouses, weirs, and tide mills, and reduces them to certainty by laying them out, would not allow a right to an acre and a half of mill yard and mill pond (in *Darling v. Crowell*) to fail for want of a method of settling the question of reasonably convenient location. *Darling v. Crowell* is one of the cases in which courts have been influenced by Sheppard's Touchstone, 79, where it is said: "If the exceptions be not set down with precision and accuracy, as if one grant a house, excepting one chamber, or grant a manor, excepting one acre, but doth not set forth which chamber or which acre [it shall be] the exceptions are void." Taken without qualification, this passage rejects the ancient doctrine of election,—the maxim that things reducible to certainty by legal measures are sufficiently certain, and the presumed intent of the parties that their contract shall not be violated with impunity if it can be enforced by a reasonable appeal to the resources of the law. When a grant or reservation of an interest in land is held void for uncertainty, it is morally certain that injustice is done. An equitable result is generally reached if due effort is made to ascertain the fact of intention by balancing probabilities, and to determine the granted

or reserved right by authorized procedure. Whether the title of personal property passes when a contract of sale is made, or remains in the vendor till something more is done, is often a question of intent for a jury. *Fuller v. Bean*, 34 N. H. 290, 302-306. At common law, when a certain amount of personalty is sold, to be taken out of a specific mass, the title passes at once before severance or identification, if such is the intent; and this intent is inferred from a delivery of the whole mass to the buyer, with power to make the separation. 1 Benjamin, Sales, Am. ed. 1894, §§ 315-317, 477; *Page v. Carpenter*, 10 N. H. 77, 80; *Bailey v. Smith*, 43 N. H. 141, 143; *Crofoot v. Bennett*, 2 N. Y. 258, 260. A constructive delivery of the whole is sufficient, even if the mass is of such diverse qualities that the separation requires a degree of skill and judgment. *Lamprey v. Sargent*, 58 N. H. 241, 242. A delivery showing a simultaneous transfer of title is not wanting in a conveyance of land by its owner. His delivery of the deed is a delivery of the property. *Bell v. Peabody*, 63 N. H. 233, 239, 56 Am. Rep. 506; *Tiedeman*, Real Prop. §§ 693, 695.

In 1844 it was considered an open question whether a conveyance of an unlocated half of a specified lot, describing the granted premises as half in value, could be made certain by legal process of partition. "Whether a conveyance, by the owner of the whole lot, of the south half of it in quantity and quality, would operate as a conveyance of one half in quantity only, on account of the uncertainty which would otherwise exist respecting the dividing line until settled by agreement of the parties, or whether some proceeding might be had in such case to settle the line of separation in case the parties failed to agree, we need not now determine. The deed . . . which contained that description . . . undoubtedly conveyed an estate. . . . The only question which could arise was where the dividing line should be located." *Smith v. Powers*, 15 N. H. 546, 562. The best inventible procedure must be capable of solving the question of value in such a case, and an appraisal must be a means of certainty where the common law provides convenient modes of ascertaining the value of land. "Excepting . . . four rows of apple trees on the north side of the orchard, . . . and the land on which they stand" (*Randall v. Randall*, 59 Me. 338), is a description that might require a location to be made by legal process. Conveyances of "a mill yard 100 feet square, adjoining said mill, . . . best to accommodate said . . . mill" (*Farrar v. Cooper*, 34 Me. 394, 398), "also one half of an acre of land near the wharf or at the wharf" (*Simpson v. Blaisdell*, 85 Me. 199, 27 Atl. 101), are valid. In 1793, "for the sum of five shillings, but more especially for the encouragement of building a bridge over the Piscataqua river at and from Fox Point," Richard Downing conveyed to the proprietors of Piscataqua bridge "1 acre, to be laid out in square form, upon any part of my farm at Fox Point . . .

where said proprietors may think proper to build said bridge." Landmarks in Dover, 75. If the phrase "where said proprietors may think proper to build said bridge" had been omitted, there would have been sufficient evidence that the grantees could select an acre in a square form, on Fox Point, at the end of their bridge.

It is not necessary in this case to consider the soundness of the rule that a tax collector, selling a part of a lot of land for taxes, cannot give an election to the purchaser. One of the reasons given for this rule is that the purchaser could not be compelled to elect in a reasonable time, there would be no remedy for his refusal to elect, and the want of remedy might be an intolerable inconvenience to the owner of the rest of the lot. *Haven v. Cram*, 1 N. H. 93, 95. This view, as we have seen in the case of nonofficial conveyances, is erroneous. If there is a sufficient reason for holding that a tax collector cannot give an election to his grantee, the question would be of the soundness of the Vermont rule, that in a collector's deed of a part, described as "36 acres of said lot," the description means "an undivided interest in the lot in the proportion that 36 acres bears to the whole number of acres in the lot." *Sheafe v. Wait*, 30 Vt. 735. "If we regard the rules that control the exposition of deeds," say the court in that case, "we can have no doubt on this point. It must have been the intent of the parties. If we accept a contrary construction, the sale and deed would be void; and the rule is that deeds should be construed so as to be upheld rather than avoided." When the rules that control the exposition of deeds were disregarded in tax cases, and the law was perverted by strained and quibbling interpretation in behalf of taxpayers endeavoring to throw their share of the common burden upon their neighbors (*Boody v. Watson*, 64 N. H. 162, 179, 9 Atl. 794), such a deed as was upheld in *Sheafe v. Wait* could be held void for uncertainty. During that period the construction of tax deeds was understood to be exceptional. A distinction was expressly made between them and other conveyances. While a collector's deed of "250 acres," part of lot No. 300 (which contained about 400 acres), was held to be void for uncertainty, it was not doubted that the same deed would have been valid if made by the owner of the lot. *Haven v. Cram*, 1 N. H. 93. "The deed of the constable is clearly void for uncertainty, unless it can be construed to be a grant of 250 acres to be located by the grantee at his election. In a common conveyance from one individual to another, the court would be warranted in putting such a construction upon a deed (Bacon, Abr. *Grants*, H 3), because every deed is to be construed most favorably to the grantee, and therefore, to give effect to the conveyance, the deed is construed to give an election in such a case to the grantee to locate the land." 1 N. H. p. 94. If it were necessary to give him an election in order "to give effect to the conveyance," that construction would be adopted. But there is 47 L. R. A.

another alternative, and it may be doubtful whether the grantee in *Haven v. Cram* would have had an election if the owner of the lot had been the grantor: "Tenancy in common" was "often expressed, in early times, by a certain number of acres." Smith (N. H.) 516, 519, note. In *Stevens v. Johnson*, 55 N. H. 405, the majority of the court held that, when the owner of a lot conveys a part of it with such a description as was given in the collectors' deeds in *Haven v. Cram* and *Sheafe v. Wait*, the grantee has an election, and that he can elect a tenancy in common, while the minority was of opinion that the deed creates that tenancy. It was unanimously decided that a deed, made by a person not acting in an official capacity, conveying premises described merely as 100 acres, part of the lot, is not void for uncertainty. If the question were new, there would be no doubt or difficulty. The maxim, *Verba debent intelligi cum effectu, ut res magis valeat quam pereat* (2 Bl. Com. 380; Bac. Leg. Max. reg. 3; Co. Litt. 36a; *Throckmorton v. Tracy*, 1 Plowd. 145, 156), is a statement of the duty of making reasonable efforts to give effect to the intent and understanding which written instruments are meant to express. An intent of contracting parties that their grants or reservations shall be void for uncertainty, and their understanding that they are void for that cause, cannot be assumed. The natural inference of fact is that they are designed to be valid, and that the intent will be frustrated if they are held void for uncertainty. Whether holders of tax titles are or are not deprived of the equal protection of the laws, and whether there are or are not exceptional cases in which the rule of *magis valeat* can properly be reversed, or in which a stipulation can be unnecessarily held to be void, we need not now inquire. An owner's grant or reservation of land described only as an acre, being a part of a described lot, is not an exception to the rule that the words are to be understood *cum effectu*, in order that the transaction (including all its parts) may be operative rather than void. The question in such a case is, not whether the grant or reservation is void, but whether the owner of the acre, being made a tenant in common by the delivery of the deed, has or has not a right of election. Unnecessary invalidity would be contrary to elementary principle.

Tenancy in common, existing until partition is made by an exercise of a right of election or otherwise, is regarded by the law with no disfavor. By a single deed, an owner of a farm conveyed it to three of his children, Richard, Abigail, and Job,—"24 acres of land" to Richard, "to be in common and undivided; 6 acres" to Abigail, "to be in common and undivided; and the remainder of said farm, with the buildings," to Job. After the death of the grantor, one of his other children contended that the deed was void for uncertainty. "It seems clear," say the court, "that the grantor intended to convey, 'in the buildings,' a several estate to Job. . . . It is not improbable, there-

fore, that the grantor may have expected" the three shares of the rest of the farm would be held "in common and undivided." "As the whole farm contained '104 acres,' the difficulty in ascertaining the proportion of each grantee would not be insuperable. Excluding the buildings, the proportion of Richard, Jr., in the land would be $\frac{1}{4}$, that of Abigail $\frac{1}{8}$, and that of Job $\frac{1}{4}$ If the farm was found to contain a larger or less quantity of land, the proportions would remain in the same ratio. . . . Were it necessary, for the purpose of making the deed operative, to resort to a different construction, it would not be a very forced one to pass by the deed a several estate to each of the grantees,"—to Richard "24 acres of land," . . . to be "in common and undivided" till it was elected in which part of the farm to make the location of it; '6 acres to Abigail,' in a similar manner; and the 'remainder of the farm, with the buildings, to J. W.'" *Cunning v. Pinkham*, 1 N. H. 353, 355, 356. A grocer, having sold his store, No. 9 Main street, his goods, and the goodwill of his business, and covenanted not to open another grocery "in the immediate vicinity" of No. 9, opens another in No. 10 of the same block, and contends that, as No. 10 is conterminous with No. 9, he has not broken his covenant. The answer is that the object of the covenant was to prevent competition, and that on his construction this object would not be accomplished. The purpose of the covenant is conclusive evidence that the parties understood adjoining stores would be "in the immediate vicinity" of each other. In some connections the phrase may include, in others it may exclude, actual contact. Its meaning may depend upon a scheme indicated in the context. Any word or phrase of a stipulation capable of two meanings is to be so read, if it reasonably may be, as not to baffle or embarrass the plan or the clause in which it occurs. In Cross's reservation, the purpose of retaining a mill privilege is satisfactory evidence that the parties understood "the immediate vicinity" did not exclude the greatest degree of proximity, and that the east end of the dam might adjoin the measured acre or stand upon it. The interposition, between the dam and the acre, of a strip of land across which the owner of the dam and the acre could not dig a canal or build a flume, would be inconsistent with the apparent design of a manufacturing plant. It is not probable that the parties intended to forbid the junction of parts of the reserved estate, or thought of prohibiting unity by requiring "immediate vicinity." That phrase is a limitation of the uncertainty arising from an unexecuted power of election. An exercise of the power is the means provided for the removal of the limited uncertainty. The reserved "piece of land fronting on said river . . . 12 rods in length on the bank of said river, and extending back far enough, same width, to comprise 1 acre," is an acre on the east side of the water's edge, and the east half of the bed of the river in front of it. The west half

of the dam will be on the plaintiff's land, and in this inquiry it is assumed that the east half will be on the reserved tract, which contains more than an acre, but which, being in a legal sense the reserved acre, may properly be called the acre. If the plaintiffs should build or propose to build the east half of the dam on the defendant's land, questions might be raised which there is now no occasion to consider. A judgment in favor of the plaintiffs for the measured acre, bounded on the west (as it is bounded in the declaration) by the low-water line of the river, will establish their title to the east half of the bed of the stream in front of that acre. An executed writ of possession, describing the premises as they are described in the declaration, will give them possession of the half of the bed which in legal effect is a part of their acre.

4. On the question whether Cross's reserved "right of building a dam . . . together with the right of flowage" was more than a life estate, the defendant takes this position: Although the word "heirs" is not necessary in a New Hampshire grant of a fee, the decision in *Cole v. Lake Co.* 54 N. H. 242, leaves deeds and wills on the same common-law footing. A conveyance or reservation of a fee must contain such an expression of the idea of perpetuity as the common law requires in a devise of a fee. The clause relating to Cross's right to build a dam and his right of flowage is a reservation, and not an exception. "Reserving," "excepting," and "excluding" are generally used as synonyms. Whether a provision is a reservation or an exception does not depend upon the use of a particular word, "but upon the nature and effect of the provision itself." *Stockwell v. Couillard*, 129 Mass. 231, 233; *Fischer v. Laack*, 76 Wis. 313, 319, 320, 45 N. W. 104; *Keeler v. Wood*, 30 Vt. 242, 246; *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.* 143 U. S. 596, 599, 613, 614, 36 L. ed. 277, 282, 283, 12 Sup. Ct. Rep. 479. "A clause of reservation is construed to be an exception, if that will best effect the intent of the parties." *Bowen v. Conner*, 6 Cush. 132, 135; *Pettee v. Hawes*, 13 Pick. 323, 326, 327. If Cross were now living, and had parted with no interest in what he reserved, or in the west section, he could make the location that has been made by the plaintiffs, and could build a dam on the west section and the acre. His undivided tract of land, extending from the east side of the acre to the west side of the west section, would include the whole bed of the river in front of the measured acre, and the west half of the rest of it in lot 4. By flowing that tract he would not exercise his reserved "right of flowage." The only easement he would have would be the reserved right of flowing the part of the east section not belonging to him, and that easement would be an appurtenance of his land. *Watson v. Bartlett*, 62 N. H. 447, 450; *Borst v. Empie*, 5 N. Y. 33, 39; *Winthrop v. Fairbanks*, 41 Me. 307, 311-313; *Smith v. Ladd*, 41 Me. 314, 319, 320. The right of flowing the land conveyed to Wilson being reserved for the benefit of land

retained by the grantor (the acre and the west section), and being for that reason annexed to the grantor's land as an appurtenance, the easement is perpetual. Washb. Easem. *21; *Parker v. Nightingale*, 6 Allen, 341, 347, 83 Am. Dec. 632; *McMahon v. Williams*, 79 Ala. 288, 291. Even if the word "heirs" were required by New Hampshire law in the conveyance of a fee, the easement retained by Cross for the benefit of land which he continued to hold would be a perpetual estate, although not expressly reserved "to myself and my heirs." *Chappell v. New York, N. H. & H. R. Co.* 62 Conn. 195, 202-207, 17 L. R. A. 420, 24 Atl. 997. The acre remained his in fee. His title to it, like his title to the west section, was not reduced to a life estate by his sale of an interest in adjoining land. Wilson took the east section, less the acre, subject to a flowage easement. In other words, he took the east section less the acre, and also less the easement. Cross's right to flow the servient tenement, severed from it and annexed to the dominant tenement (situated on both sides of the thread of the river), did not lose the perpetuity belonging to it as a part of the retained mill privilege. In common speech, the retained privilege on the east side, dominant and appurtenant,—the acre and the flowage right,—was not conveyed. In technical parlance, it was not reserved, but excepted.

By a feudal rule, Cross's retention of an easement in the east section would have been a reservation if the easement had not been retained as an appurtenance of his land. "Reserving . . . the right of building a dam, . . . together with the right of flowage, . . . also reserving a piece of land . . . 1 acre," is a form of expression indicating that the parties did not intend a part of this property should be reserved, and the rest excepted, but did intend that the whole should be one estate of uniform duration, and part of a mill privilege of the same duration. The deed being their lawful understanding, proved by competent evidence, and not by rules of construction, the distinction between a reservation and an exception is useless in this case. Cross's reserved estate in the acre was the fee, not because, as a matter of law, his retention of the acre was an exception, and not a reservation, but because the deed, understood in the ordinary and popular sense of its terms, does not divide the title into a life estate, and a remainder, but is silent on that subject; and, as a matter of fact, the deed, containing no allusion to a division of that kind, is convincing evidence that the grantor and grantee intended the grantor should keep the described "piece of land," which the deed says he reserved, and not a mere life estate, of which the deed makes no mention. In the ordinary and popular sense in which they used the word, "reserving" is "keeping," and keeping his own land was keeping the whole of his title. His right of flowing the land he conveyed to Wilson was retained as a part of his mill privilege, and an appurtenance of land of which he kept the fee. 47 L. R. A.

If he had meant to impair the value of his mill privilege by reducing such a part of it to a life estate, it is not probable that a clear and express statement of so singular a transaction would have been left out of the deed. If he had reserved the acre "for and during the term of my natural life" only, this would have been evidence on the question whether his right of flowing the east section above the acre was intended to be reduced to a life estate. There might be some ground for arguing that the term of the easement on the east side was probably not meant to be longer than the term of the east part of the dominant tenement. Until Cross delivered the deed, the bed of the river and the undivided mill privilege were a part of his land. He could have stipulated that if he built a mill on the acre, and a dam on the acre and the west section, and died as soon as he completed the investment, the mill lot (including the mill, the measured acre, half of the adjoining bed of the river, the east half of the dam, and half, or other portion, or the whole, of the water power) should be the property of Wilson, and the owner of the west section should have no right to flow any part of the east section. It is possible that the owner of an unimproved mill privilege has reduced his perpetual rights of use and occupation to a tenancy for his life, with a design of constructing a manufacturing establishment which would not go to his heirs or devisees at his death, and in which he could sell only his precarious life estate, or with a design of selling a right to make an investment of that kind. Such a division of the title might not conclusively prove his need of a guardian. The grantee of the remainder might have entertained views that led him to indemnify the grantor for the damage done by breaking up the fee. For some purpose, the grantee might have desired to prevent the improvement of the mill privilege during the life of the grantor, and been willing to pay for the postponement of its use. The field of conjecture is boundless. But when an apparently wasteful disposition of property is not made in express terms, and the intent of contracting parties is to be inferred as a fact from competent evidence, and the evidence is a mere grant and reservation of realty, the tribunal cannot reject probability, and assume that the intent was whimsical or extraordinary.

Understood in a peculiar sense, "reserving" would import the technical theory that Cross conveyed to Wilson the whole of the east section except the acre, and at the same time took back a right of flowage by an implied grant from Wilson. "A reservation is always of something taken back out of that which is clearly granted, while an exception is of some part of the estate not granted at all." *Craig v. Wells*, 11 N. Y. 315. 321. "A right of way reserved . . . is, in strictness of law, an easement newly created by way of grant from the grantee." *Durham & S. R. Co. v. Walker*, 2 Q. B. 940, 967. "The part excepted is already in existence, and is said to remain in the grantor.

The grant has no effect upon it. A reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted,—something which did not exist, as an independent right, before the grant. . . . A reservation is in the nature of a grant to the grantor, and therefore requires the same words of limitation as in the direct grant to the grantee. But an exception requires no words of limitation." Tiedeman, Real Prop. § 843. By this rule, applied without regard to the appurtenant character of the reserved right, Cross retained his fee in the acre, because he did not convey it to Wilson; but he retained only a life estate in "the right of flowage," because he conveyed that right to Wilson, and did not reserve it "to myself and my heirs," as he must have done to acquire a perpetual right by the implied reconveyance. "Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it." Selden, J., in *Wynnehamer v. People*, 13 N. Y. 378, 433. The most absolute land title is a perpetual right of exclusive occupation and perpetual rights of use. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 301, 392 13 L. R. A. 826, 21 Atl. 1090. By considering the fee as dissolved into the legal rights of which it consists, a view is obtained of the fictitious character of the process which conveys to Wilson one of Cross's reserved rights, and takes it back by a reservation construed as a reconveyance. In Connecticut, under the feudal rule requiring the word "heirs" in the conveyance of a fee, a deed containing a provision that "we [the grantors] reserve to ourselves the privilege of crossing and recrossing" the granted premises raised the question whether the reserved easement was more than a life estate. "The right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be, in effect, conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant." *Chappell v. New York, N. H. & H. R. Co.* 62 Conn. 195, 204, 17 L. R. A. 420, 24 Atl. 999.

As the reservation in this case does not appear to have been written in a peculiar sense, it is to be taken in its ordinary, natural, and popular signification, which is that after the conveyance Cross was to have no right that he did not have before. This popular sense is the legal sense, not because an artificial rule has been established by judicial or legislative power, but because the law ascertains the facts of the case, and acts upon them; and, a peculiar meaning not being proved, the inference of fact is that Cross and Wilson understood the reservation in a sense that is not peculiar,—the ordinary sense in which it would be understood by people in general. Thus understood, it describes proprietary rights that

did not pass from the grantor, and consequently is a part of the description of those that did pass. The deed is a mere conveyance from Cross to Wilson, and not a conveyance in that direction supplemented by an implied reconveyance. Reading it in a peculiar sense, it can be made to express an intent to take one of Cross's rights from him, give it a new technical name, and re-vest it in him as a new and less durable right, by imaginary grants to and fro between him and Wilson. There is no reason to believe that this superfluous project of a nominal creation was in their minds. The law does not resort to fictions without a motive, or for any other purpose than a compliance with the requirements of justice. 3 Bl. Com. 43, 206; Broom, Legal Maxims, 90; Langwell, Summary of Law of Contracts, 116; *Aslin v. Parkin*, 2 Burr. 665, 668, 669; *Johnson v. Smith*, 2 Burr. 950, 962; *Morris v. Pugh*, 3 Burr. 1241, 1243; *Low v. Little*, 17 Johns. 346, 348; *Gibson v. Oshuteau*, 13 Wall. 92, 101, 20 L. ed. 534, 537; *Newhall v. Sanger*, 92 U. S. 761, 766, 23 L. ed. 769, 770. A contract may be implied by law contrary to the fact, as a mode of enforcing the performance of a legal duty. *Sceva v. True*, 53 N. H. 627; *Kelley v. Davis*, 49 N. H. 187. In ejectment, a fictitious lease has been adopted as a just and convenient form of procedure. Whatever equitable use may be made of grants which Cross and Wilson did not make, and which exist only in the imagination of an interpreter, they cannot operate inequitably without a repeal of the maxim that a legal fiction injures no one. They do not alter the grant that was made. They do not unjustly abridge a right retained by the grantor. Cross's right to flow the east section above the acre was in existence before the deed was made. It was perpetual before he conveyed a part of that section; and, in the popular meaning of "reserving," what he reserved he did not convey, and what he did not convey remained his in continuation of his former title. There was but one conveying contract. The reservation, negatively describing the granted premises, explains and qualifies the grant, and is a part of it. The grant, thus explained and qualified, divided the title, left a part in Cross, and transferred the rest to Wilson. Cross's right to flow the east section above the acre became a right to flow Wilson's land. Its substance was the same after the conveyance as before. Before the conveyance it was one of the rights of which the undivided title was composed. Afterwards it was an easement. For some purposes the change in its technical name may be called a creation of a right, but the change is not material in this case. The deed does not express an intent to change the duration of Cross's interest in any part of the reserved property. If technicality and figment, instead of the intent of the parties, were adopted as the ground of decision, the perpetual right of flowing the east section above the acre, which had belonged to Cross, could be cut down to a life estate. A legal fiction could transfer it

from Cross to Wilson, and transfer back to Cross a life estate in it. Two deeds could be made for them without their consent or knowledge. By holding, contrary to their understanding, that the reservation was a grant from the grantee to the grantor, a conveyance from Wilson to Cross could be invented, and an opportunity could be gained to put in operation the rule requiring the word "heirs" in the grant of a fee. Applying this rule to the fictitious conveyance, Cross could be wrongfully deprived of a portion of his property. Consistency would deal with the rest of the reservation in the same circuitous and violent manner. As the grantor did not reserve anything to his heirs in the terms required by the feudal rule, an implied reconveyance, construed by that rule, would make Cross a tenant for life of the acre as well as the easement. If the deed conveyed the fflowage to Wilson, it also conveyed the acre. An imaginary reconveyance is no more necessary for one than for the other. The competent evidence has no more tendency to show a life estate in the easement and a fee in the acre than to show a fee in the easement and a life estate in the acre. Estates of different durations in the reserved property can only be established by inserting in the contract a technical distinction between a reservation and an exception, which the written evidence distinctly rejects, and assuming that the parties relied upon their meaning being disclosed by some form of a feudal rule of which there is no reason to suppose they had any knowledge.

5. "The intention of the testator fails on account of a feudal rule of law, which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested. . . . This is an arbitrary feudal rule,—one of the legacies of the Middle Ages which has come down to our times. . . . It is quite true that the testator probably never heard of this rule of law, but I think his conveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake." *Jessel, M. R., in Cuniffe v. Brancker*, L. R. 3 Ch. Div. 393, 399, 401. Aside from obsolete difficulties of procedure, the only reason of the rule requiring a contingent remainder to be supported by a freehold is said to be that, if the freehold were in abeyance, the feudal lord would be at a loss to know upon whom to call for feudal service. 4 Kent, Com. 237; *Taylor ex dem. Atkins v. Horde*, 1 Burr. 60, 101. "The introduction of the feudal law into England by William the Conqueror had much infringed the liberties, however imperfect, enjoyed by the Anglo-Saxons in their ancient government, and had reduced the whole people to a state of vassalage under the King or barons, and even the greater part of them to a state of real slavery. . . . The feudal law is the chief foundation, both of the political government, and of the jurisprudence established by the Normans in Eng- 47 L. R. A.

land." 1 Hume, *History of England*, p. 423, chap. 11, App. 441, 444-446. "The military tenure of land had been originally created as a means of national defense, but in the course of ages whatever was useful in the institution had disappeared, and nothing was left but ceremonies and grievances." 1 Macaulay, *History of England*, chap. 2; 4 Bl. Com. 438. "The rules concerning real property, and, to a considerable extent, those concerning personal status and relations, were feudal in their origin and nature." 1 Pom. Eq. Jur. § 18. "The feudal system in its day made serfs of masses of men. . . . It was inimical to peaceful pursuits. Out of its logic sprang the most baneful doctrine that has blighted the English law,—the doctrine of tenure. To gratify ancestral pride and maintain family splendor, the feudal aristocracy tied up landed property in the iron fetters of tenure. . . . The feudal system is the principal source of the land laws of Great Britain, which still press with such weight upon the agricultural and industrial classes. . . . Having done its work feudalism is happily gone. . . . Largely, the curse of the common law came from the feudal system, and from the obstinacy with which the doctrines of feudalism were adhered to when the system . . . had ceased to exist. . . . Our real property law is still poisoned by the feudal taint." Dillon, *Laws and Jurisprudence of England & America*, 169, 170, 302-304, 355, 356, 385.

"If a man purchases lands to himself forever, or to him and to his assigns forever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word 'heirs.' The rule was founded originally on principles of feudal policy, which no longer exist, and it has now become entirely technical. A feudal grant was, *stricti juris*, made in consideration of the personal abilities of the feudatory, and his competency to render military service; and it was consequently confined to the life of the donee, unless there was an express provision that it should go to his heirs." 4 Kent, Com. 6. "Common sense would have dictated that an absolute estate should pass by a conveyance without any limitation.

. . . Maxims of law which grow out of the feudal system are, in general, inapplicable in this country." Smith (N. H.) 452, 523. It must be considered settled that such inconvenient and unjust rules as are based solely on feudal reasons, and are not adapted to the land system of this state, are not in force here. "Unless the lord bound himself that the fief should go to the heir of his vassal, the heir had no rights in it on the death of his ancestor. . . . The rule was nothing more or less than the practice of the feudal sovereign, securing and perpetuating his grasp upon all the land and the services of all the landholders in his realm. Its origin, purpose, and history show it to be in no way adapted to our institutions, system of government, or condition of society. As a feudal rule of con-

struction, it was a recognition of the fact that the vassal held his lord's land upon the condition of rendering in his own person certain services to his lord. The vassal, thus holding the land by reason of the personal trust and confidence reposed in him by his lord, could not assign, nor could his heirs inherit, his obligation of personal service on the land held on such a condition. . . . The feudal rule is inapplicable to a conveyance of New Hampshire land not held by any such tenure. When the fetters which feudalism had fastened upon the tenure of lands in England fell off, every reason on which this rule had rested fell with them. . . . An act of Parliament cannot alter by reason of time, but the common law may, since *cessante ratione cessat lex*. . . . They who brought the general body of the common law with them to this region might well have omitted to bring the feudal rule, not because it was fabricated in a barbaric age, but because it was designed and fitted to perpetuate a barbaric condition; . . . not because, as a part of the military system of Europe, it was less necessary in feudal times than other compulsory methods of filling armies and navies in other times, but because the general feudal relation of lord and vassal not being an incident of New Hampshire civilization, and the particular debt of personal service due from the vassal to the lord (which the heirs of the vassal might be incompetent to perform) not being a universal consideration of the conveyance of New Hampshire real estate, the feudal rule (requiring the word 'heirs' as evidence of the lord's intention to assume the risk of his vassal's heirs being incapable of the stipulated service) was inapplicable to the situation and circumstances of the emigrants, and implied a servitude inconsistent with the principles of personal freedom and equality which pervaded their social and political plan, hostile to the general object of their emigration, and particularly subversive of that absolute ownership of the soil which they specially sought in the New World. . . . The rule, which would defeat the obvious intention and destroy the plainly expressed contract of the parties, . . . is not adapted to our institutions, or the condition of things in this state. . . . It never became part of the law of the state." *Cole v. Lake Co.* 54 N. H. 242, 285, 286, 290.

In England the rule "is now softened by many exceptions. . . . It does not extend to devises by will, in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed; and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee simple, the devisee hath an estate of inheritance, for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life, for it does not appear that

the devisor intended any more." 2 Bl. Com. 108. In a note to this passage, Chitty says, of the softened form of the feudal rule applied to wills: "Lord Coke teaches us (1 Inst. 322b) that it was the maxim of the common law, and not, as has been sometimes said (*Idle v. Cook*, 1 P. Wms. 70, 77, 78), a principle arising out of the wording of the statutes of wills." "Although a set form of words, and the word 'heirs' particularly, are necessary in deeds to convey an inheritance, yet may they be dispensed with in last wills, at which time it is presumed that the testator is *inops consilii*; hence great regard is paid to the intention of the testator." Bacon, Abr. *Devises* (C). This seems to be an intimation that the intent of testators is entitled to more regard than the intent of grantors and grantees. By whomever and under whatever circumstances deeds and wills have been usually drawn in England, the different degrees of skill employed in drafting such instruments in this state do not sustain a general or special rule for finding a life estate in words of a deed which would prove a fee if the grantor had used them in his will. As understood by the entire population of the state, with trifling, if any, exceptions, without the aid of a statute of interpretation, "I give my farm to A. B." are words of perpetuity in a will, and "I sell my farm to A. B.," are words of perpetuity in a deed. They may be qualified by other words in the same instrument. When they are used without qualification, an intent to dispose of the whole of the devisor's or grantor's interest in the farm is plainly and adequately expressed.

Under feudal usages and feudal traditions, and systems of tenure and entail in which the largest title was in effect a life estate, the construction of deeds and wills has been obstructed and deflected by a rule against an intent to grant, reserve, or devise an estate of inheritance. In the case of deeds, the rule took a more absolute form than in the case of wills. There was a difference in the amounts of wrong done by its two forms, but the operation of its softened form was purely destructive. When a testator devised to N. a described tract of land, and to "my loving wife" "all the rest of my lands, tenements, and hereditaments," the feudal hostility to estates of inheritance, surviving in a so-called rule of law, was strong enough to mutilate the will, change the devisees into tenants for life, and leave the testator intestate as to the remainders. *Moor v. Denn ex dem. Mellor*, 2 Bos. & P. 247. There is no such rule in this state, where inheritable titles, free from every vestige of feudalism, were one of the objects for which the wilderness was occupied, were the issue determined in favor of the people in the Masonian controversy, and have prevailed since the first towns divided their lands among the settlers. Their new home was a new world in a very comprehensive sense. For many of the advantages of an original organization of society, with which they began their work, they never ceased to contend. While many old rights which they

brought with them are found in English history, the decision in *Cole v. Lake Co.* is sufficient authority for applying to this case the common law that grows out of the institutions and circumstances of the country. *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 6, 7, 15, 17, 19, 18 L. R. A. 679, 25 Atl. 718; *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 72, 73, 18 L. R. A. 646, 25 Atl. 588. A plain provision of a deed or will should not be expunged or altered by importing a method of construction or a rule of law founded on, or developed by the spirit and influence of, an oppressive policy in regard to the tenure of land, from which our ancestors liberated themselves by migration. If such methods and rules were properly adopted in England, they are precedents for contrary methods and rules under opposite conditions. The policy of servitude, which produced the feudal rule against grants, reservations, and devises of estates of inheritance, being inapplicable to our situation and circumstances, it would be impossible to justify a judicial introduction of that rule (in either of its forms), or a survival of feudal prejudice against competent evidence of contractual or testamentary intent.

"The English common law of real property . . . is founded upon the doctrines of the feudal system. . . . When land was conveyed to the tenant or vassal, it was called a 'feud,' 'fief,' or 'fee.' It was at first only for the life of the tenant. Under the early feudal system an estate of inheritance was unknown. Afterwards it became customary to grant a fief or feud to a tenant and his sons, and subsequently to him and his heirs. For a long time after the conquest a vassal could not alien his land without the consent of the lord. It was a personal confidence reposed in him, and a full power of alienation would have enabled him to let an enemy of the lord into possession of his lands. . . . So obsolete has the ancient doctrine of tenures become, that writers of eminence unhesitatingly pronounce the lands in this country to be absolutely allodial, i. e., free from the burdens of tenure." *Tiedeman, Real Prop.* §§ 20, 21, 25. The rule of construction against an estate of inheritance, applied in one form to deeds, and in a softened form to wills, is a relic of the system in the early ages of which an estate of inheritance was unknown. In this state, where that system has not existed, and the branch of the rule applied to English deeds has not been introduced, a described tract of land conveyed or reserved by deed, and reduced to a life estate by the branch applied to English wills, would be an anomalous instance of feudal taint. The remark that the technical description of a fee contained in the word "heirs" . . . "could not now be safely omitted without using some other form of expression showing with legal accuracy the intention and contract of the parties" (*Cole v. Lake Co.* 54 N. H. 242, 290), is to be read with the accompanying statement that "the word is no more necessary to the valid conveyance of land than to the valid conveyance of a horse," and with the decisions in which it is 47 L. R. A.

settled that the actual intent of the parties, proved by competent evidence, is the legal meaning of a deed, and that the question of intent is a question of probability, to be determined by the ordinary and popular sense of the deed, when its language does not appear to have been used in a technical or peculiar sense. In this mode of construction, an unqualified grant or reservation of land shows with legal accuracy an intent to convey or reserve nothing less than the grantor's interest in the described land, and an unqualified grant or reservation of the right to flow a described lot is a grant or reservation of an interest not less durable than the grantor's right of flowing that lot. A common form of quitclaim grant describes the premises as "all my right, title, and interest in a certain tract of land," or "all my right, title, and interest in" a certain easement. A warranty deed of the land or easement is not less effective than a quitclaim of all the grantor's right, title, and interest, and a reservation of a described right of flowage is as strong as a reservation of "all my title and interest in" such a right. The authorities show how ideas and principles inherent in a community of lords and vassals have outlived the military and social system to which they belonged, what injustice has been done by the original form of the feudal rule applied to deeds, and by a modified form of it applied to wills, and what consequences would follow the enactment of either form in this jurisdiction.

"The rule of law is inflexible. To create an estate of inheritance by deed, except by a deed to a corporation, and one or two other special exceptions, . . . the land must be conveyed to the grantee and his heirs; and no words of perpetuity will supply the omission of these necessary words of limitation. A grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life. . . . And the same rule applies to words of reservation." *Curtis v. Gardner*, 13 Met. 457, 461; *Buffum v. Hutchinson*, 1 Allen, 58, 60; *Sedgwick v. Lafin*, 10 Allen, 430. "The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. . . . The same rules of construction apply to a reservation or implied grant as to an express grant. In this case the words used were, 'reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert.' This gave only an estate for life. . . . To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity." *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 198,

199, 30 Am. Rep. 672. A deed from Merrifield to Cobleigh contained the following clause: "Reserving, however, to myself the privilege of a bridle road in front of the house." "In a deed to an individual," say the court, "the word 'heir' is necessary to create an estate of inheritance in the grantee. . . . The same rule applies to a reservation which operates by way of an implied grant. . . . When a clause in a deed is strictly an exception, taking out of the grant some portion of the grantor's former estate, as if one should convey his farm, excepting the wood lot, the part excepted would remain in the grantor as of his former title, because not granted. But, when the effect of the clause is to create some right or easement not before existing, it is, properly speaking, a reservation, and is generally considered as operating by way of an implied grant. . . . Merrifield, while he was the owner of the lots now held by the plaintiff and the defendant, had the right to pass and repass over any part of his estate, but no right of way, properly speaking, existed over the plaintiff's lot. This easement or servitude in favor of the lot retained by Merrifield was a new interest in real estate, created by the reservation and its acceptance by the grantee in the deed. As the reservation contains no words of inheritance, it follows . . . that Merrifield had only a life estate in the easement." *Bean v. French*, 140 Mass. 229, 231, 3 N. E. 206. "An exception may be created by words of reservation. . . . Whether, in a given case, the language shall be construed to create an exception or a reservation, will depend upon the situation of the property and the surrounding circumstances." *White v. New York & N. E. R. Co.* 156 Mass. 181, 185, 30 N. E. 613. "According to the English law, a right of way cannot strictly be made the subject of an exception or a reservation, because, as stated by Chief Justice Tindal in *Durham & S. R. Co. v. Walker*, 2 Q. B. 940, 967, 'it is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation.' If, therefore, an easement is excepted or reserved in a deed, it operates by way of grant from the grantee to the grantor. . . . In such a state of the law, the word 'heirs' must be used to create an easement in fee. In this commonwealth, however, an easement may be created by way of exception or reservation. . . . If created by way of reservation, the word 'heirs' is necessary to create an easement in fee. *Ashcroft v. Eastern R. Co.* 126 Mass. 196, 30 Am. Rep. 672; *Bean v. French*, 140 Mass. 229, 3 N. E. 206. But, if created by way of exception, the word 'heirs' is not necessary to create an easement in fee. . . . *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476; *White v. New York & N. E. R. Co.* 156 Mass. 181, 30 N. E. 612. As an exception may be created by words of reservation (*Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476), little reliance can be placed upon the language used, in determining whether the right is by way of exception or

by way of reservation. . . . In *White v. New York & N. E. R. Co.* 156 Mass. 181, 30 N. E. 612, where the easement was held to be perpetual, the language was, 'reserving the passageway at grade over said railroad where now made,' and the deed purported to release the railroad from all damages from maintaining the railroad. The defendant had also previously taken the land by its location. In deciding that the right of way was by way of exception, and not by way of reservation, reliance is placed on all these facts, including the fact that the passageway was already existing when the deed was executed. In the case at bar the defendant had not already taken the land by its location, . . . and there was no evidence of an existing way across the land. The construction of the deed, therefore, is determined by *Bean v. French*, 140 Mass. 229, 3 N. E. 206, and the right of way must be taken to have been acquired by way of reservation, and not by way of exception." *Claflin v. Boston & A. R. Co.* 157 Mass. 489, 492, 494, 20 L. R. A. 638, 32 N. E. 660.

If the softened form of the feudal rule against inheritable estates had been substituted for the other form in the construction of deeds, less injustice would have been done than has been done. In some cases, in which a fee, intended by the parties, has been changed into a life estate by the form that requires the word "heirs," the softened form (which has been applied to wills) would not have done the same wrong. In some cases, perhaps in many, it would not have been strong enough to nullify the competent evidence of intent. But its existence is not justified by its being less capable of mischief than another form of the same rule. Its only effect in the construction of wills has been to change an intended fee into a life estate, and it could have no other effect in the construction of deeds. "It is . . . the constant confession of the English judges that" rules of construction, "when arbitrarily and unfinchingly followed, often lead one side of the most obvious intent of the testator. . . . In the great majority of cases, where the devise has been cut down or restricted to an estate for life, upon the mere ground that no words importing clearly that any larger estate was intended to pass, it has resulted in defeating the intention of the testator." Redf. Wills, 420, 421. A man, having personal estate and a fee in land, devised his land, adequately described, to his nephews, M., G., and T., gave 10s. to J., his heir at law, and several small legacies to other relations, and made M., G., and T. residuary legatees; evidently supposing that the bequest of 10s. to his heir, other legacies to other relations, and the residue of his personality to his nephews, would vest in the legatees all the title he had to that kind of property, and that the devise of his land to his nephews (emphasized by the legacy of 10s. to his heir) would vest in the devisees all the title he had to the land. He was not aware that, while a gift of personality made the donee the owner, an ancient rule had so far survived the reason of its

existence that giving him land made him a tenant for life. The feudal distinction was maintained by the King's Bench, in violation of the elementary rule that a writing is to be understood in the ordinary, natural, and popular sense of its terms, when they do not appear to have been written in a peculiar sense. It was held that the devisees took only a life estate in the land, and that the heir took the remainder, notwithstanding the plainly expressed intent that the nephews should have the land, and the testator's manifest understanding that the land he devised to them was the whole land title. "The law," says Lord Mansfield, "implies a life estate only, where there are no words of limitation. . . . There must be words in the will to control the rule of law, which I believe in a variety of cases thwarts the intention of the testator. I suspect extremely that in this very case the testator meant to give his nephews a fee." "I really think," says Aston, J., "from the circumstance of the testator giving 10s. to his heir at law, he meant to disinherit him." *Denn ex dem. Gaskin v. Gaskin*, 2 Cowp. 657, 659, 660. "I verily believe that in almost every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted, for ordinary people do not distinguish between real and personal property." Lord Mansfield in *Right v. Sidebotham*, 2 Dougl. 759, 763. "In many of the cases . . . in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the deviser to give the absolute property to the first taker; and Lord Mansfield used to observe that the common class of men imagined that they could devise a fee simple by the same words that are sufficient to give a piece of plate. . . . Whatever our conjectures may be (and, privately speaking, I think the deviser meant to give an estate in fee to his wife), we are not at liberty to follow those conjectures, but are compelled by the authorities to say that she only took an estate for life." Lord Kenyon, in *Denn ex dem. Moor v. Mellor*, 5 T. R. 558, 562, 563. "Though it may be assumed, as Lord Mansfield once said, that, in almost every case where property is devised to one generally, the testator means to give a fee, yet we are tied down by a positive rule of law." Lord Ellenborough in *Goodright ex dem. Drewry v. Barron*, 11 East, 220, 222. "We are bound," says Le Blanc, J., in the same case (p. 223), "by a rule of law contrary to what I think was the probable intention of the testator in this case, to say that the widow only took a life estate." "If a man by deed of conveyance at common law gives land to another generally, without words of limitation, the donee has only an estate for life. But I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator; for common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty and

a devise of land or real estate. But as they know when they give a man a horse they give it him forever, so they think if they give a house or land it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine, in the case of a devise affecting real estate, that the devisee has only an estate for life, because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law. But as this rule of law has the effect I have just mentioned, of defeating the intention of the testator in almost every case that occurs, the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. . . . In general, wherever there are words and expressions, either general or particular, or clauses, in a will, which the court can lay hold of to enlarge the estate of a devisee, they will do so to effectuate the intention. But, if the intention of the testator is doubtful, the rule of law must take place. So, if the court cannot find words in the will sufficient to carry a fee, though they should themselves be satisfied beyond the possibility of a doubt as to what the intention of the party was, they must adhere to the rule of law." *Loveacres ex dem. Mudge v. Blight*, 1 Cowp. 352, 355. "I am satisfied that the idea expressed by Lord Mansfield in *Loveacres v. Blight* is correct. . . . 'Almost every case determined by this rule . . . has defeated the real intention of the testator, for common people . . . do not distinguish between a bequest of personalty and a devise of land.'" Sedgwick, J., in *Richardson v. Noyes*, 2 Mass. 56, 59, 3 Am. Dec. 24. Lord Mansfield "did not explain by what authority the court has laid hold of the generality of other expressions in a will to take the devise out of this rule, . . . provided it is a rule of law that the word 'heirs' is indispensable to the passing of a fee. . . . By what right can the courts say that the intention of a testator plainly written in his will shall govern, but the intention of a grantor as plainly written in a deed of bargain and sale shall be set at naught, the consideration of the sale be disregarded, and the property be thrust back upon the grantor or his heirs, on the death of the grantee, for the want of this feudal word of inheritance? In the nature of things, the word is no more necessary to the valid conveyance of land than to the valid conveyance of a horse." *Cole v. Lake Co.* 54 N. H. 242, 289.

In *Wright v. Denn ex dem.* Page, 10 Wheat. 204, 6 L. ed. 303, the testator died without issue, and a clause of his will showed that he was childless at the date of his will, eight months before his death. In the will, using the words "give and bequeath," he made general gifts of money to three sisters, and by the same words he made a general gift to his wife of all his realty, describing it as "all and singular my lands, messuages, and tenements," intending and clearly expressing his intention to dispose

of his whole title. He evidently understood that all his lands included, not only all his soil, but also all his interest in it, and that the whole title of the land he gave to his wife did not need a more extensive or more specific description than the whole title of the money he gave to his sisters. He was not aware that, in the peculiar language of the officials by whom his will would be construed, all his land was not all his interest in land, but a different interest, that might not last an hour. In disregard of the ordinary, natural, and popular meaning of the will, and of the natural presumption that he intended to dispose of his whole title (*Kenard v. Kenard*, 63 N. H. 303, 311), it was held that his wife took a life estate only, and that as to the remainder he died intestate. "It is not sufficient," says Story, J., delivering the opinion, "that the court may entertain a private belief that the testator intended a fee. It must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy. . . . We cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did; but the intention cannot be extracted from his words with reasonable certainty, and we have no right to indulge ourselves in mere private conjectures." The legislature have empowered an owner of property to dispose of it by will, and have determined who shall inherit it if his testamentary power is not exercised. A partiality that favors heirs at the expense of devisees, or prefers devisees to heirs, is not a policy of New Hampshire common law, but a violation of it. The question whether a general devise of a described tract of land, or of "all and singular my lands, messuages, and tenements," was intended to give all the testator's title, or to dispose of only a life estate, and leave him intestate as to the remainder, is determined as a question of fact, upon an impartial consideration of all competent evidence, by balancing probabilities, and not by technical rules. *Rice v. Boston Port & Seaman's Aid Soc.* 56 N. H. 191, 197, 198, 203; *Brown v. Bartlett*, 58 N. H. 511; *Kimball v. Lancaster*, 60 N. H. 264; *Goodale v. Mooney*, 60 N. H. 528, 534, 535, 49 Am. Rep. 334; *Sandborn v. Sandborn*, 62 N. H. 631, 643; *Kenard v. Kenard*, 63 N. H. 303, 310; *Bodwell v. Nutter*, 63 N. H. 446, 3 Atl. 421; *Kimball v. New Hampshire Bible Soc.* 65 N. H. 139, 160, 23 Atl. 83, 85. His probable knowledge or want of knowledge may be evidence of his probable intent. "It is a thousand to one that the testator . . . knew nothing of that artificial reasoning which gave rise to the expression 'indefinite failure of issue,' and probably had never heard it." Sedgwick, J., in *Richardson v. Noyes*, 2 Mass. 56, 66, 3 Am. Dec. 24. "It is a far-fetched and somewhat startling supposition that the testator must have been conversant with Coke upon Littleton, and the profound maxim, *Nemo est heres viventis*." Williams, J., in *Doe ex dem. Winter v. Perratt*, 6 47 L. R. A.

Mann & G. 314, 334. "The testator . . . was not aware of the distinction between real and personal estate." *Thellusson v. Woodford*, 13 Ves. Jr. 209, 222. It is as true in this country as in England, that "common people, and even others who have some knowledge of the law," are not familiar with the relaxed feudal rule concerning a devise of an estate of inheritance. To apply that rule to their wills or deeds is to disregard the evidence of intent furnished by the probable extent of their information. In *Wright v. Denn*, above cited, an intent to devise all the land title the testator had was proved beyond reasonable doubt by competent evidence. In this state the intent, duly proved, and the statutory rights of testator and devisee, are not defeated by a spirit of favoritism that sets aside the conclusion reached by a performance of the judicial duty of weighing legal proofs and balancing probabilities. The rejection of such a conclusion as a private and unauthorized conjecture exhibits in a clear light the mode of construction in which the acknowledged meaning of written instruments is overridden by arbitrary rules. Among the most instructive decisions are those in which the employment of this method in the accomplishment of this result is accompanied by a confession of the wrong. Authorities of this class (some of which have been cited), and others based on the same theory,—that testamentary or contractual intent, found by weighing competent evidence in the balance of probability, is legally overthrown by unwritten rules of construction,—affirm the soundness of opposite results in a jurisdiction where the intent, so found, prevails over those rules.

The conclusive argument on the duration of Cross's reserved easement is, it does not appear more probable than otherwise that the reservation was understood by the grantor and grantee in a peculiar sense; and the common and substantially universal understanding is that a conveyance or reservation of any piece of property, real or personal, is a conveyance or reservation of the grantor's interest in it. *Richardson v. Noyes*, 2 Mass. 56, 61. People in general do not regard the feudal word of inheritance, or other specific reference to the perpetuity of the estate, as more needed in a conveyance of described realty than in a conveyance of shares of an incorporated land company. Reading this reservation, as our law requires it to be read, for the purpose of giving effect to the actual intent of the parties, "a piece of land" is the fee, "the right of flowage" is a perpetual estate, a life estate that is not mentioned is not created. "Reserving to myself" a right of flowage, as a part of a reserve mill privilege, does not express the grantor's purpose to cut off his heirs by severing the appurtenance from the rest of the privilege at his death. The feudal rule, in the modified form in which it has been applied to wills, as well as in the original form in which it has been applied to deeds, is one of the formulas that our common law does not use to thwart the purpose of testators or contracting parties. The mere acceptance of correct views of the

law does not remove all danger of erroneous construction. In this case it is not enough to admit that the feudal rule, in its original form, requiring the word "heirs" as evidence of intent to convey the whole title, is no part of our law, and that the court have no power to enact it in the modified form that requires more evidence of such intent in a written sale or devise of a farm than in a written sale or bequest of a chattel or chose in action. The right of grantors and devisors to use language in its popular sense may be infringed when that sense is not understood by judges who labor under an educational bias, and are unduly impressed by the feudal idiom of the printed forms habitually used by the profession. Interpreters of deeds and wills may err because they are more familiar with legal phraseology than with the terms in which the mass of their neighbors express themselves on legal subjects. A full and exact knowledge of both languages is often needed in determining in what sense a word or phrase was used by a grantor or devisor. The statutory provision that "every devise of real estate shall be holden to pass all the estate of the devisor therein, unless it shall appear that it was his intention to pass a less estate" (Pub. Stat. chap. 186, § 6), is a partial enactment of New Hampshire common law, which maintains a grantor's as well as a devisor's right to use the language of the people in the sense in which they understand it. The statute is a recognition of the fact that a devise of land is commonly understood to pass all the devisor's interest in it, unless it appears that it was his intention to pass a less estate. And in this respect a devise and grant are commonly understood in the same sense.

6. Cross conveyed to "Wilson, and his heirs and assigns, forever, a certain piece of land, . . . reserving to myself . . . also reserving . . . to have and to hold the said premises . . . to him, the said Wilson, his heirs and assigns, forever." The printed form of conveyance generally used in this state runs "unto the said —, his heirs and assigns, forever." If a reservation had been printed in the same form, its verbal structure would probably have harmonized with the context. "Reserving to the said grantor, his heirs and assigns, forever," would preserve a uniformity of style. There being no such clause in the bank deed, a trap would be set for grantors if "heirs" were held to be a material word in Wilson's contract. The number of persons who use the printed form of the grant as a model in drafting a reservation is small, and the number of those who make constant use of feudal phraseology in their original compositions is smaller still. The consequence is that a deed containing a reservation of an easement generally furnishes ground for arguing that the grantor intended to convey a fee and reserve a life estate. If this was not his purpose, why did he mention the grantee's heirs in the premises and habendum, and omit his own in the reservation? The premises and habendum of the common form are extracts from ancient English precedents, drawn with

a degree of redundancy, technicality, and cumbersome formality that is foreign to the purpose of a New Hampshire deed. In procedure we have "happily lost a great mass of antiquated and useless rubbish." *Boston O. & M. R. Co. v. State*, 23 N. H. 215, 231. In conveyancing there has been a similar loss. 2 Bl. Com. Append.; Wood, *Conv.*, *passim*; Bell, *Justice & S.* ed. 1856, 452. And a large part of what remains is unserviceable and sometimes misleading. It muddles a simple business transaction with irrelevant learning that seems to suggest something recondite, and goes to support unsound views of American law. The habendum "has degenerated into a mere useless form." 4 Kent, Com. 468. When A sells his farm to B, and exercises what power he has to transfer his title and make B the owner by saying, in a paper duly signed, sealed, witnessed, acknowledged, and delivered, "I convey my [described] farm to B" (Id. 461), an iteration of the perpetual character of the estate has no more effect than the mere duplication often found in the description of its territorial extent. While the most reasonable meaning of every word of a deed is to have due weight as evidence of actual intention, the words "give, grant, bargain, sell, alien, enfeoff, convey, and confirm" are unnecessary (*Brown v. Manter*, 21 N. H. 528, 53 Am. Dec. 223; *Currier v. Janorin*, 58 N. H. 374; *Fletcher v. Chamberlin*, 61 N. H. 438, 474, 475; *Bronson v. Coffin*, 108 Mass. 175, 180, 11 Am. Rep. 335), and so far as they have any probative force they are synonymous. Giving them eight meanings instead of one would be a distortion of the evidence. Customary words and phrases of perpetuity that have been transmitted from former times are to be read in the light of their history. A false gloss is not to be put upon repetitions evidently due to abundant caution, or to the use of forms that originally had a significance they cannot have here, in the absence of the institutions and conditions to which they were adapted, and of which they were products and incidents. When a blank deed comes from the printer's hands, "his heirs and assigns, forever," like "give, grant, bargain, alien, enfeoff, and confirm," is surplusage. Whether it is erased or not does not matter. It is a needless repetition of the idea of perpetuity fully expressed in the preceding word "sell," and repeated again and again in the words of grant. Upon a consideration of what is probable, it cannot be found that, in a written reservation, the parties abstain from the barren verbiage of the printed form for the purpose of giving the printed word "heirs" an evidential force which it did not have before the reservation was inserted. They may hold the correct legal view of the printer's work. They may rely upon their scrivener's supposed knowledge of his business, having themselves no sufficient motive for seeking instruction on so technical a subject. Their reliance upon an incorrect view of the printed word "heirs" to affect the meaning of the written reservation is a conjecture that passes the bounds of probability. Their good faith and contracting capacity being presumed, it is in-

credible that a purpose to reserve a life estate is intentionally left to be inferred from the nonreasure of the superfluous word "heirs" in the print, and their nonuse of it in the writing. If the whole deed is written, and the grant is an ancient form, the contrast of the reservation, composed in this country, and the form dictated to foreign draftsmen by foreign law, may not prove a reservation of a life estate. The mixed authorship may be as apparent as if the reservation were written in a printed form. *Sandborn v. Sandborn*, 62 N. H. 631, 647. In the minds of Cross and Wilson, "reserving to myself . . . the right of flowage, . . . also reserving a piece of land . . . 1 acre," might be a reservation of the flowage, and an exception of the acre. They might hold the erroneous opinion that Cross's interest in the right of flowage, reserved as an appurtenance of his land, would be a life estate. They might suppose that some form of a feudal rule would be applied to a reservation, and that no form of it would be applied to an exception. With this mode of construction in view, instead of saying "reserving" the flowage and "excepting" the acre, they might say "reserving" the flowage, "also reserving" the acre. Studiously avoiding plain and express terms (such as "reserving the right of flowage for and during the term of my life") that would be intelligible to all, and would naturally be used by every scribe, expert or inexperienced, they might prefer the useless and aimless risk of an attempt to exclude an estate of inheritance by a refinement in the use and nonuse of surplusage, which not one person in a thousand would understand. But such possibilities have no bearing on the question of probability.

7. "When nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs, or executors." Co. Litt. 145a. The intent, proved by competent evidence, is the contract that determines whether the title passes before election or afterwards. Under the feudal rule against inheritable interests in reality, it is not strange that a grantee's right of selecting his land, like the land itself, would not go to his heirs without such an expression of the grantor's intent that it should go to them as would be superfluous in this state. When the sway of ideas generated in feudal ages was absolute, and contractual rights were largely determined by arbitrary rules, with much less search for the intent of the parties than is now made, it is not strange that a sale of one of three horses should be held to require the election "to be made in the life of the parties." *Beyward's Case*, 2 Coke, 35, 36. In such a case the purchaser has an election if the parties understand he is to have it, and it may be inferred that for the agreed price the vendor gives the vendee his choice. If the vendee pays the price when the bargain is made, 47 L. R. A.

and instantly dies, it is not a matter of law that the parties were so actuated by feudal hostility to inheritable rights as to intend that the right of election, sold by one and paid for by the other, should be a life estate. When the location of granted premises is to be made certain by election, the title passes to the grantee when the deed is delivered, and if the right of election, passing to him as an incident of the title, is not exercised by him it passes by his conveyance of the land. *Armstrong v. Mudd*, 10 B. Mon. 144, 50 Am. Dec. 545. The proposition that Cross conveyed the acre to Wilson, with an implied stipulation that it should revert to the grantor if he located it, or that any right was conveyed with such a defeasance, or that, on any theory, the grantor lost or failed to regain any property by not locating it, would be in conflict with general principles of property, conveyancing, construction, and remedial law that have been already considered. If, by an ancient rule, the title of any of the reserved property would pass to Wilson, and could only be reverted in Cross by his exercising a right of election, this rule, like the different forms of the feudal rule governing grants, reservations, and devises of perpetual interests, is irrelevant where the law finds the contractual intent in the written instrument, understood in its ordinary and popular sense. When that sense is evidently what the parties meant, it is not suppressed in this state by a rule which the legislature have not seen fit to adopt. In Cross's grant and reservation there is no evidence that the parties understood his perpetual interest in any part of the reserved property was conveyed, and there is an intrinsic probability that he did not intend his existing and reserved title should depend upon his living long enough to make a selection and survey. Until the right of election was exercised there was an ownership in common, conformable to the proprietary rights which the deed conveyed, and the proprietary rights which the reservation shows the deed did not convey. There was a tenancy in common, because the deed conveyed, not the whole of the east section, but a part of it. The title of what Cross reserved remained in him, and the seisin of that part remained with the title. His exercise of the right of election could not be necessary to vest in him what the deed did not convey from him. As the acre was his before he reserved it, and he could not lose it by reserving it, his property in it could not begin by subsequent election. If it had been located by a decree on a bill in equity brought by Cross or Wilson, the title would not have begun when partition was decreed; and, whether partition were made by process of law or by an exercise of the right of election, "a piece of land . . . 1 acre" would not be conveyed to Wilson, nor would the title be taken from Cross and left in abeyance, by the deed in which it was reserved.

The plaintiffs are entitled to judgment. *Case discharged.*

Chase, J., dissents. The others concur. Rehearing denied.

NEW YORK COURT OF APPEALS.

ROCHESTER & KETTLE FALLS LAND
COMPANY, Appt.,

v.

William O. RAYMOND, Resp't.

(158 N. Y. 576.)

1. A subscription to the stock of a corporation is not an agreement to pay so much money unless so expressed in the contract, but is a contract to enter into the relation of stockholder.
2. An exception to the direction of a verdict is sufficient to present the question whether there is a case for the jury without requesting that any fact be submitted.
3. A corporation which permits the transfer of stock by canceling the

certificate and issuing a new one to the purchaser, and afterwards brings an action against him for the unpaid portion of the stock, ratifies the transaction, and cannot subsequently claim that the transfer is ineffectual to release the original shareholder from liability as such on the ground that it was not made in good faith.

(April 18, 1899.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, overruling exceptions taken by plaintiff at the trial in Monroe County and ordered to be heard by the Appellate Division in the first instance in an action brought to hold defendant lia-

NOTE.—Effect of transfer of shares of stock upon liability for unpaid subscription.

- I. Introductory.
- II. Statutes continuing liability.
- III. Transfer prohibited.
- IV. Generally transfer releases subscriber.
 - a. Under statutory provisions.
 - b. Corporation scheme contemplates release.
 - c. Transfer must be perfected.
 - d. Transfer must be bona fide.
 - e. After insolvency of corporation.
- V. Transfer to or release by corporation.
- VI. Rights of creditors.
- VII. Time of transfer.

I. Introductory.

Before determining what the effect of a transfer of shares may be a consideration of the liabilities of the original subscriber will be necessary. No attempt will be made to make the collection of authorities involving such liability exhaustive, but enough will be cited to show the trend of the decisions upon that question.

Express promise to pay enforceable.

First, it may be stated that if the subscription paper contains an express promise to pay for the shares the courts are all agreed that so long as that contract exists it is enforceable by action. *Townsend v. Goewey*, 19 Wend. 424, 32 Am. Dec. 514; *Smith v. Natches S. B. Co.* 1 How. (Miss.) 479; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Haskell v. Sells*, 14 Mo. App. 91; *Union Turnp. Co. v. Jenkins*, 1 Cal. 381; *Harlem Canal Co. v. Seixas*, 2 Hall, 504; *Dayton v. Borst*, 7 Bosw. 115; *Banet v. Alton & S. R. Co.* 13 Ill. 504; *Stokes v. Lebanon & S. Turnp. Co.* 6 Humpb. 241.

In accordance with that principle, it has been held that—

Where, in the articles of association, provision is made as to the persons who are to be the payees, and the several subscribers stipulate to make payment for the number of shares subscribed by each to such persons as should be appointed to receive the same by a majority of the shareholders, the subscription may be enforced. *Ives v. Sterling*, 6 Met. 316; *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

On a written promise to a corporation to pay a certain sum for each share set against the subscriber's name in such instalments as the president and directors may legally require, the corporation may maintain an action for as-
47 L. R. A.

assessments without first selling the shares for nonpayment. *Proprietors of City Hotel v. Dickinson*, 6 Gray, 586.

If the subscriber has promised to take and pay for the shares an action will lie against him, although the corporation has not exercised its authority to sell the shares for delinquency of payment. *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360.

A subscription which a subscriber undertakes to pay is, in contemplation of law, a promissory note. *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, 570.

Under a contract by which persons agree to subscribe the number of shares opposite their names, and bind themselves, their heirs, etc., to pay said amount in such instalments as may be called for by the company, the contract may be enforced by action by the corporation when it comes into existence, where the statute provides for action or forfeiture of the stock in case of failure to pay. *Glenn v. Busey*, 5 Mackey, 233.

If the subscribers sign a paper making them liable to pay all legal assessments as shall be made after the corporation shall be organized according to the statute, they may be compelled to comply with their agreement. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23.

Where the subscriber agrees to pay the amount subscribed at specified times, he is subject to suit therefor, although no assessments have been made. *Shattuck v. Robbins* (N. H.) 44 Atl. 694.

The interest acquired by a subscriber in the corporation is a sufficient consideration to support an action for the amount subscribed upon express promise to pay. *Vermont C. R. Co. v. Clayes*, 21 Vt. 30.

How far subscription may be enforced if contract contains no express promise to pay.

The courts have taken two opposite views of the obligations imposed by the mere agreement to take stock without any express agreement to pay for it, and with nothing in the statute, charter, or by-laws expressly requiring such payment. The one view is shown by the following decisions:

Where the agreement is simply to take the number of shares set opposite a subscriber's name, no promise to pay for them will be implied, and the corporation will be limited to the remedy given by the statute. *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80. In support of its ruling the court says very clearly the corporation has no power, as incident to it at common law, to assess for its

ble for assessments upon unpaid stock of plaintiff for which he was alleged to be responsible. *Affirmed.*

Statement by Martin, J.:

Appeal from a judgment in favor of the defendant entered April 22, 1896, which was directed by the appellate division of the supreme court in the fourth judicial department to be entered upon a verdict previously directed by the trial court, and which overruled the exceptions taken upon the trial, which were ordered to be heard in the first instance at general term. The action was brought to recover of the defendant the amount of certain assessments levied by the plaintiff on thirty shares of its capital stock. The plaintiff is a domestic corporation, organized under chapter 40, Laws 1848, for the purpose of dealing in real estate. Its

own use a sum of money on the corporators, and compel them by action at law to the payment of it. To authorize this assessment the power must be derived from general statute. The power to make the assessment is implied from a section of the statute permitting a forfeiture of the shares for failure to pay the assessment, but since the statute gives a new power, and provides a means of executing it, those who claim the power can execute it in no other way.

Where the statute requires payments of instalments to be made at such times as the board of directors may order, and provides that in case of failure to pay the instalments at the appointed time the shares may be declared forfeited, no action can be maintained to enforce the subscription. *Odd Fellows' Hall Co. v. Glasier, 5 Harr. (Del.) 172.* The court says a person may be willing to embark in an undertaking authorized by an act of incorporation when he observes by the terms of the act that the only risk which he incurs will be the forfeiture of his stock and the instalments he pays, but may be very unwilling, and might refuse, to become a member of a corporation when the act makes him personally liable for the whole amount of the shares of stock for which he becomes a member.

The other view is set forth in *Webster v. Upton, 91 U. S. 65, 23 L. ed. 884*, where the court, in discussing the liability of an assignee of unpaid stock, says an express promise to pay is almost unknown except in the case of an original subscription, and oftener than otherwise it is not made in that. The subscriber merely takes the stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for the creditors is only that portion of each share which was paid prior to the organization of the company, in many cases not more than 5 per cent. The plain object of the statute fixing the minimum capital would be defeated if there is no liability of the stockholder to pay the full subscribed amount of each share of his stock. When one comes into privity with the company as a stockholder there is a necessary implication that he undertakes to complete the payment of all that is unpaid of the shares he holds whenever it shall be demanded. There are decisions of highly responsible courts to be found, in which it was held that even a subscriber to the capital stock of an incorporated company is not personally liable for calls unless he has expressly promised to pay them, or unless the act of incorporation or some statute de-

clares that he shall pay them. In most, if not all, of these cases, it appeared that the law authorizing the incorporation had provided a remedy for nonpayment of calls. The company was authorized to declare forfeited, or to sell, the stock for default, and, the law having given such a remedy, it was held to be exclusive of any other. Yet it was conceded that if the statute had declared that the calls should be paid, assumption would lie on the promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized shall be in fact paid is plain enough when the authority to exist as a corporation is given on condition that the capital shall not be less than a specified sum. If the intent of the law was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares when payment is required.

As will eventually appear, *Webster v. Upton* represents the doctrine of the majority of the courts; but there is another principle which rules many cases, which must first be referred to.

Statutes and charter part of the contract.

The principle is that the statutes and charter are part of the subscription contract, so that if the express duty to pay is enjoined by them the courts will enforce such duty, or, as stated in *Spear v. Crawford, 14 Wend. 20, 28 Am. Dec. 513*, the promise of the subscriber to take the shares may be construed in connection with the act of incorporation, and with other parts of the contract, and in the light of such instruments held to be a promise, not only to take the shares, but to pay for them, so that the corporation may enforce the promise by action.

So, it has been held that—

As between the corporation and the subscriber the liability upon the subscription will depend upon the terms of the charter where there is no express promise to pay. *Robertson v. Sibley, 10 Minn. 323, Gil. 253.*

Whether or not a subscriber is liable to pay instalments is a question of law arising upon construction of the charter. *Chesapeake & O. Canal Co. v. Dulany, 4 Cranch, C. C. 85, Fed. Cas. No. 2,647.*

The articles of subscription and association may be combined, and where they are so, and the articles of association contain an express or implied promise to pay the sums annexed to the names of subscribers, suit may be maintained upon the latter. *Heaton v. Cincinnati & Ft. W. R. Co. 16 Ind. 275, 79 Am. Dec. 430.*

when the defendant paid the 30 per cent upon the amount of the assessable stock subscribed for by him as provided in the agreement and received a certificate therefor. George Hennegan was a subscriber for ten shares of the assessable stock of the plaintiff corporation, and received a certificate therefor, which he afterwards transferred to Frederick W. Zoller, who subsequently, and on the 27th of February, 1892, duly transferred it to the defendant, the consideration for the transfer being \$5. These transfers were duly registered on the books of the company, the former certificates canceled, and a new one issued to the defendant. Previously to Zoller's transfer to the defendant, and on January 26, 1892, the plaintiff made a call upon its shares of assessable stock of 7½ per cent which Zoller paid, and the defendant also paid that call upon the twenty

shares of stock then held by him. So that on February 27, 1892, the defendant held thirty shares of assessable stock, 62½ per cent of the par value of which was unpaid. Thereafter defendant acquired two more shares, which had been held by his son George W. Raymond, making defendant's holding of the plaintiff's assessable stock thirty-two shares. On March 4, 1892, the defendant transferred these shares to Frank B. Van Every for the consideration of \$3. The certificates therefor were duly surrendered to, and canceled by, the plaintiff, and it issued new certificates to Van Every for that number of shares. The plaintiff's secretary duly registered these transfers upon its books, and took Van Every's receipt for the shares received by him. The defendant had been a director of the plaintiff, and continued such until October 24, 1892, when

Signing a contract agreeing to take stock to the amount of the number of shares set opposite his name subject to the by-laws, rules, and articles of incorporation, will obligate the subscriber to pay the amount of the subscription where the by-laws provide that the stock shall be paid for. *Waukon & M. R. Co. v. Dwyer*, 49 Iowa, 121.

Subscribers to stock are bound by the statutes as though they were part of the contract of subscription. *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223.

By the subscription without condition or stipulation the subscriber undertakes to pay for his shares according to the conditions of the charter. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

Where the charter of the corporation provides that the capital shall be a certain amount, and that a certain portion thereof shall be paid in within a certain time, and that the directors may call in the balance at such times as they may think proper, the undertaking of the subscriber is to pay the par value of his stock. *Ward v. Griswoldville Mfg. Co.* 16 Conn. 593.

A subscription for stock becomes in law an absolute undertaking for the payment of the stock subscribed according to the provisions of the charter. *Wight v. Shelby R. Co.* 16 B. Mon. 4, 63 Am. Dec. 522.

The taking of stock creates a contract to pay for it in the mode prescribed by the charter, and a stipulation to that effect in the subscription paper is not necessary. *Fry v. Lexington & B. R. Co.* 2 Met. (Ky.) 814.

The act of subscription made by affixing the name in the stock book is equivalent in every respect to an express contract, and the terms of subscription prescribed in the charter attach to it as effectually as if they had been written at length. *Beene v. Cahawba & M. R. Co.* 3 Ala. 660.

Although the charter and statutes are to be read into the contract as indicated by the above authorities, the question is still open as to what the rule of construction shall be. Will the court further the intent of the corporation law to provide a fund to pay corporate debts by compelling payment of subscriptions although the duty to pay them is not expressed, or is it necessary to expressly create the duty to pay? It is upon this question that the courts are not agreed.

It has been stated by one court that the liability of a stockholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability it is not perceived how a person to 47 L. R. A.

whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

That being so, unless a contract to pay can be implied it will in many cases not exist.

It has been held that—

Although there is no express promise of the subscriber to pay instalments, if the charter fixes the stock at a certain number of shares of a certain amount each, by the act of subscribing each associate undertakes to raise his proportion of the capital as it may be called, and assumes the duty of paying for it. *Merrimac Min. Co. v. Levy*, 54 Pa. 227. The court says if the subscribers are not bound to pay for their stock, there is nothing more than a nominal capital. Certainly it was intended that creditors should have the security of a real capital to the extent of a sum named as the aggregate stock.

By subscribing to the stock of a railroad corporation on the terms mentioned in the charter, and the allowance of the shares subscribed for, the relation of stockholder and company is created, from which the law implies a promise by such subscriber to pay instalments ordered by the directors pursuant to the charter. *Danbury & N. R. Co. v. Willson*, 22 Conn. 435.

Where the articles of association define the capital stock, the number of shares, and the amount of each share, and stipulate that the subscribers thereto agree to take the number of shares set opposite their names, a promise is implied that each subscriber will pay the amount specified per share. *Miller v. Wild Cat Gravel Road Co.* 52 Ind. 51.

Carrying out the idea that the limited liability of the stockholder is conferred because a fund has been established for payment of corporate obligations, the courts of all except three or four states have held that generally the relation of stockholder towards the corporation involved the payment of stock subscriptions.

Thus, a subscriber to the stock of a corporation undertakes to pay a sum for each share which is fixed by the act of incorporation or by the by-laws of the company. *Wood v. Pearce*, 2 Disney (Ohio) 411.

In *Beene v. Cahawba & M. R. Co.* 3 Ala. 660, the court says we cannot conceive that the legislature intended to confer the franchise contemplated on such as might desire to associate together without requiring from them something in return. It would be unreasonable to con-

he disposed of the nonassessable stock he held, and one Kingsley was elected in his place. On July 7, 1892, the plaintiff made a further call upon its stock of 12½ per cent. Van Every did not pay, and on November 4, 1893, a judgment by default was obtained against him by the plaintiff for the amount thereof. This judgment was satisfied by the plaintiff, September 14, 1894, and in the following October it began this action against the defendant for the amount of the call attempted to be collected of Van Every, and for the further amount of a call of 10 per cent subsequently made. This action was not commenced until two years and eight months after the transfer of the defendant's shares to Van Every, and nearly a year from the date of the recovery of judgment against the latter for the amount of one of the calls included in this action.

Van Every was a waiter in a restaurant where the defendant took some of his meals, and was a person of little or no pecuniary responsibility. Soon after this transfer to him, Van Every transferred the certificates to someone in the defendant's store to whom he was introduced, but did not know, and received \$5 therefor. He claims that he did this in pursuance of some arrangement with the defendant by which he was to procure a purchaser of the stock.

Mr. James G. Greene, for appellant:

The subscription of the defendant for twenty shares of stock was a contract to take and pay the par value thereof, binding upon him until such payment was made. A mere transfer of the certificate for such shares without some other act of the corporation than registration of such transfer

clude that the act of subscription gave to those subscribing a chance of gain without the possibility of loss; which would be the case if the subscriber could afterwards withhold the amount of his subscription with impunity.

In *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57, the court says it would be contrary to the plainest principles of law and equity, as well as common sense, after having subscribed the requisite amount of stock to give the corporation a legal existence, and, after having organized it, to allow the stockholders to refuse to pay in so much of the unpaid stock as may be necessary to discharge the fair and just debts due from the company, and which had been contracted on the foundation of such subscription and organization.

It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. *Hawley v. Upton*, 102 U. S. 814, 28 L. ed. 179.

The obligation of a subscriber to pay for his stock is not a statutory obligation, but an obligation in equity arising out of the consideration that the capital stock of the corporation is a trust fund for the payment of its debts. *Bell's Appeal*, 115 Pa. 88.

To render a subscriber liable to pay for the stock it is not essential that there should be an express promise to pay the subscription price. Oftener than otherwise there is none, the subscription being an agreement to take so many shares of stock. By necessary implication there arises from such a subscription a promise to pay the par value of such stock, upon which an action of assumpsit lies. *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. 340; *Rensselaer & W. Pl. Road Co. v. Wetzel*, 21 Barb. 56.

Each subscriber of stock in a corporation thereby becomes liable for the amount of stock subscribed by him, and he can only be discharged by paying money or money's worth in the manner provided by the charter and by-laws, and this obligation may be enforced by creditors in case the corporation becomes insolvent. *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680.

One who subscribes to the capital stock of a corporation impliedly promises to pay for it, although there is nothing requiring him to do so in the articles of association or subscription paper, and the statute merely provides that the corporation shall provide for sale of the shares upon nonpayment of calls. *Windsor Electric Light Co. v. Tandy*, 66 Vt. 248, 29 Atl. 248. 47 L. R. A.

An agreement to take a certain number of shares of the capital stock of a corporation subscribed previously to the time of incorporation creates an implied promise to pay for the shares which will sustain an action by the corporation to recover the amount of calls duly made upon the stock. *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 836; *Rensselaer & W. Pl. Road Co. v. Barton*, 16 N. Y. 457, note.

Subscription to the stock of a banking corporation creates a legal liability to pay the amount of the subscription. *Dayton v. Borst*, 31 N. Y. 485.

A subscription for stock is a debt which the corporation may call in to satisfy its creditors. *Hightower v. Thornton*, 8 Ga. 502, 52 Am. Dec. 412.

In *Mann v. Penta*, 8 N. Y. 415, it is said that when the stock has not all been paid in, the delinquent stockholder should be compelled to contribute from the unpaid subscriptions sufficient to pay debts. Such unpaid balance should be deemed for this purpose a portion of the capital stock.

The liability of a stockholder to pay for unpaid subscriptions results from the implied promise to take and pay for the stock implied as against the original subscriber on his subscription, or, as against a subsequent holder, by his accepting the certificate, thereby succeeding to the liabilities of the original subscriber. *Seymour v. Sturgess*, 26 N. Y. 134.

The law implies a promise by the original subscriber of stock who did not pay for it in money or in property to pay for the same when called upon by the creditors. *Handley v. Stuts*, 189 U. S. 417, 85 L. ed. 227, 11 Sup. Ct. Rep. 530.

A constitutional provision that stockholders of corporations shall be liable for the indebtedness of the corporation to the amount of the stock subscribed for creates no new right, but simply provides for the preservation of the old one. The liability is not to the creditor, but for the indebtedness. That is no more than the liability created by the subscription. *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265, 1 Sup. Ct. Rep. 432.

The supreme court has decided that state statutes providing liability of stockholders to the extent of unpaid amounts on shares do not create a new right, but merely recognize a liability of the stockholder which existed at the time the statute was enacted. *National Park Bank v. Peavey*, 64 Fed. Rep. 912.

A subscription is not necessary to hold a stockholder liable for the amount unpaid on the stock if the stock is in fact issued, and is held by the one sought to be charged. *Calumet*

does not release the defendant. He is liable for the stock subscribed for irrespective of the question whether the transfer to Van Every was in good faith and out and out, or otherwise.

Billings v. Robinson, 94 N. Y. 415; *Schoenectady & S. Pl. Road Co. v. Thatchers*, 11 N. Y. 102; *Small v. Herkimer Mfg. & Hydraulic Co.* 2 N. Y. 330; *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Northern R. Co. v. Miller*, 10 Barb. 260; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer & W. Pl. Road Co. v. Barton*, 16 N. Y. 457, note; *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297; *Dayton v. Borst*, 31 N. Y. 435.

A promise to take shares imports a promise to pay for them.

Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; *Flinn v. Bagley*, 7 Fed. Rep. 785; *Mann*

v. Currie, 2 Barb. 294; *Seymour v. Sturgess*, 26 N. Y. 134; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344; *Veiller v. Brown*, 18 Hun. 571; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

The implied contract is a fiction (*Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344), for which there is no occasion if there is an express contract.

Flinn v. Bagley, 7 Fed. Rep. 785; *Stanton v. Wilson*, 2 Hill, 153; *Hamilton & D. Pl. Road Co. v. Rice*, 7 Barb. 167; *Eastern Pl. Road Co. v. Vaughan*, 14 N. Y. 546; *Dorris v. French*, 4 Hun. 292; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

If anything further is needed to clinch defendant's liability than the subscription, it is supplied by his participation in the or-

Paper Co. v. Stotts Investment Co. 96 Iowa, 147, 64 N. W. 782.

The obligation of actual payment is created by a subscription to the stock of a corporation unless plainly excluded by the terms of the subscription. *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297; *Palmer v. Lawrence*, 8 Sandf. 161.

And the payment will be enforced where the terms of subscription expressly require payment of a certain amount as soon as a certain amount of subscriptions has been received, and that the remaining instalments shall be called for as the board of directors may find necessary. *Busey v. Hooper*, 85 Md. 15, 6 Am. Rep. 350.

If the capital stock is defined and divided into a certain number of shares a subscription for a given number of shares at a fixed money value, although containing no express promise to pay, will support an action of assumpsit where the object of the corporation requires the raising of the capital, and the enterprise might result in failure if there was no power to enforce subscriptions. *Hughes v. Antietam Mfg. Co.* 34 Md. 316.

Signing a certificate stating that the undersigned have associated to organize a corporation for the carrying on of a certain business which complies with the requirements of the statute, and declares that the subscribers have subscribed to the number of shares taken as affixed to their several signatures, is sufficient to render the subscriber liable to pay his subscription. *Cole v. Ryan*, 52 Barb. 168.

A subscription of a paper stating that the undersigned have associated themselves for the purpose of banking under a certain statute, and declaring that the name and residence of shareholders with the number of shares held by each are as follows, amounts to a subscription for capital stock, and binds the subscribers to pay for the number of shares set opposite their names. *Nulton v. Clayton*, 54 Iowa, 425, 6 N. W. 685.

One who signs a writing: "We do hereby subscribe to the stock of said corporation the number of shares annexed to our names respectively,"—thereby impliedly promises to pay for the shares which he sets opposite his name. *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499. The court says it is true a promise to pay in precise terms does not appear to have been made. But the subscriber has done an equivalent act. He has contracted with the corporation to become a member, and to be interested in the stock to the extent of \$100 for each share assigned to him if that amount be required. This contract has been executed on the part of the corporation by delivering to him the shares. 47 L. R. A.

They are to be paid for in money; and by voluntarily becoming a member of the corporation under the provisions of the charter, an implied assumpsit arises to pay the instalments on the terms, conditions, and limitations mentioned in the charter.

A promise to take stock subject to the conditions, requirements, liability, and benefits of the act of incorporation is equivalent to an express promise to pay for the stock. *Northern R. Co. v. Miller*, 10 Barb. 260.

A promise to take shares of stock imports a promise to pay for them. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203.

It is the duty of managers to see that the stock is contributed, and it is not less the duty of the subscribers punctually to contribute it when required to do so. If not thus contributed, equity may compel it to be done in a proper case and when good faith requires it, but lapse of time may preclude creditors from enforcing the duty. *Gilmore v. Bank of Cincinnati*, 8 Ohio, 62.

The taking of stock in the corporation creates a contract, express or implied, to pay for it in the mode prescribed by the charter. *Gill v. Kentucky & C. Gold & S. Min. Co.* 7 Bush, 635.

In *Brant v. Ehlen*, 59 Md. 1, which was an action against an assignee of shares sold as fully paid, the court said the liability for a subscription to the stock of the corporation is founded on contract. Where one agrees to take a certain number of shares the law implies a promise to pay for them according to the terms of his subscription.

Assumpsit will lie in favor of a corporation for assessments on stock where no other remedy is provided by the statutes or by-laws, although there is no express promise to pay. *Essex Bridge Co. v. Tuttle*, 2 Vt. 393.

An agreement to take stock is equivalent to an express promise to pay for it. *Ogdensburgh, R. & C. R. Co. v. Frost*, 21 Barb. 541.

A few of the courts, however, following the lead of Massachusetts, have held that there was no implied promise to pay for the shares.

An agreement to take the number of shares set opposite the names of the subscribers does not amount to a promise to pay the assessments that may be made on them. *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *New Bedford & B. Turnp. Corp. v. Adams*, 8 Mass. 138, 5 Am. Dec. 81; *Franklin Glass Co. v. White*, 14 Mass. 286; *Mechanics' Foundry & Mach. Co. v. Hall*, 121 Mass. 272.

An agreement to take shares imposes no personal obligation to pay for them. *Belfast &*

ganization of the plaintiff and the payment of the 30 per cent and the 7½ per cent instalments.

Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536; *Poughkeepsie & S. P. Pl. Road Co. v. Griffin*, 24 N. Y. 150; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 31 N. E. 907; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. Supp. 95; *Wheeler v. Miller*, 90 N. Y. 553.

The trustees of a corporation have no power to release a subscriber from his liability to pay without some consideration good and valuable.

Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196; *Stone v. Van-*

M. L. R. Co. v. Moore, 60 Me. 561; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

An agreement in writing to subscribe a specified number of shares to the stock of a corporation is not an express promise to pay for them. *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470.

A subscription for shares of a corporation authorized by law to lay assessments and to sell shares for nonpayment of them imposes no personal liability upon the subscriber unless he has expressly promised to pay. *Katama Land Co. v. Jernegan*, 126 Mass. 155.

Even in the states which refuse to imply a contract any promise which may be construed as one to pay for the shares will be enforced.

Thus, an agreement to fill the number of shares set against the name of a subscriber amounts to a promise to pay assessments which will sustain an action against the subscriber for the assessments. *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

An agreement by several persons to associate together under the provisions of a proposed corporate charter, and to take the number of shares set against their respective names and to be paid for in certain instalments, creates a contract which may be enforced by the corporation. *Kennebec & P. R. Co. v. Palmer*, 34 Me. 366; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 758.

Effect of provision for forfeiture.

In the states which refuse to imply a promise to pay for the shares it is held that a provision in the charter or statute for forfeiture of the shares in case of nonpayment of calls is the exclusive remedy, so that no suit can be maintained to enforce payments.

Thus, a corporation cannot enforce payment of assessments upon stock unless the subscriber has made an express agreement to pay for it, or unless by the charter or other statutory provision a personal obligation is imposed upon the holder to make such payment. *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470. And where the charter provides for forfeiture in case of nonpayment the corporation is limited to that remedy.

Under the Massachusetts statute of 1808, the only compulsory mode which a manufacturing corporation had to enforce payment of assessments was by sale of the share. *Cutler v. Middlesex Factory Co.* 14 Pick. 483.

Under a statute providing that no stockholder shall be liable in his person or property for any

dalia Coal & Coke Co. 59 Ill. App. 536; *Burke v. Smith*, 16 Wall. 390, 21 L. ed. 361.

Mere manipulation of the certificates cannot destroy the subscriber's liability.

2 Thomp. Corp. § 1512.

Defendant's liability upon the ten shares of stock transferred to him by Zoller is upon the assumption of the unpaid balance implied from his becoming the owner of shares not fully paid up.

Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384.

The transferee is liable for calls made while the holder of stock.

Mann v. Currie, 2 Barb. 294; *Cole v. Ryan*, 52 Barb. 168; *Billings v. Robinson*, 94 N. Y. 415; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; 1 Cook, Stock & Stockholders, 3d ed. § 256.

assessment beyond his interest in the corporation, though every share shall be perpetually pledged for all assessments, the only remedy for failure to pay assessments is to forfeit the shares. *Bangor House Proprietary v. Hinckley*, 12 Me. 385.

So, in an early New York case which was subsequently questioned and afterwards departed from it was held that a clause in the charter of forfeiture of shares subscribed takes away the right of suing for them or money ordered to be paid upon them. *Jenkins v. Union Turnp. Road*, 1 Cal. Cas. 95. One ground for the decision in that case, however, was that a perfected contract had not been entered into.

And in a later case it is stated that where the statute provides for forfeiture of the stock, and no absolute duty to pay is imposed by statute or by the terms of the subscription, there is no personal duty to pay the calls. The rule is generally different as to creditors. *Fort Edward & F. M. Pl. Road Co. v. Payne*, 17 Barb. 567.

Even in the states which hold that provision for forfeiture is exclusive in the absence of a promise to pay, an express promise may be enforced notwithstanding a provision for forfeiture.

Power to forfeit shares for nonpayment will not prevent an action if there was an express promise to pay. *Worcester Turnp. Corp. v. Willard*, 5 Mass. 80, 4 Am. Dec. 39; *Taunton & S. B. Turnp. Corp. v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

The principle of *Worcester Turnp. Corp. v. Willard*, 5 Mass. 80, 4 Am. Dec. 39, was recognized in *Essex Turnp. Corp. v. Collins*, 8 Mass. 292, although it was held that no contract of subscription had been perfected.

An action may be maintained upon an express promise to pay for the stock, although the subscription paper authorizes a sale in case of nonpayment. *Boston, B. & G. R. Co. v. Wellington*, 118 Mass. 79.

If the subscriber has expressly promised to pay for his stock an action may be maintained on the promise, although the charter provides also for forfeiture of the stock upon failure to pay. *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

Where the subscriber expressly agrees to pay assessments, he will be liable to an action thereon, although a by-law of the corporation provides for forfeiture of the stock in case of failure to pay. *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

And that rule, of course, obtains in the states

If a person accepts anything which he knows to be subject to a charge or duty, it is rational to conclude that he meant to take the charge or duty upon himself; and the law may very well imply a promise to perform what he has so taken upon himself.

Broom, Legal Maxims, 677-680, as cited in *Johnson v. Underhill*, 52 N. Y. 203.

The transfer by the defendant to Van Every is no defense, either as to calls on the twenty shares originally subscribed for, or the ten shares received from Zoller, unless such transfer was bona fide.

Billings v. Robinson, 94 N. Y. 415; *Isham v. Buckingham*, 49 N. Y. 216; *Tucker v. Gilman*, 121 N. Y. 189, 24 N. E. 302; 3 *Thomp. Corp.*, § 3255; 1 *Cook, Stock & Stockholders*, 3d ed. p. 356, § 263; *Williams's Case* L. R. 9 Eq. 225, note.

which hold the provision for forfeiture to be merely a cumulative remedy.

A promise to pay will be binding, although the charter provides for a sale of stock only in case of failure to pay. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

The fact that the subscription is made "upon pain of forfeiting" for nonpayment will not prevent an action to enforce the subscription. *Troy Turnp. & R. Co. v. McChesney*, 21 Wend. 296.

Provision for forfeiture merely a cumulative remedy.

In most of the states the provision for forfeiture is merely a cumulative remedy. This is, of course, true if there is a requirement of payment.

Where the charter of the corporation authorizes the directors to require payment of the subscription money a debt is incurred by the subscription which may be enforced by action, although the remedy by forfeiture is given by the statute. *McDonough v. Phelps*, 15 How. Pr. 372.

Where the charter requires a certain amount of capital, and the subscribers agree to subscribe for and take the number of shares set opposite their names, and bind themselves to fulfil all the covenants and engagements contained in the articles of association, their undertaking will extend to the payment of the shares, and they may be compelled to do so, although the charter also provides for forfeiture in case of nonpayment. *Sagory v. Dubois*, 8 Sandf. Ch. 466.

A charter provision for forfeiture will not bar an action on an express promise to pay. *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

Where the subscriber has agreed to pay the subscription, a provision in the charter authorizing the infliction of a penalty upon nonpayment of calls, and the forfeiture of stock when the penalties aggregate a certain amount, will not prevent a suit upon the contract, but the corporation may waive the forfeiture. *Delaware & S. Canal Nav. Co. v. Sansom*, 1 Binn. 70.

An action lies against a subscriber to the stock of a corporation upon his promise to pay unpaid instalments, notwithstanding the statute gives the remedy of forfeiture. *Goshen & M. Turnp. Road v. Hurlin*, 9 Johns. 217, 6 Am. Dec. 273.

Where the charter provides that the subscriber shall pay the amount subscribed, and that upon failure to make payment the shares, together with any past payments, shall be forfeited to the company, the provision for forfeiture is cumulative merely, and does not prevent 47 L. R. A.

The unpaid stock is a part of the assets of the corporation.

Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220.

This with the other assets of a corporation constitute a trust fund for the payment of stockholders and creditors of which the directors of the corporation are the trustees.

Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Stiefel v. New York Novelty Co.* 14 App. Div. 371, 43 N. Y. Supp. 1012; *Stuart v. Hayden*, 36 U. S. App. 462, 72 Fed. Rep. 402, 18 C. C. A. 618; *Foster v. Lincoln*, 72 Fed. Rep. 382; *Bowden v. Johnson*, 107 U. S. 251, *sub nom. Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Veiller v. Brown*, 18 Hun, 571.

As one of plaintiff's trustees the defendant is presumed to know its condition.

suit for delinquent subscriptions. *Greenville & C. R. Co. v. Cathcart*, 4 Rich. L. 89.

Assumpsit will lie on an express promise, notwithstanding a provision for forfeiture. *Barbee v. Jacksonville & A. Fl. Road Co.* 6 Fla. 262.

Under a charter giving the directors power to require payment of subscriptions under penalty of forfeiture of all previous payments thereon, the forfeiture is merely cumulative, and will not bar an action upon the subscription. *Rutland & B. R. Co. v. Thrall*, 85 Vt. 536.

But even where payment is not required, it is generally held that a corporation may maintain an action upon an implied promise for the collection of assessments upon stock, notwithstanding the charter provides for forfeiture. *Kirksey v. Florida & G. Pl. Road Co.* 7 Fla. 23, 68 Am. Dec. 426. The court, in distinguishing the Massachusetts cases, says: "To our minds the distinction . . . [between express and implied promises] seems to be singularly arbitrary, and is neither deducible from any established principle of law, nor sustained by any sound reason. . . . With all proper deference, we would respectfully inquire what there is in the nature of an implied promise, which negatives the idea of a legal consideration. Indeed, every implied promise presupposes the existence of a sufficient consideration, for it springs only out of a legal liability which never arises but upon a legal consideration as ample as is the extent of the liability."

The company, by reason of its incorporation, obtains the right to sue upon stock subscriptions, and this right is not taken away by the affirmative grant in the charter of the right to forfeit the shares for nonpayment of a subscription. *Instone v. Frankfort Bridge Co.* 2 Bibb, 576. The court says the subscriber is as much bound to pay the amount of shares subscribed by him as he would be to pay any other debt, and the right of the company to demand payment is no less incontestable.

Where the statute provides that the directors may require payment of the sum subscribed for the capital stock under penalty of forfeiture of the stock and all previous payments thereon, one who subscribes to the stock impliedly promises to pay therefor, and an action will lie to enforce compliance with this promise where the statute also provides that in case no forfeiture is sought thirty days' notice to pay will be sufficient, whereas sixty days is required in case the forfeiture is sought. *Dexter & M. Pl. Road Co. v. Millerd*, 8 Mich. 91; *Carson v. Arctic Min. Co.* 5 Mich. 288.

A provision in the charter for forfeiture of stock in case of nonpayment of calls is not exclusive, but an action will also lie to compel

Paine v. Mead, 59 How. Pr. 318; *Nathan v. Whitlock*, 3 Edw. Ch. 215.

The financial responsibility of the transferee is an important factor in determining the bona fides of a transfer.

Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, *sub nom. Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; 1 Cook, Stock & Stockholders, 3d ed. § 263; *Miller v. Great Republic Ins. Co.* 50 Mo. 55.

The plaintiff is not precluded from pursuing the defendant by reason of having sued and recovered a judgment against Van Every.

There could be several recoveries, but only one satisfaction.

Woods v. Pangburn, 75 N. Y. 495.

Unless there is inconsistency, there is no election of remedies.

payment. *Selme & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Carlisle v. Cahawba & M. R. Co.* 4 Ala. 70; *Beene v. Cahawba & M. R. Co.* 3 Ala. 680.

The fact that the statute gives a remedy against delinquent stockholders by forfeiture of their stock does not exclude an action to recover upon their implied promise to pay therefor. *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499; *Northern R. Co. v. Miller*, 10 Barb. 260; *Troy & B. R. Co. v. Kerr*, 17 Barb. 581; *Troy & B. R. Co. v. Tibbitts*, 18 Barb. 297; *Ogdensburgh, R. & C. R. Co. v. Frost*, 21 Barb. 541; *Herkimer Mfg. & Hydraulic Co. v. Small*, 21 Wend. 273; *Peoria & O. R. Co. v. Eiting*, 17 Ill. 429; *Hightower v. Thornton*, 8 Ga. 502, 52 Am. Dec. 412; *Stokes v. Lebanon & S. Turnp. Co.* 6 Humph. 241; *Eastern Pl. Road Co. v. Vaughan*, 20 Barb. 155; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 386; *New Orleans, F. & H. S. R. Co. v. Briggs*, 27 La. Ann. 318; *Troy Turnp. & R. Co. v. McChesney*, 21 Wend. 298; *Freeman v. Winchester*, 10 Smedes & M. 577.

A provision for striking off the names of delinquent subscribers and selling their shares is cumulative, and will not prevent a suit for the subscription. *Tar River Nav. Co. v. Neal*, 10 N. C. (3 Hawks) 520.

The permission of the charter to declare a forfeiture can only be considered as a penalty clause which the corporation may or may not avail itself of, but which, if it does not choose to enforce, does not deprive it of the right of requiring execution of the obligation contracted by the stockholders respectively, and of instituting an action against the defaulting stockholders for that purpose. *Mexican Gulf R. Co. v. Viavant*, 6 Rob. (La.) 305.

Right to enforce both remedies.

There may be circumstances under which an action may be maintained for the deficiency, even after sale of shares for nonpayment of assessments.

Under the statute 8 & 9 Vict. chap. 16, the forfeiture of shares for nonpayment of calls will not bar an action for the unpaid subscriptions, since the two remedies are not made alternative, but cumulative, by the terms of the act. *Great Northern R. Co. v. Kennedy*, 4 Exch. 417, 7 Dowl. & L. 197.

But if the remedies are made alternative then the forfeiture of the shares will bar the action. *Giles v. Hutt*, 3 Exch. 18; *Edinburgh, L. & N. R. Co. v. Hebblewhite*, 6 Mees. & W. 707.

Under a deed of settlement providing that in case of a neglect to pay calls the directors may proceed to fix a day for payment, and in default 47 L. R. A.

Crossman v. Universal Rubber Co. 127 N. Y. 34, 13 L. R. A. 91, 27 N. E. 400; *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498.

But even if there be inconsistency, there can be no election without knowledge.

Rochester Distilling Co. v. Devendorf, 72 Hun, 428, 25 N. Y. Supp. 200; *Rommel v. Townsend*, 83 Hun, 353, 31 N. Y. Supp. 985.

The satisfaction of the judgment without payment did not extinguish the claim.

Rochester Distilling Co. v. Devendorf, 72 Hun, 428, 25 N. Y. Supp. 200; *Rochester Distilling Co. v. Devendorf*, 72 Hun, 622, 25 N. Y. Supp. 529.

Mr. W. A. Sutherland, for respondent:

The plaintiff's right of action to recover assessments upon its stock rests upon the contract relation spelled out of the status of a stockholder to the corporation.

of payment to declare the shares forfeited, or if they should think fit to enforce payment of the amount due instead of declaring a forfeiture, the directors could not after proceeding to judgment in a suit to recover the amount due on a call, declare the shares forfeited. *Giles v. Hutt*, 3 Exch. 18.

Forfeiture of stock under a statute for non-payment of calls is not necessarily an extinguishment of the right to sue on the stockholder's liability. *Herkimer Mfg. & Hydraulic Co. v. Small*, 21 Wend. 273, 2 Hill, 127.

If a person subscribes for shares, and in the terms of his subscription makes a promise to pay assessments, he is liable to an action for all assessments before resort is had to a sale of the shares under the charter. But where he only agrees to take a specified number of shares without agreeing to pay assessments the shares must be sold to pay the assessments before an action can be maintained under a charter providing that if any subscriber shall neglect to pay assessments the directors may order the treasurer to sell his shares at public auction, and that such delinquent subscriber shall be held accountable for the balance, provided the shares shall sell for less than the assessments with interests and costs. *New Hampshire C. R. Co. v. Johnson*, 30 N. H. 402, 64 Am. Dec. 300.

Under a charter permitting the directors upon failure to pay calls to sell the stock, and in case enough is not produced thereby to satisfy the subscription to sue and recover the balance from the subscriber, the directors are not compelled to make sale in the first instance, but may sue for calls without making sale. *Western R. Co. v. Avery*, 64 N. C. 491.

But if the statutes provide a method of holding the subscriber liable for unpaid assessments after a sale of his stock, the method must be strictly followed in order to charge him. *Portland, S. & P. R. Co. v. Graham*, 11 Met. 1.

Under a statute giving the right to sell stock at auction for unpaid subscriptions and hold the subscriber liable for the balance, the subscriber may be held after an attempt to sell the stock which is unsuccessful for want of bidders. *Grays v. Lynchburg & S. Turnp. Co.* 4 Rand. (Va.) 578.

Under the Massachusetts statutes in reference to railroads the stockholder is made liable for deficiencies in assessments which arise after the sale of his stock, for the payment of the assessments. *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311; *Troy & G. R. Co. v. Newton*, 1 Gray, 544.

The provisions of the English statutes enable the company to enforce payment of calls by action or suit, and also give power to the company to forfeit shares for nonpayment of calls,

Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

This subscription, made before the company was organized, was not a subscription to the capital stock, but a pledge between the parties signing the instrument, to the effect that they would take the stock when the corporation should be formed.

Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219.

There never was any subscription upon the stock books of the corporation signed by the defendant, and even the original agreement between the individuals, that they would thereafter take stock in the company to be incorporated, and which agreement was signed by the defendant as to twenty of the thirty shares upon which he is sued, was merged into the implied agreement arising out of the defendant's relation as a stock-

holder when the company became incorporated and the stock was issued.

Poughkeepsie & S. P. Pl. Road v. Griffin, 24 N. Y. 150; *Billings v. Robinson*, 28 Hun, 122, Affirmed in 94 N. Y. 415.

When the plaintiff took its judgment against Van Every, the transferee of the defendant, it became estopped from suing the defendant to collect those same assessments.

Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L. R. A. 145, 21 N. E. 172; *Van Epps v. McGill*, Hill & Denio Supp. 109; *Jaudon v. Randall*, 15 Jones & S. 374; *Heaton v. Angier*, 7 N. H. 397, 28 Am. Dec. 353; *Wharton v. Walker*, 4 Barn. & C. 163; 1 Parsons, Contr. 219.

The obligation to pay assessments runs with the stock, and is not personal to the holder, except while he is a holder.

Weston's Case, L. R. 4 Ch. 20; *Master's*

whether the company have sued for the amount of such calls or not. *Inglis v. Great Northern R. Co.* 1 Macq. H. L. Cas. 112, 16 Jur. 895.

Rights of creditors.

This whole scheme of implied liability upon subscriptions is ultimately for the benefit of creditors, and therefore creditors are permitted to enforce it.

Stockholders of an insolvent corporation are liable to creditors for the amounts which remain unpaid on their several shares of stock under the New York statutes. *Morgan v. New York & A. R. Co.* 10 Paige, 290, 40 Am. Dec. 244.

Unpaid subscriptions constitute a trust fund which may be reached by creditors of the corporation in a court of equity. *Marsh v. Burroughs*, 1 Woods, C. C. 463, Fed. Cas. No. 9,112; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, Fed. Cas. No. 17,636.

If the subscriber has contracted to pay in a certain amount of the capital stock the contract may be enforced for the benefit of creditors. *Harmon v. Page*, 62 Cal. 448.

If the capital stock has not been paid for it is the plain duty of the court to require so much of it to be collected as is necessary to pay unpaid debts when the corporation becomes insolvent. *Clayton v. Ore Knob Copper Co.* 109 N. C. 385, 14 S. E. 36.

The unpaid subscriptions to corporate stock are part of the funds to which the creditors of the corporation may resort for payment of their claims. *Baines v. Babcock*, 95 Cal. 588, 27 Pac. 674. Affirmed in 95 Cal. 581, 30 Pac. 776.

Where there has been no promise to pay, and the statute provides only for forfeiture in case of nonpayment, no action will lie on behalf of creditors to compel the payment. *Farwell v. Wadsworth*, 35 Ill. App. 469.

Until all the debts of the corporation are paid creditors are entitled to pursue stockholders for unpaid subscriptions. *Ailing v. Wenzell*, 46 Ill. App. 562; *Walker v. Lewis*, 49 Tex. 123; *Crawford v. Rohrer*, 50 Md. 599; *Clark v. Richardson*, 17 Ky. L. Rep. 514, 31 S. W. 878.

A bill in the form of a creditor's bill will lie against creditors of a corporation to reach unpaid stock subscriptions in favor of creditors of the corporation. *Henry v. Vermillion & A. R. Co.* 17 Ohio, 187.

But the receiver cannot maintain an action unless the corporation itself could have done so, since he represents the corporation, and not the statutory rights of the creditors. *Billings v. Robinson*, 28 Hun, 122.

A statutory recognition of the right of credit-
47 L. R. A.

ors of a corporation to look to unpaid instalments of stock subscriptions to obtain satisfaction of their demands does not confer a new right, but is a recognition of a right existing before the statute by virtue of the relations between a corporation and its creditors and stockholders. *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468.

Creditors have no greater rights than the corporation had to unpaid subscriptions, since they claim through it, at least, so far as the question of whether or not the defendant has become a stockholder by a transfer of the shares is concerned. *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

The insolvency of the corporation is no ground for restraining the collection of subscriptions for stock. *Dill v. Wabash Valley R. Co.* 21 Ill. 91.

The right of creditors to hold stockholders liable for unpaid subscriptions was recognized in *Union Sav. Assn. v. Seligman*, 92 Mo. 635, 15 S. W. 630.

The doctrine that a subscriber to stock undertakes to pay for it, so far as necessary to satisfy the claims of creditors, is fully recognized in *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 781.

In *Merchants' Nat. Bank v. Bailey Mfg. Co.* 84 Minn. 828, 25 N. W. 639, the right of creditors to enforce payment of the unpaid subscriptions was recognized under the Minnesota statutes.

Subscribers cannot release themselves from payment of their stock when payment is necessary for the payment of corporate debts. *Gaff v. Fleisher*, 38 Ohio St. 107.

Conversely, the subscriber is not bound to pay more of his subscription than is necessary to satisfy outstanding debts, when the corporation is insolvent and its effects under the control of a receiver. *Lamar Ins. Co. v. Moore*, 84 Ill. 575.

A New York case has held that the most that can be implied from a mere subscription is a promise to pay upon request of the corporation, or upon such terms and conditions and at such times as the corporation by its by-laws has prescribed; so that, in case the corporation has made no request and the by-laws no provisions, there is no liability which can be enforced by creditors. *Seymour v. Sturgess*, 26 N. Y. 134.

Statutory liability.

"In most of the states the statutes expressly require payment of stock subscriptions; so that the discussion as to implied duty to pay as found in the cases has become to some extent obsolete. Construction of such statutes is

Case, 41 L. J. Ch. N. S. 501 *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Outting v. Damerel*, 88 N. Y. 410; *Tucker v. Gilman*, 121 N. Y. 194, 24 N. E. 302.

Martin, J., delivered the opinion of the court:

This appeal is sought to be sustained upon two grounds: (1) That the defendant is liable to pay for the number of shares subscribed for by him, notwithstanding their subsequent transfer; (2) that he is liable upon all the shares he held, including those subsequently purchased, upon the ground that the transfer to Van Every was not made in good faith, but for the purpose of avoiding his liability as stockholder for the unpaid calls thereon.

First, as to the liability of the defendant by reason of his having been a party to the

agreement to organize the plaintiff, and to take a given number of shares of its stock when issued, it is to be observed that there is no provision in that agreement by which the defendant was to do more than take the number of shares mentioned and to pay 30 per cent upon the amount of assessable stock subscribed for by him. There is no claim that he is in default as to the performance of either of those provisions. He took the agreed number of assessable shares, and paid 30 per cent thereon. Therefore it cannot be said that there was any requirement of the agreement he subscribed with which he has not fully complied. But the appellant claims that, when the defendant subscribed for the plaintiff's shares, it included an implied agreement to pay to it the par value thereof, which is binding until payment is actually made, and that the

found in *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317, which deals with the Minnesota statute providing for an action upon failure to pay calls.

And *Joy v. Manion*, 28 Mo. App. 55, which holds that under the Missouri statutes a subscription to stock of a corporation is equivalent to a promise to pay for it.

By Stat. 8 & 9 Vict. chap. 16, § 86, it is provided that where an execution against a company has been returned unsatisfied, execution may issue against any of the shareholders to the extent of their shares not paid up.

Under the Iowa Code one who subscribes toward the capital stock of a corporation assumes toward the creditors of the corporation an obligation to pay for the stock for which he subscribes. *Singer v. Given*, 61 Iowa, 98, 15 N. W. 858.

The Alabama statute provides for enforcement of the subscriber's liability by suit. *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.* 89 Ala. 391, 7 So. 398.

The Alabama statute provides that each shareholder shall be liable for corporate debts to the amount of stock owned by him. *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 So. 149.

The general railroad act of New York provides that each stockholder shall be individually liable to creditors of the company to an amount equal to the amount unpaid on stock held by him for all debts and liabilities of the company until the whole amount of the capital stock so held by him shall have been paid. *Rankine v. Elliott*, 16 N. Y. 377.

Although the duty to pay may not be enforceable, there may be an action for breach of contract, and it has been held that the measure of damages for breach of a contract to take and pay for stock is the difference between the agreed price and the actual or market value of the shares at the date of the breach of contract. *Band v. White Mountains R. Co.* 40 N. H. 79.

Contract for Limited Liability.

There may be peculiar contracts under which there is no liability to pay for the stock in full.

Thus, it has been held that where the corporation is a private one for the purchase of land and working mines thereon, and the various incorporators do not undertake to take and pay for stock, but merely purchase it at certain proportions of its par value upon the condition that failure to pay future calls will terminate their interest, no public interest being involved, no promise to pay the additional amounts will 47 L. R. A.

be implied. *Seymour v. Sturgess*, 26 N. Y. 134. The court says that no personal liability arises from the payment of stock subscriptions which can be enforced either by the corporation or in behalf of creditors, if the circumstances show that no promise to pay for the stock was made, or intended to be made, or understood to have been made.

So, where stock is issued to relieve the corporation from financial embarrassment, and an earnest effort made to sell the same at par and at a discount, after which the directors take it at the discount price, they will not be held liable in favor of other stockholders to pay up the stock to par. *Peter v. Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894.

The mere purchase of the stock without signing any agreement to take or pay for it will not render the purchaser liable for unpaid calls. *Wintringham v. Rosenthal*, 25 Hun, 580.

The transferee is not liable to pay calls by the mere fact of transfer, but a contract with the corporation to do so is necessary to effect that result. *Palmer v. Ridge Min. Co.* 84 Pa. 288. The court says we must look to the act of incorporation, and to the contract which it authorizes, for the definition of a shareholder, and for the liabilities which he assumes, as such. In the present case he undertook no further than that his stock might be forfeited if he neglected to pay calls, and no action will therefore lie against him. That case was distinguished in *Merrimac Min. Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 697; but followed in *Franks Oil Co. v. McCleary*, 63 Pa. 317.

So, it has been held that under the California statutes for the organization of mining companies there is no liability to pay for the stock unless it is expressly assumed. *Re South Mountain Consol. Min. Co.* 14 Fed. Rep. 347.

Different phases of this question are presented in the discussion of the right of the subscriber to withdraw from the corporation, in the note to *Bryant's Pond Steam-Mill Co. v. Felt (Me.)* 33 L. R. A. 593, and of the right to pay for stock with property, in note to *Van Cleave v. Berkey (Mo.)* 42 L. R. A. 593.

For discussion of right to enforce liability out of state, see note to *Cushing v. Perot (Pa.)* 34 L. R. A. 737.

Conclusion.

The conclusion from this examination of cases is that a personal liability to pay the subscription rests upon the subscriber where he has expressly promised to pay, where the statutes, charter, or by-laws require payment, and gener-

transfer of his shares, although made according to the requirements of the statute, and upon the books and by the act of the corporation, in no way relieved him from that liability. In other words, the claim is that a mere subscriber for the stock of a business corporation assumes a liability to pay the full par value thereof which survives its transfer, and remains, although he has ceased to be a member of the corporation, or to have any interest in it as a stockholder or otherwise.

An examination of the statute under which the plaintiff was organized (Laws 1848, chap. 40), and the subsequent statutes relating to this subject, discloses that the stock of such a corporation is declared to be personal property, and to be transferable in such manner as shall be prescribed by the by-laws of the corporation.

ally in all cases of stock subscriptions unless such obligation is negated by the special circumstances of the case. This latter rule is not in force in Massachusetts, Maine, New Hampshire, and Delaware unless made so by statute, as in Maine. See *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

II. Statutes continuing liability.

It being established that there is an enforceable duty to pay stock subscriptions, the question arises, How far may this duty be avoided by transferring the stock to another person? And first it may be stated that in some localities the statutes expressly or impliedly continue the liability to pay or forbid the transfer.

Under the Virginia statutes both the assignor and assignee of unpaid stock are liable for any instalments which may thereafter accrue, and may be proceeded against in the manner provided by the statute, and the person in whose name the shares stand on the books of the company shall be deemed its owner as regards the company. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Foote*, 36 Fed. Rep. 824; *Priest v. Glenn*, 4 U. S. App. 478, 51 Fed. Rep. 400, 2 C. C. A. 305, affirming *Glenn v. Priest*, 48 Fed. Rep. 19; *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904; *Morris v. Glenn*, 87 Ala. 628, 7 So. 90; *Glenn v. Scott*, 28 Fed. Rep. 804; *McKlin v. Glenn*, 66 Md. 470, 8 Atl. 130; *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181; *Brockenbrough v. James River & K. Canal Co.* 1 Patton & H. (Va.) 94; *Glenn v. Priest*, 48 Fed. Rep. 19; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129; *Petersburg Sav. & Ins. Co. v. Lumsden*, 75 Va. 327.

Under the Illinois statute each stockholder is liable for the debts of the corporation to the extent of the amount unpaid on his stock, and his assignment of the stock does not release him from such liability. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 50 N. E. 19.

The Illinois statute makes subscribers liable for corporate debts for the amount unpaid on their stock, and no assignment of unpaid stock will release the assignor from liability thereon. *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551.

Under the Iowa Code a bona fide transfer of stock will not exempt the original subscriber from liability for the unpaid subscription. *White v. Green*, 105 Iowa, 176, 74 N. W. 928.

By the Nebraska Constitution the original subscriber for stock is liable for the amount unpaid on the subscription, and the liability fol-

It also provides that no shares shall be transferable until all previous calls thereon shall have been paid in, or shall have been declared forfeited for nonpayment thereof. Surely, there is nothing in that statute which in any way forbids the transfer of such shares until they are fully paid for, or that indicates that any liability on the part of the subscriber or purchasing owner shall continue after their transfer, unless there have been calls previous to the time it is made. On the contrary, the plain inference to be drawn from its provisions is that transfers may be made before the shares are fully paid for, and it would seem to justify the holding that the transferee became liable in place of the original owner. We are of the opinion that, in the absence of special provisions to the contrary, either in the statute under which a corporation is or-

lows the stock without releasing the subscriber. *Commercial Nat. Bank v. Gibson*, 37 Neb. 750, 56 N. W. 616.

The Iowa statute provides that no provision of the articles of the Code relating to corporations shall exempt stockholders from an individual liability to the amount of unpaid instalments on the stock owned by them or transferred by them for the purpose of defrauding creditors. *National Park Bank v. Peavey*, 64 Fed. Rep. 912.

By statute 11 & 12 Vict. chap. 45, § 76, it is provided that in case any of the contributories shall, after the making of the order for the winding up of the concern, absolutely assign or dispose of his interest in the company, it shall be lawful for the master to introduce into the list of the contributories the name of the person to whom the assignment shall be made, either by way of substitution for the name of the contributor making such assignment or conjunctively therewith; provided, nevertheless, that no such assignment or disposal shall release or exonerate the party making the same from any liability as a contributor further or otherwise than he would be released or exonerated if the affairs of the company were not being wound up.

The Pennsylvania railroad incorporation act provides that the transfer of shares shall be subject to all payments due or to become due. *Pittsburgh & C. R. Co. v. Clarke*, 20 Pa. 150; *Graff v. Pittsburgh & S. R. Co.* 31 Pa. 489.

III. Transfer prohibited.

A provision in the charter that no transfer of stock shall exempt the person transferring it from the obligation of paying instalments afterwards called for until 50 per cent on each share shall have been paid, exempts from liability to the company only those who have transferred their shares after the payment of 50 per cent before the instalments have matured and payment has been demanded. *Vicksburg, S. & T. R. Co. v. McKeen*, 14 La. Ann. 734.

In *Re Bachman*, 12 Nat. Bankr. Reg. 223, Fed. Cas. No. 707, it was held that a by-law prohibiting the transfer of stock while the transferor was indebted to the corporation applied to an indebtedness upon a stock subscription upon which no calls had been made, and that so long as the stock was unpaid the stockholder could not, even with the consent of the officer, discharge his liability by attempting to substitute a third person in his place, so far as the rights of creditors were concerned.

The liability to pay for stock subscribed is an indebtedness within the meaning of the statute

ganized or in its by-laws, an original subscriber to the stock of such a corporation can transfer his stock to another, and, if made in good faith, his liability as a stockholder ceases, and the transferee will be substituted in his place, with the same rights and liabilities as the original holder. Indeed, one of the chief attributes of corporate stock is the right of transfer, whereby the rights and liabilities of the stockholder are transferred to the purchaser. We find no principle or authority which limits the power of substitution of the purchaser to the rights and liabilities of the owner to a time after the stock has been fully paid for. Unless so expressed in the instrument, the subscription is not an agreement to pay so much money, but is a contract by which the subscriber agrees to enter into the relation of a stockholder in the corporation. These

prohibiting the transfer of stock while the subscriber is indebted to the corporation, although no calls had been made at the time of the transfer. *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146.

Under the Pennsylvania railroad act of 1849, allowing transfers subject to all payments due, or to become due thereon, a subscriber was not discharged from liability for unpaid subscriptions by transferring stock. *Ibid.*; *Graff v. Pittsburgh & S. R. Co.* 31 Pa. 489.

IV. Generally transfer releases subscriber.

a. Under statutory provisions.

Many of the statutory schemes for the government of corporations in the several jurisdictions contemplate the change of stockholders, and when this is the case either expressly or impliedly a subscriber may terminate his liability by transferring his shares in the manner contemplated by the statutes.

ROCHESTER & KETTLE FALLS LAND CO. v. RAYMOND is placed partly upon the New York statute, but the full effect of that statute is brought out more clearly in other New York cases.

After a bona fide transfer of the stock the transferee is no longer subject to calls, although he has promised to take and pay for the shares, where the statute contemplates the transfer of stock which shall release the subscriber and substitute the new holder for his liability to the corporation, since the acceptance by the corporation of the transferee as a stockholder will amount to a novation. *Billings v. Robinson*, 94 N. Y. 415.

A transfer of the stock will relieve the stockholder from liability to pay future calls. *Tucker v. Gilman*, 121 N. Y. 189, 24 N. E. 302.

Where one who has agreed to take stock in a corporation before the same is paid for with the assent of the corporation transfers the same in good faith to another, he is relieved from his liability on the subscription. And the fact that the articles of association provide that no shares shall be transferable on which any call shall be unpaid will not prevent this result, since, notwithstanding such provision, the corporation may consent to the substitution of stockholders. *Cowles v. Cromwell*, 25 Barb. 413.

To relieve the subscriber from liability his stock must be transferred in the manner which the certificate issued to him provides that it must be, to place the title to it in another. *Cutting v. Damerel*, 23 Hun, 339.

If the corporation has assented to a substitution

considerations relate only to cases where there are no special provisions declaring the original subscribers to be liable for the amount of their subscriptions. Where there is such an agreement, effect must be given to it, but in its absence we think no such liability is to be implied. *Lowell, Transfers of Stocks*, § 187; *Cowles v. Cromwell*, 25 Barb. 413; *Cole v. Ryan*, 52 Barb. 168; *Billings v. Robinson*, 94 N. Y. 415; *Isham v. Buckingham*, 49 N. Y. 216; *Tucker v. Gilman*, 121 N. Y. 189, 24 N. E. 302; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Johnson v. Underhill*, 52 N. Y. 203; *Schenectady & S. Pl. Road Co. v. Thatcher*, 11 N. Y. 102; *Cook, Stock & Stockholders*, § 255.

The authorities to which our attention has been called by the appellant are those in which there was a provision, either by statute or in the contract, to the effect that the

transfer of the stock to its receiver cannot maintain an action against the subscriber. *Billings v. Robinson*, 28 Hun, 122.

The transferee becomes substituted to the liabilities of the subscriber. *Mann v. Currie*, 2 Barb. 294.

So far as the rights of the corporation are concerned, the bona fide transfer of stock will relieve the subscriber from his liability for unpaid subscriptions. *Rochester & K. F. Land Co. v. Raymond*, 4 App. Div. 600, 89 N. Y. Supp. 145.

Where the charter of a corporation provides that a subscriber to corporate stock who secures his subscription by mortgage may be released from his mortgage upon transferring his stock to another who furnishes a mortgage to the satisfaction of the officers of the company, such transfer will release the original subscriber from his liability on his subscription. *Haynes v. Palmer*, 13 La. Ann. 240.

Under the statute 8 & 9 Vict. chap. 16, § 21, providing that persons who have subscribed money to a corporation shall pay the sum subscribed when called for by the company, and that every transfer of shares shall be by deed, a person who has duly subscribed, and had his name entered on the register of shareholders, cannot transfer his shares by assignment of the scrip certificates merely, so as to escape liability for the amount unpaid thereon, unless the company recognizes the transfer, and substitutes the name of the transferee on the register as a shareholder, so as to bring him within the words of the 22d section of the statute, which declares that shareholders are the ones to pay all calls. *Midland Great Western R. Co. v. Gordon*, 11 Jur. 440, 16 L. J. Exch. N. S. 165, 16 Mees. & W. 804.

In that case the court, in discussing the liability of a transferee of scrip certificates, said the company had a right to register the original subscriber. All that the purchaser took by the sale to him of the scrip certificates for shares was an equitable right to have his name entered on the register as a shareholder. If he so registers his name when he is a shareholder the liability of the original shareholder ceases, but until he does so it continues.

In *London Grand Junction R. Co. v. Freeman*, 2 Mann. & G. 606, 2 Scott, N. R. 705, 2 Railway Cas. 468, which was an action against one not an original subscriber for calls on shares, the court said it is clear that the purchasers of shares in a statutable form were intended to pay calls, but it is equally clear that such purchasers do not subscribe in the strict sense of the word. The calls are to be made on

shares were to be paid for by the subscriber, notwithstanding any transfer which should be made, or where there is some other provision showing a clear intent that the original subscriber should be regarded as absolutely liable to pay the full amount of the stock for which he subscribed. Those cases have no application to the question here.

At the time the plaintiff was organized the greater portion of chapter 40, Laws 1848, had been repealed by chapter 564, Laws 1890, and the provisions of that chapter, which was known as the "Stock Corporation Law," were substituted in place of the portion of the law of 1848 which was repealed. The statute of 1890 contained this provision: "If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a

copy of this section is written or printed upon the certificate of stock" (§ 26),—which is continued by chapter 688, Laws 1892. Therefore, if the directors of the plaintiff had desired to make the stock nontransferable, without their consent, so long as the stockholder should be indebted to the corporation, they might have done so by causing to be written or printed upon the certificate a copy of the section which contains that provision. But, as nothing of the kind was done, no such right existed. This court so held in *Reynolds v. New York Building Loan Bkg. Co.* 158 N. Y. 694, 53 N. E. 1131, in which no opinion was written.

Moreover, as we have already seen, the same result might have been effected by a provision in the by-laws of the corporation, or by a provision in the original agreement signed by the subscribers. But as none of

proprietors. And that the liability of one whose name appears on the books of the corporation as a proprietor is not defeated by showing that a third person was the original subscriber in respect of the shares in question.

Under statutes providing that a transfer of stock shall not in any way exempt the person making it from any liabilities of the corporation created prior thereto, and that the private property of each stockholder in any corporation is liable for corporate debts in the following cases: First, For all unpaid instalments on stock owned by him or transferred for the purpose of defrauding creditors, a bona fide transfer entered on the books of the corporation will relieve the subscriber from his liability for unpaid subscriptions. *Re People's Live Stock Ins. Co.* 56 Minn. 180, 57 N. W. 468; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501.

Under a constitutional provision making stockholders liable to creditors to the amount of their stock subscribed and unpaid, and a statute permitting transfers and making voluntary transferees liable to existing creditors for the amount unpaid unless it is paid by the purchaser, a subscriber will not be liable after an assignment of the stock except on failure of the assignee to make payment. *Ladd v. Cartwright*, 7 Or. 329.

Where by the statute subscribers are given power to assign their shares, and the company is given authority to make calls as it may think fit, an original subscriber is not liable for a call made after he has assigned his share. *Hudsonfield Canal Co. v. Buckley*, 7 T. R. 36.

b. Corporation scheme contemplates release.

The cases are not numerous in which the court has considered the effect of the transfer as between the corporation and subscriber on principle.

In *Merrimac Min. Co. v. Bagley*, 14 Mich. 501, the court, considering the question from the standpoint of the transferee, said the very essence of a corporation consists in its corporate succession, which in stock companies is kept up by the substitution of one owner for another in the proprietorship of shares; and that there is no principle of law which can establish any difference among stockholders in the duties which are implied from that relation, whether they are original subscribers or transferees, so far as they have not expressly agreed to pay for the stock, but each is liable for unpaid subscriptions so long as he holds his stock and no longer. *Merrimac Min. Co. v. Bagley*, 14 Mich. 501.

Accordingly, it is generally held that a bona fide

transfer completed so as to substitute the transferee as a stockholder will release the subscriber. There is a slight difference of opinion among the courts as to what is necessary to effect a substitution in case of an express promise to pay, but the principle appears to be the same in all cases.

Where there has been an express promise to pay the law of contracts requires a novation to effect a substitution of liability, and in accordance therewith it has been said that a distinction is drawn between one who holds his stock by transfer and an original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from liability for unpaid instalments by due transfer of his shares, while the latter cannot obtain immunity in that way. *Hood v. McNaughton*, 54 N. J. L. 425, 24 Atl. 497.

And in *Messersmith v. Sharon Sav. Bank*, 96 Pa. 440, the court, in deciding against the claim of a subscriber who had transferred his stock to freedom from liability, said, exactly why he should be discharged from his contract by the mere fact of his assignment of it to a third party has not been made clear to us. Had the latter agreed with the corporation to assume the obligation, and had the corporation thereupon executed a release to the subscriber, the matter would have been easy of comprehension, but that the transfer of the stock without more should have the effect contended for cannot be admitted. It is said that the officers of the corporation assented to the transfer, and that it was made on the books of the corporation. Concede this to be so, that does not help the matter, for the transferee did not thereby assume the unpaid instalments of the stock subscription, neither was the subscriber thereby released.

A similar doctrine is announced in *Louisiana Ins. Co. v. Gordon*, 8 La. 174.

In *Aultman's Appeal*, 98 Pa. 505, it is said that we might hold it as the law of Pennsylvania that, although a transferee may relieve himself from liability on stock subscriptions by retransferring the stock, an original subscriber cannot do so.

The majority of the courts, however, seem to make no distinction between subscriptions in which there is an express promise to pay and those in which there is not, so far as the release from liability is concerned, holding that when the transfer has been perfected, liability of the transferee ceases, and that recognition by the corporation of the transferee is sufficient to perfect the transfer.

The principle of the Virginia statute, making

those things were done, and as no such agreement is implied, the defendant was not liable to pay in full for the stock subscribed for by him after he ceased to be a stockholder by a bona fide transfer of his shares, and this action must fail so far as it rests upon that contention.

This brings us to the second question, whether the transfer by the defendant to Van Every was made in good faith, or whether there was evidence which presented a question of fact for the jury as to whether the transfer was absolute or otherwise. When the plaintiff rested, the defendant moved that the court direct a verdict in his favor upon the ground that the undisputed evidence was that the plaintiff accepted Van Every as a stockholder in the place of the defendant, and had pursued its remedy against him to judgment and satisfaction

the subscriber and his assignee both liable for future calls, is stated in *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904, to be a radical departure from the ordinary common-law principle that governs and regulates the rights of assignor and assignee of stock and their relation and obligation to the company. The law implies a promise or duty by every holder of stock in a joint-stock company to pay the full par value of the stock as it may be called for; and it follows, as a matter of course, that an assignee of the stock by coming into privity with the company is equally liable as the former holder was before the transfer. The liability to pay the calls made upon the stock after the transfer is shifted from the outgoing to the incoming shareholder; the transfer of stock working a complete novation of the contract of membership, the transferee being substituted to the place of the transferor with all the rights and liabilities incident to the holder of the shares.

If the subscriber transfers his interest to another from whom the corporation accepts a bond and mortgage to secure payment of the subscription, there is a novation which will release the original subscriber from liability. *Palmer v. Lawrence*, 3 Sandf. 161.

Subject to the exceptions that the corporation is limited to the remedy provided by the charter, and that if the charter makes the subscriber liable, even after transfer, the transfer will not remove the liability, the obligation to make good the unpaid portions of capital stock when the necessity of creditors requires it is a charge upon the stock which passes with it to the transferees. *Bell's Appeal*, 115 Pa. 88, 8 Atl. 177. This was a *dictum* because the transfer had not been perfected and was not intended to conflict with the rule in *Messersmith v. Sharon Sav. Bank*, 96 Pa. 440, *supra*.

In *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818, which was a suit against an assignee of stock, one of the reasons given for holding the assignee liable is that by the transfer on the books of the corporation the former owner is discharged.

And a similar reason was given in *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

A stockholder who transfers his stock in good faith with no intention to defraud while the corporation is solvent, and has the transfer entered on the books of the company, is not ordinarily liable, either to the corporation or its creditors, for unpaid subscriptions. *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

The transfer of the stock accepted by the corporation before an assessment, will relieve 47 L. R. A.

thereof. This motion was granted, and an exception taken. As the plaintiff made no motion and took no action from which a waiver of its right to go to the jury could be implied, its exception to the ruling of the trial judge directing a verdict was sufficient to present the question whether there were facts for the jury, and it was not necessary to go further, and request that any fact be so submitted. *East Hampton v. Kirk*, 68 N. Y. 459; *First Nat. Bank v. Dana*, 79 N. Y. 108; *Stone v. Flower*, 47 N. Y. 566; *Frecking v. Rolland*, 53 N. Y. 422, 424.

In determining the question of the good faith of the transfer from the defendant to Van Every, the circumstances disclosed by the evidence should be considered. They were peculiar in many respects. It must be conceded that the corporation was at the

the subscriber from liability. *Stewart v. Walla Walla Printing & Pub. Co.* 1 Wash. 521, 20 Pac. 605. The court says the question of good faith is the test which practically determines the nonliability. If the transfer is made in fraud, or after a call has been made, and to escape it, liability will exist.

After a subscriber has parted with his stock, either by sale or gift, in good faith, and the stock has been transferred on the books of the corporation, the subscriber does not remain liable for the payment of future corporate debts, although at the time of the sale the corporation and transferee were both insolvent, and the object of the transfer was to escape future liability. *Peter v. Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894.

In *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. 840, which was an action against the transferee which had surrendered the original and received a new stock certificate, the court says that the transfer operates as a novation, the transferor ceases to be shareholder, and the transferee becomes one. The first is ordinarily relieved from all further liability to contribute capital, and loses all right to participate in the further profit or management.

By the assignment and transfer on the books of the corporation the assignees are substituted in the place of the original subscribers, and hold the shares on the same conditions, and are subject to the same rules and orders. *Bend v. Susquehanna Bridge & Bank Co.* 6 Harr. & J. 128, 14 Am. Dec. 261.

A transfer of stock by the subscriber to a third person, who assents thereto, and who is recognized as a stockholder by the corporation in making assessments upon him, will substitute the liability of such third person for that of the subscriber for the payment of the unpaid portion of the subscription. *Hall v. United States Ins. Co.* 5 Gill, 484.

In *Upton v. Burnham*, 3 Biss. 431, Fed. Cas. No. 16,798, the court says the company having accepted and substituted another party as stockholder, the liability of the original subscriber ought to terminate with his rights as stockholder.

The statutes of Illinois under which the Upton cases arose, provide that stockholders are liable for the payment of the amounts unpaid on their stock so far as such payment may be necessary to satisfy the claims of creditors.

When the original subscriber has in good faith transferred his stock, and the transfer has been accepted by the company, the subscriber is not liable for assessments subsequently made.

time greatly embarrassed, if not insolvent. The proof shows that the mortgage and floating debts of the corporation amounted to \$68,000, and that it had been sued upon a note for \$5,000. The defendant was one of the trustees, and was generally in attendance at the meeting of the directors. As such, he opposed assessments upon the stock until he disposed of all that stood in his name which was assessable. When he first transferred a portion of his stock, it included all that was assessable, and at the same time he procured to be conveyed to the same purchaser two shares that formerly belonged to his son. The consideration for the transfer of \$3,200 par value of the stock, upon which there had already been paid \$1,200 upon calls made by the corporation, was the sum of \$3. The purchaser was a waiter in a restaurant where the de-

fendant had taken a portion of his meals. He did not even know how many shares he purchased, nor from whom they originally came. He had not seen the certificates when he made the purchase, nor did he apply to have the stock transferred to him upon the books of the company. That was done by the defendant. He was never seen by the officers of the plaintiff, or known to them. When all these facts are considered, with the added one that the defendant procured some person unknown to Van Every to purchase his stock, and that the transfer of it by him was not completed by a transfer upon the books of the company, it can hardly be said, as matter of law, that the defendant parted with his stock in good faith, so as to be relieved from his responsibility as a stockholder of the plaintiff as to its creditors and the other stockholders.

Stewart v. Walla Walla Printing & Pub. Co. 1 Wash. 521, 20 Pac. 605.

In *Jackson v. Silgo Man. & M. Co.* 1 Lea, 210, it is said that it seems to be settled that a party owning shares of stock unpaid may transfer them and thus cease to be liable, no law forbidding, nor any prohibition in the charter. In that case no stock books were kept, and the suit was by creditors who had given no credit because of the stock subscriptions.

An original subscriber cannot, after a bona fide transfer of the stock, when all calls which have been made are paid up, and the issuance of certificates to the transferee, be compelled to contribute the unpaid stock for the satisfaction of creditors. *Gilmore v. Bank of Cincinnati*, 8 Ohio, 62.

In *Upton v. Hansbrough*, 3 Blas. 417, Fed. Cas. No. 18,801, the court, in considering the liability of an assignee, said that when the assignee assumes the relation of stockholder to the corporation he succeeds to all the liabilities of the original subscriber.

A bona fide transferee on the books of a corporation is substituted in the place of the original subscriber. *Hartford & N. H. R. Co. v. Boorman*, 12 Conn. 530.

In *Van Demark v. Barons*, 52 Kan. 779, 35 Pac. 798, which was a suit to enforce statutory liability against the holder of paid-up stock, the court says the general rule is that shares of stock in a corporation are personal property, and may be transferred like any other property, unless the transfer is restrained by the charter or articles of association, and that a bona fide transfer terminates the liability of the transferor to the corporation and to creditors.

It seems that a subscriber is not liable to creditors under the Maine statute for the amount due on shares which he transferred prior to the time that the debt of the creditor seeking to enforce the liability was contracted. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

The law implies a promise or duty by every holder of stock in a joint-stock company to pay the full par value of the stock as it may be called for, and it follows, as a matter of course, that an assignee of the stock by coming into privity with the company by having the stock transferred to him on its books is equally liable as the former holder was before the transfer. The assignee takes the shares with all their rights and liabilities. The liability to pay the calls made upon the stock after the transfer is shifted from the outgoing to the incoming shareholder; the transfer of stock working a complete novation of the contract of membership. 47 L. R. A.

the transferee being substituted to the place of the transferor. *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904.

The transfer of shares bona fide and for a valuable consideration will release the subscriber from his liability on his contract to pay for the shares, where the statute provides only for a sale of the shares for delinquencies, and such nonliability continues after he has purchased the shares. *Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92. This construction is placed largely on the wording of the promise, the court saying that he promised to pay merely on his shares, and not on the shares, and that when the promise was made the promisor was an original proprietor and made the promise concerning the shares owned in that capacity. And that the person to whom he sold was not subject to pay the assessments, and consequently when he repurchased he, as vendee of the one not liable, bought with no other liabilities than those which attached to the shares in the hands of his immediate vendor. There was a period when the original subscriber was neither owner of these shares nor a legal member of the corporation. His liability on the contract then ceased, was dissolved. The genuine object of the promise had been accomplished when capital had been raised to commence business and a value given to the shares. The subscribers cannot be presumed to have burdened themselves with a premeditated and unnecessary responsibility for the assessments after they should cease to have any interest or influence in the corporation, and, when once bona fide exempt from liability they could not intend that those liabilities should revest, if they repurchased of others not liable, and came into a company which might then be mostly constituted of subsequent stockholders who were not liable to any such burden.

c. Transfer must be perfected.

To effect the release of the subscriber the transfer must be perfected so that the transferee has assumed the liability of the transferor.

If an attempted transfer is not consummated so that the obligation of the transferee is substituted for that of the original subscriber the latter will remain liable on his subscription. *Ryder v. Alton & S. R. Co.* 13 Ill. 516.

The obligation of a stockholder of a corporation can only be discharged by a novation accomplished through the substitution of another in his place occupying the same relation. *Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905.

Therefore a transfer must be accepted by the transferee to relieve the original subscriber

If this was all of the case, we should have little difficulty in holding that the question whether the transfer was absolute, or a mere sham, was a question of fact, which should have been submitted to the jury.

We however find that the sale of the stock by the defendant to Van Every was not only ratified by the plaintiff by canceling its certificate issued to the defendant and issuing a new certificat   to the purchaser, but that after the lapse of a year and eight months it commenced an action against Van Every as a stockholder to recover the amount of a call it had made upon the shares of stock then standing in his name, and subsequently obtained a judgment against him therefor, which it satisfied. Moreover, this action was not commenced until nearly a year after the judgment against Van Every was ob-

tained, and nearly two years and eight months after the transfer of the defendant's stock to him. The learned appellate division held that, under these circumstances, it was too late for the plaintiff to attempt to retreat from the position it occupied, rescind its action, and hold the defendant liable as a stockholder. As this is not an action by the creditors of the corporation, but is between the corporation and a former stockholder, the transfer of whose stock they have thus confirmed, we are disposed to sustain the decision of the court in that respect, and upon that ground affirm its judgment.

The judgment should be affirmed, with costs.

All concur.

from his liability. *Wilbur v. Stockholders, 18 Nat. Bankr. Reg. 178, Fed. Cas. No. 17,636.*

So, a transfer of unpaid stock to one who has no knowledge thereof and does not consent thereto, for the sole purpose of escaping liability on account of unpaid instalments, will not release the subscriber from his liability. *Rider v. Morrison, 54 Md. 429.*

And an assignment for creditors will not carry stock in a corporation so as to relieve the assignor from liability on the subscription and place it on the assignee, where there is nothing to show that the assignee accepted the liability, and the liability for unpaid stock was not scheduled as a liability of the assignor, and no claim was proved in respect to it against his estate. *Denison v. Smith, 43 U. C. Q. B. 508.*

In most cases there are provisions of the statutes or by-laws which give the corporation itself some control over the transfer of shares, and in case such provisions exist they must, so far as valid, be complied with. See note to *New England Trust Co. v. Abbott (Mass.) 27 L. R. A. 271.*

If a shareholder whose shares by statute can be transferred only by deed, and by an alteration in the register, attempts to transfer them by the assignment of the scrip, he will not relieve himself from liability for future calls, although the company accepted from the transferee payment of calls made after the transfer. *McEuen v. West London Wharves & Warehouses Co. L. R. 6 Ch. 655, 40 L. J. Ch. N. S. 471, 25 L. T. N. S. 143, 19 Week. Rep. 837.*

In any event recognition by the transferee by the corporation is generally necessary to consummate the substitution.

The subscription to the stock and the acceptance of a certificate for the shares constitute a contract between the subscriber and the company by which the subscriber engages to pay the remaining instalments on demand by the corporation. From this agreement the subscriber cannot recede, even by transferring his stock, without the consent of the company,—especially where the by-laws provide that transfers must be entered on the books of the corporation, and that possession of a certificate of stock shall not be regarded as vesting ownership in any person other than the one in whose name it is issued, as between the company and the owner, until the transfer has been duly made on such books. *Hood v. McNaughton, 54 N. J. L. 452, 24 Atl. 497.*

To effect the release of the subscriber by transfer, the transfer must be completed by an entry upon the books of the corporation. *Bell's Appeal, 115 Pa. 88, 8 Atl. 177.*

The transfer on the books of the corporation 47 L. R. A.

must have been effected to relieve the subscriber from liability. *Mann v. Currie, 2 Barb. 294.*

But in England it has been held that holders of shares may be liable for calls, although they did not sign the subscription contract and no memorial of transfer to them from the original subscribers has been presented to the corporation. *London Grand Junction R. Co. v. Graham, 1 Q. B. 271, 2 Railway Cas. 870.*

As against the corporation, the entry of the name of the transferee in the company's books is sufficient to relieve the subscriber from further liability, in the absence of anything to show that it was imposed upon by a fictitious and fraudulent transfer contrived to evade payment of a call. *Provincial Ins. Co. v. Shaw, 19 U. C. Q. B. 588.*

A transferee of stock cannot divest himself of his liability as a stockholder, either to the corporation or to its creditors, until the transfer has been duly perfected on the corporation books. *Vale Mills v. Spalding, 62 N. H. 605.*

A mere informal *eo parte* transfer in writing of shares of a corporation by the original subscriber never entered or appearing on the books of the company, and a private agreement of the transferee, that the subscriber shall not be liable for anything due on the shares, is not such an assignment as will relieve the original subscriber from liability to pay the amount unpaid on the shares so transferred. *Bell's Appeal, 115 Pa. 88, 8 Atl. 177.*

Although a stockholder sells stock which he has subscribed for he will be compelled to pay up the calls if the corporation does nothing to release him from his obligation, and merely permitting a transfer on the books of the corporation is not sufficient. *Louisiana Ins. Co. v. Gordon, 8 La. 174.*

The transfer of shares and entry thereof upon the books of the corporation substitute the new shareholder to the subscription liability of the subscriber. *Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10.*

A transfer of stock by a subscriber for the purpose of escaping liability upon it without the consent of the company is not a valid defense to an action against him by the company for the purchase money of the shares subscribed. *Everhart v. West Chester & P. R. Co. 28 Pa. 389. Court divided.*

Where the corporation has recognized a transfer of stock by paying dividends to the transferee, the transferor cannot subsequently be held liable for unpaid subscriptions merely because the transfer was not made upon the books of the corporation. *Cutting v. Damerel, 98 N. Y. 410.*

However, if a transfer of the stock as required by statute is not effected because of the

fault of the corporation it will not be permitted to take advantage thereof for the purpose of enforcing calls subsequently made against the one attempting to make the transfer. *Isham v. Buckingham*, 40 N. Y. 216.

Under a statute making a stockholder liable for unpaid stock in favor of debts created during his ownership thereof, the liability to continue for one year after a transfer, the time does not begin to run until the transfer is registered in the books of the company. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462, 16 So. 351.

The carrying out of an agreement by which certain persons subscribing to the stock of a railroad company upon condition that if a city shall subscribe a certain amount of stock their subscriptions over a nominal sum shall be transferred to the city, which shall accept and become liable for it, will relieve the subscribers from liability to corporate creditors for the amount of their subscriptions over such nominal sum, and the transfer is not illegal by the fact that the directors who permitted it were original subscribers to the corporation who might be benefited by the transfer, and therefore personally interested in the transaction. *Burke v. Smith*, 16 Wall. 390, 21 L. ed. 361.

d. Transfer must be bona fide.

In *Aultman's Appeal*, 98 Pa. 505, the court approved the statement of Judge Thompson in his treatise on the Liability of Stockholders, that a transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect of such liability, is void as to creditors of the company and as to other shareholders, although, as between the transferor and transferee, the transfer may be out and out.

The subscriber will be liable for unpaid stock, although all the statutory requirements for its transfer have been complied with, if he did not sell the stock in good faith and with intent to dispose of his real interest and personal dominion over the shares. *Billings v. Robinson*, 28 Hun, 122.

A stockholder in an insolvent corporation, part of whose subscription is unpaid, cannot by a donation to an insolvent individual made to get rid of his liability for such unpaid stock avoid responsibility as a stockholder. *Mandion v. Firemen's Ins. Co.* 11 Rob. (La.) 177.

Where the statute makes the subscriber liable to the par value of his shares he cannot escape liability by transferring the stock to an insolvent assignee. *Wishard v. Hansen*, 99 Iowa, 307, 68 N. W. 691.

A sale to an insolvent person of stock in an insolvent corporation will not, as against creditors, release the subscriber from his liability to pay subscriptions. *Ford v. Lamson*, 17 Ohio C. C. 539.

The transfer to a fictitious person is a nullity, and will not relieve the subscriber from his liability. *Muskingum Valley Turnp. Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191.

One who has received an assignment of stock in a corporation, which subsequently becomes insolvent, cannot avoid his liability for an unpaid subscription by assigning it without consideration to an insolvent person. *National Carriage Mfg. Co. v. Story & I. Commercial Co.* 111 Cal. 531, 44 Pac. 157.

The subscription is a contract which cannot be dissolved at the option of one party by a transfer to an irresponsible person. *Gaff v. Fleisher*, 33 Ohio St. 107.

But where by the statutes a married woman may receive transfers from her husband and become a stockholder in a bank, a bona fide trans-

fer in good faith by a subscriber to bank stock to his wife, when the stock was only partly paid, and at a time when he was not indebted to the bank and the bank was prosperous, may transfer to his wife the stock in such a way as to relieve himself from liability to future calls, even as against creditors of the bank. *Simmons v. Dent*, 16 Mo. App. 288.

e. After insolvency of corporation.

An attempted transfer after the corporation has become insolvent, which is not accepted by the corporation, will not be effectual to relieve the liability of the subscriber to existing creditors. *Central Agri. & Mechanical Asso. v. Alabama Gold L. Ins. Co.* 70 Ala. 120, Citing *Allen v. Montgomery R. Co.* 11 Ala. 437.

A solvent stockholder who has given a stock note to the corporation for the purchase price of the stock cannot on insolvency of the company, even with the consent of the directors, transfer his stock to an irresponsible person, and be discharged from his liability upon substituting the note of such person for his own. *Nathan v. Whitlock*, 9 Paige, 152, Affirming 8 Edw. Ch. 215.

V. Transfer to or release by corporation.

The corporation is generally given some power to compromise or release subscription liability by forfeiture or otherwise.

But the power to forfeit can only be exercised for the benefit of the corporation, and never for the benefit of the shareholder. 2 *Thomp. Corp.* § 1802.

Therefore any schemes by which the liability of the subscriber is released without possible benefit to the corporation are likely to prove ineffectual.

A subscriber cannot by his own mere surrender or abandonment of the stock, or of his rights of membership, discharge himself from his contract obligation. *Minnehaha Driving Park Asso. v. Legg*, 50 Minn. 333, 52 N. W. 898.

After an agreement has been signed to take shares in a corporation to be formed, the subscriber cannot withdraw so as to relieve himself from liability. *Burke v. Lechmere*, L. R. 6 Q. B. 297, 40 L. J. Q. B. N. S. 98, 19 Week. Rep. 565.

See also note to *Bryant's Pond Steam-Mill Co. v. Felt* (Me.) 33 L. R. A. 593.

The question of issuance of stock at a discount is not within the scope of this note, but, as indicating the questions which may arise in case of such an attempt and the possible difference of opinion, attention is called to the statement in *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, that the corporation and the subscriber may contract for a discount in payment of the shares, but such contract will not be binding on corporate creditors.

And to the case of *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648, which was an action by a creditor to compel payment of an amount which had been credited by the corporation on stock, although not fully paid and which failed, the court said it may be admitted that the liability of subscribers on unpaid stock subscriptions constitutes an asset of the corporation which cannot be surrendered or given up by the corporation without consideration to the prejudice of creditors. But the plaintiff seeks to charge defendant as though he had subscribed for the stock and entered into a contract obligation with the company to pay therefor. We can see no ground upon which he can be made to respond to creditors as upon an unpaid subscription. And that case was followed in *Christensen v. Quintard*, 29 N. Y. S. R. 62, 8 N. Y. Supp. 400.

Also to *Wood v. Dummer*, 8 Mason, 308, Fed. Cas. No. 17,944, where the stock had been distributed as dividends, and the holders were held liable to creditors on the ground that the stock was a trust fund pledged for the payment of debts.

Generally the liability cannot be evaded by surrender of the stock to the corporation as against existing indebtedness. *Vick v. La Rochelle*, 57 Miss. 602.

A subscription made upon the condition that the future calls shall be paid or the shares shall become the property of the company does not give the corporation the right to take a transfer of sufficient of the shares to make the remaining shares of the subscriber paid up, and relieve him from further liability. *Mann v. Cooke*, 20 Conn. 178.

A subscriber cannot rid himself of liability by assigning part of his shares to the corporation in payment of assessments upon other shares. *Glenn v. Scott*, 28 Fed. Rep. 804.

A subscriber cannot relieve himself from liability by transferring the stock to the corporation and receiving back paid-up stock to an amount which his payments are sufficient to cover. *Mann v. Pentz*, 2 Sandf. Ch. 258.

A subscriber who after insolvency of the corporation, having had notice that stock would be sold unless assessments were paid, voluntarily assigns the certificate in blank to the treasurer of the corporation, does not thereby relieve himself from liability for the unpaid portion of the subscription. *Burt v. Real Estate Exchange*, 175 Pa. 619, 84 Atl. 928.

The directors of a corporation have no power to cancel stock and thereby release the subscribers. *Bedford R. Co. v. Bowser*, 48 Pa. 87.

A corporation whose capital stock, as fixed and limited, has not been fully paid in cannot relieve a delinquent stockholder from payment of assessments upon his stock by a purchase of the same,—especially against the objection of another stockholder. *Currier v. Lebanon Slate Co.* 56 N. H. 262.

The directors cannot release liability on the subscription, or modify the contract except in accordance with the provisions of the charter. *Chase v. East Tennessee, V. & G. R. Co.* 5 Lea, 415.

Although a subscriber may relieve himself from liability for unpaid stock by transferring the stock to a third person, he cannot accomplish that result reducing the stock subscribed for to the number of shares which his payments would pay up, and then transferring that number as paid-up stock. *Putnam v. Hutchison*, 4 Kan. App. 278, 45 Pac. 981.

A transfer to the corporation and its release of the amount remaining due on the stock are not sufficient to relieve the subscriber from further liability. *Rider v. Morrison*, 54 Md. 429.

The subscriber cannot discharge his liability by assigning his interest in the corporation. *Dayton v. Borst*, 7 Bosw. 115.

In *Richmond's Case*, 4 Kay & J. 305, 6 Week. Rep. 779, a distinction was recognized between the power of the directors to forfeit shares for the benefit of the company and their power to cancel shares of stockholders in such a way as to diminish the capital, the court holding that there was no power to do the latter. But the ruling was placed entirely on the language of the deed of settlement.

In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, where, according to an agreement between the subscriber and the corporation, the subscription contract was delivered up to him upon payment of 20 per cent of the amount subscribed, and certificates of stock issued to him, the court said it is hardly necessary to argue 47 L. R. A.

the proposition that if defendant became a holder of shares of capital, and had paid but 20 per cent thereof, its creditors were entitled to require of him the payment of 80 per cent remaining unpaid. The acceptance and holding of a certificate of shares in a corporation make the holder liable to the responsibilities of the shareholder.

An agreement by which the subscription is to be fictitious and not to be enforced is illegal. *Robinson v. Pittsburgh & C. R. Co.* 32 Pa. 334, 72 Am. Dec. 792.

The question of forfeiture of shares presents a question very similar to that raised by the proceeding condemned by the above decisions. But there is a distinction which may uphold the right of forfeiture in that forfeiture may be a remedy beneficial to the corporation, and which it may therefore exercise. The authorities upon the question will be found in the note to *Morris v. Metalline Land Co.* (Pa.) 27 L. R. A. 305.

In *Gratz v. Redd*, 4 B. Mon. 193, the court said, if the provision for forfeiture was intended to be exercised at the will and discretion of the subscribers, and to terminate their liability on their stock, then after the whole stock was raised by subscription and the work commenced and contracts made and liability incurred, one half of the subscribers might forfeit the pitance paid in on their stock and back out of the concern at pleasure, leaving the debts unpaid and the whole burden upon the other half of the subscribers without the means to pay the debts or to complete the work, without which it might be left an unprofitable wreck upon their hands. Good faith among the subscribers themselves, as well as between them and the public and special creditors, would repudiate such a construction.

A subscriber cannot avoid his obligation to pay his subscription under an express agreement to do so by forfeiting his stock to the corporation. *Klein v. Alton & S. R. Co.* 18 Ill. 514.

If the charter provides for forfeiture in case of nonpayment the option to forfeit is in the company, and not in the stockholder. *North Eastern R. Co. v. Rodriguez*, 10 Rich. L. 278.

Where the statute permits the corporation to sue for unpaid subscriptions, or to forfeit the stock therefor, the corporation may forfeit the stock so as to effectually release the subscriber from liability for unpaid subscriptions, although it is at the time insolvent, if it has not been declared insolvent and the management taken from its officers. *Macaulay v. Robinson*, 18 La. Ann. 619.

Under a statute making subscribers liable to creditors until the whole amount of stock subscribed for by them has been paid, a forfeiture of the stock for nonpayment of shares will destroy further liability. *Mills v. Stewart*, 41 N. Y. 384.

The directors of the corporation may release the liability of a subscriber for future calls, even as against creditors, by in good faith forfeiting his stock for nonpayment of calls, but they cannot do so fraudulently. *Mills v. Stewart*, 62 Barb. 444.

After the corporation, pursuant to a provision of its charter, has forfeited the stock of a subscriber for nonpayment of an assessment, it cannot maintain an action to recover any part of such subscription. *Small v. Herkimer Mfg. & Hydraulic Co.* 2 N. Y. 380; *Mills v. Stewart*, 41 N. Y. 384.

Before a corporation has incurred liabilities it may forfeit stock for nonpayment of assessments so as to relieve the subscriber from future liability. *Ailing v. Wensel*, 138 Ill. 264, 24 N. E. 551.

A forfeiture of stock is an extinguishment of the right to recover upon the subscription, but a mere threat to forfeit is not sufficient to work that result. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

A mere resolution that stock not paid for within thirty days shall be forfeited without anything more is not sufficient to sever the subscriber's connection with the corporation and relieve him from liability for unpaid stock. *Hays v. Franklin County Lumber Co.* 85 Neb. 511, 53 N. W. 381.

If the charter provides that upon failure to pay the subscription the shares may be sold, and if they do not bring enough to pay the assessment the balance may be collected by action, and by another section that they may be declared forfeited, and may be transferred to any responsible person who will subscribe for them, the corporation cannot, after forfeiting and transferring them to another person, enforce the liability of the original subscriber upon his contract. *Athol & E. R. Co. v. Prescott*, 110 Mass. 213.

If the corporation resorts to forfeiture it cannot, without express authority, hold the subscriber liable for the deficiency. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

The forfeiture of stock by the act or declaration of the corporation for nonpayment is not known to the common law. Such a right can exist, such a remedy be pursued, only when authorized by the general statute law, or by the charter of the corporation, or by consent of the stockholder. *Minnehaha Driving Park Asso. v. Legg*, 50 Minn. 383, 53 N. W. 398.

If the corporation forfeits a subscriber's stock for nonpayment of a call, it cannot afterward recover upon a note given for a previous unpaid assessment. *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

VI. Rights of creditors.

One of the principal reasons for enforcing the stockholder's liability is to afford protection to creditors of the corporation, and the general rule is that creditors will be protected against illegal transfers.

The general rule, and some cases to support it, are set out in the introductory part of this note. Those authorities apply equally in case of attempted transfers of stock. Many of the decisions collected under the heading IV. *supra*, involved the liability of subscribers to creditors. It may be stated that in the absence of fraud, special contract, or other peculiar circumstance the rights of creditors are measured by the subscribers' liability to the corporation.

So, where a subscriber to the stock, before the same is paid in good faith, transfers his shares to another person supposed to be a man of responsibility, and no debts of the corporation exist at the time, the receiver of the corporation will be bound by its acts in recognizing the transferee as the owner of the stock, so as to be precluded from enforcing the subscription liability against the original subscriber. *Cole v. Ryan*, 52 Barb. 168.

VII. Time of transfer.

Under a statute providing that until a transfer of shares shall be delivered to the secretary of the corporation the seller shall remain liable for calls, and shall not be entitled to have the shares transferred until calls are paid, a person who was a shareholder at a time when a call was made is liable to suit therefor, although before it became payable he had transferred his shares and delivered the transfer to the secretary. *North American Colonial Asso. v. Bent*, 47 L. R. A.

ley, 15 Jur. 187, 19 L. J. Q. B. N. S. 427. The court says by joining the company the subscriber entered into a contract to pay any call which should be properly made upon him while he should be shareholder. The moment, therefore, a call was properly made it was a call due from him to the company.

A subscriber is liable to the corporation for the amount of his subscription, although, after calls were made and before they were payable, he assigned his stock to a responsible party, and had it transferred on the books of the company. *Schenectady & S. Pl. Road Co. v. Thatcher*, 11 N. Y. 102. The court said that the sale of the stock did not release the subscriber from his express promise to pay; and one of the judges suggests that liability upon the contract can only be extinguished in those modes in which ordinary liabilities to pay money are extinguishable.

In *Aylesbury R. Co. v. Mount*, 4 Mann. & G. 651, 5 Scott, N. R. 127, 2 Dowl. N. S. 143, it is said that it is clear at common law that a declaration showing a transfer after a call, but before the time appointed to receive it, is not sufficient to hold the transferrer liable. The court of common pleas held that the same was true under a statute giving a right of action against the owner of shares "for the time being" in case of his refusal to pay the call. But the decision was reversed on appeal upon the ground that the declaration might be sustained as disclosing a possible state of things under which defendant might be liable by virtue of the act of Parliament, and that whether the defendant was or was not such a proprietor as to become liable to the call according to the act of Parliament would be a matter of evidence at the trial.

The lower court says that the general scope of the act is to treat a shareholder, at least one not an original subscriber, as identified with his share, and as having nothing to do with the company, either with respect to rights or liabilities, before he becomes or after he ceases to be a shareholder. The duty of the shareholder who takes by transfer to pay a call is a creature of the act; the act requires the payment to be made at the time appointed by the directors, at that time, and not before the duty arises, and it is a duty which by the terms of the act is cast on the owner for the time being. *Aylesbury R. Co. v. Mount*, 4 Mann. & G. 651, 5 Scott, N. R. 127, 2 Dowl. N. S. 143.

Transfer after the making of the call will not relieve the stockholder from liability under statute 10 & 11 Vict. chap. 68, § 13. *Montreal Min. Co. v. Cuthbertson*, 9 U. C. Q. B. 78.

The existence of an illegal call will not prevent a transfer of shares. *Moore v. McLaren*, 11 U. C. C. P. 534.

In *Wilson v. Birkenhead, L. & C. Junction R. Co.* 20 L. J. Exch. N. S. 306, 6 Exch. 627, 6 Railway Cas. 771, which was an action under the statute for calls in which the question arose whether or not it was sufficient to allege that defendant was the holder of shares, Maule, J., said, a man, I think, cannot part with his shares after a call has been made until it has been paid. And upon counsel suggesting that he may do so with the consent of the company, the reply was made that it may be that the statute only allows an action under it where the party has retained his shares up to the time the action is brought, and that the company would be confined to its common-law remedy against a shareholder who had transferred his shares.

Under a statute providing that if an execution against a corporation is returned *nulla bona*, "then such execution may be issued against any shareholder to the extent of his capital not then paid up," the shareholder can-

not transfer his shares after the issuance of the execution against the company so as to avoid liability. *Nixon v. Brownlow*, 27 L. J. Exch. N. S. 509, 4 Jur. N. S. 878, 3 Hurlst. & N. 686. Few English cases have been referred to be-

cause the system of corporation law is so different in that country from the law in the United States that on this branch of the subject the English decisions furnish little light.
H. P. F.

OREGON SUPREME COURT

J. W. SHUTE, Admr., etc., of Martin Manning, Deceased, Resp't.,
v.

A. HINMAN, Assignee, etc., of Anton Pfanner, Appt.

(.....Or.....)

The general deposit by an administrator, of moneys of the estate in a bank owned by him, destroys its identity, if any portion of the money in the bank is afterward checked out so that it is impossible to trace the fund as a trust fund into the hands of the bank's assignee in case of insolvency, although more than the amount of such deposit remains in the bank.

(March 30, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to reach an alleged trust fund which had gone into defendant's hands as assignee of an insolvent estate. *Reversed*.

The facts are stated in the opinion.

Mr. S. B. Huston, for appellant:

Where a creditor seeks to enforce a claim which is at the same time consistent with the validity of the trust, but in conflict with the rights of other creditors, it is essential that they be joined as parties defendant, because there is a want of community of interest between them and the creditor bringing suit.

2 Enc. Pl. & Pr. 890; *Rogers v. Rogers*, 3 Paige, 37; *Fisher v. Worth*, 45 N. C. (Busbee, Eq.) 63; *Hudson v. Eisenmayer, Sr., Mill & Elevator Co.* 79 Tex. 401, 15 S. 385; *Anonymous v. Gelpcke*, 5 Hun, 245; *Codwise v. Gelston*, 10 Johns. 521; Perry, Tr. § 881; Burrill, Assignm. § 427.

Upon the second quest, we think that the evidence is utterly insufficient to establish the claim as a preferred claim.

The person claiming a lien or preference over other creditors must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property or proceeds thereof.

Ferchen v. Arndt, 26 Or. 121, 29 L. R. A. 664, 37 Pac. 161; *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *Muhlenberg v. Northwest Loan & T. Co.* 26 Or. 143, 29 L. R. A. 667, 38 Pac. 932; *Sharpe v. Hartman*, 26 Or. 131, 40 Pac. 230; *Multnomah County v. Oregon Nat. Bank*, 61 Fed. Rep. 912; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 27 N. E.

NOTE.—For trust in deposit in insolvent bank and the right to follow the fund, see note to *Bruner v. First Nat. Bank* (Tenn.) 34 L. R. A. 532.

47 L. R. A.

907; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172, 2 L. R. A. 480; *Little v. Chadwick*, 151 Mass. 109, 7 L. R. A. 570, 23 N. E. 1005; *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L. R. A. 788, 23 Pac. 986; *Calhoun v. Bank of Greenwood*, 42 S. C. 357, 20 S. E. 163; *Burrows v. Johns*, 67 Kan. 778, 48 Pac. 27.

Messrs. Bagley & Brown and Thomas H. Tongue for respondent.

Bean, J., delivered the opinion of the court:

This is a proceeding to require the assignee of the estate of Anton Pfanner, insolvent, to pay the administrator of Martin Manning, deceased, \$879.84 out of the moneys coming into his hands as assignee, on the ground that it is a trust fund. The facts are that on February 3, 1896, Pfanner was appointed and qualified as administrator of the estate of Martin Manning, deceased, and acted as such until June 1897, when he was removed by the county court, and the present petitioner appointed in his stead. Soon after his appointment as administrator, Pfanner purchased and assumed control of a banking house at Forest Grove; and all funds received by him belonging to the estate were deposited in the bank to his credit, and commingled with and used as a part of the general funds of the bank in the usual course of business. On June 10, 1897, the bank failed, and Pfanner made a general assignment for the benefit of his creditors. He had in the bank vault at the time the sum of \$1,755.09 in cash, and was indebted to the Manning estate in the sum of \$879.84 for moneys collected by him as administrator. The present administrator sets out these facts in his petition, and prays an order directing the assignee to pay over such sum to him out of the funds on hand at the time of the assignment. The petition was granted, and the assignee appeals, claiming that the evidence is insufficient to establish the right of the Manning estate to a preference over the other creditors of Pfanner.

The rule in this state is that one claiming a preference over other creditors, on account of trust property, must either identify the specific property, or the proceeds thereof, or show that the property of the debtor which he seeks to affect with such lien or preference includes the trust property. The rule formerly prevailed that the claimant must identify the particular property or the proceeds thereof; but this has been so modified that, although its identity has been completely lost, equity will afford relief if it is shown to have been mingled into a common mass, and forms a part thereof. "This

equitable doctrine is put upon the ground," says Mr. Chief Justice Lord, "that the real owner has the right to retake and reclaim his property, through all its transformations and forms, so long as it may be traced, whether its identity is preserved, or is merged into a mass of which it forms a part. To accomplish this end, when such trust property has been mingled into a mass of which it forms a part, but its identity is lost, equity affords relief by creating a charge or lien upon such mass for its ascertainable value. The right to such relief has its basis in the right of property, and 'simply asserts,' as Andrews, J., says, 'the right of the true owner to his own property.' *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504. But whether such owner seeks to recover specific property, or to create a lien upon a mass or fund, he must trace such property, and show that it belongs to him, or that it has gone into, and then remains in, the mass which he seeks to impress with a lien or charge. In such cases the question to be determined always is whether the trust property or fund, or the proceeds thereof, is traceable into any specific property or fund. Before, therefore, one claiming to be a trust creditor can be entitled to a lien or preference over other creditors, he must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property, or the proceeds thereof." *Merchen v. Arndt*, 20 Or. 121, 127, 29 L. R. A. 664, 37 Pac. 161, 163. By applying this rule to the facts in the case before us, its solution presents no difficulty. The evidence shows that the money for which the plaintiff claims a preference was indiscriminately mixed and mingled with the bank's other money, and its identity wholly lost. None of it has been traced or followed into the mass sought to be charged with the lien. It was used by the bank in the ordinary course of its business to pay its debts and obligations, the same as any other money; and, so far as this record shows, none of it was in the possession of the bank at the time of its suspension, or has since come into the hands of the assignee.

This is not a case where the trustee has mingled the trust fund with his own, and a balance remains sufficient to satisfy the trust, as in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; but here the trust fund was commingled with the other funds of the bank, the same as that of other depositors, and was paid out and disbursed in the same manner. It is manifest, therefore, that the petitioner has no preference over other creditors.

The decree must therefore be reversed, and the petition dismissed; and it is so ordered.

A rehearing having been granted, **Moore, J.**, on November 6, 1899, handed down the following additional opinion:

A rehearing having been granted in this cause, it is insisted that, inasmuch as the testimony conclusively shows that Pfanner placed the \$879.84 belonging to the Manning estate in his bank, and thereafter, until the assignment, retained more than that amount 47 L. R. A.

therein, it was error in the former opinion, in speaking of the money which was sought to be impressed with a preference, to say that "none of it has been traced or followed into the mass sought to be charged with the lien." Pfanner, as a witness, says, in substance, that when appointed administrator he was a broker, and kept the funds of the estate in his safe, but when he went into the banking business they were placed in his bank, and that most of his collections as administrator were made after he engaged in the latter business. In speaking of the manner in which the money of the estate was deposited, he says, "It was placed with the bank's money, the same as any other money." If Pfanner had continued in the business of a broker, and kept the funds of the estate in his safe, but commingled with his own, it is quite probable that if, at the time of the assignment, the money therein was sufficient to satisfy the demands of his trust, a court of equity, upon proper application, would have enforced a lien thereon in favor of the *cestui que trust*. So, too, as intimated in the former opinion, if, after having mixed the money of the estate with his own, Pfanner had made a general deposit thereof in a bank, where it remained at the time of the assignment, a court of equity would undoubtedly have impressed the money with a lien in favor of the estate. *Overseers of Poor v. Bank of Virginia*, 2 Gratt. 544, 44 Am. Dec. 399; *Stair v. York Nat. Bank*, 55 Pa. 304, 93 Am. Dec. 759; *Van Allen v. American Nat. Bank*, 52 N. Y. 1; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693. This rule is founded upon the principle that, if a trustee mingles with his own money the funds of his *cestui que trust*, the whole will be regarded as belonging to the latter, except so far as the trustee may be able to distinguish his own. *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108. It has been held, by invoking the presumption that the ordinary course of business has been followed (*Hill's Ann. Laws (Or.)* § 776, subd. 20), that, in the absence of evidence to the contrary, a deposit of money in a bank will be regarded as a general deposit (*Alston v. State*, 92 Ala. 124, 13 L. R. A. 659, 9 So. 732). However, there exists no necessity, in the case at bar, for invoking this presumption, for the testimony conclusively shows that Pfanner made a general deposit of the money of the estate in the bank. This created the relation of creditor and debtor between him and the bank, thereby giving it the right to mingle the money so deposited with its own funds. *Morse, Banks*, § 289; *Cadwell v. King*, 84 Iowa, 228, 50 N. W. 975; *Catlin v. Savings Bank*, 7 Conn. 487; *Coffin v. Anderson*, 4 Blackf. 395; *Horwitz v. Ellinger*, 31 Md. 492; *Carman v. Franklin Bank*, 61 Md. 467; *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. ed. 785; *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704; *Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897.

Although the bank may have retained in its vaults at all times a sum greater than the trust funds, a general deposit thereof was

technically a use of such funds in its business. *St. Paul Trust Co. v. Kittson*, 82 Minn. 408, 65 N. W. 74. In *Otis v. Gross*, 96 Ill. 612, a clerk of a court, having made a general deposit of trust funds in a bank, which became insolvent, sought to impress the money of the bank in the hands of a receiver with a preferential lien, but the relief was denied, the court holding that he must share *pro rata* with the other creditors of the bank. In *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904, an executor made a general deposit of the funds of his testator in a bank, which subsequently failed, and in a suit to impress with an equitable lien the money of the bank in the possession of its assignee it was held that the suit would not lie; the court saying: "It is clear that it was impossible, when the assignment was made, to identify the money of the appellee as a separate trust fund, distinct from the other moneys of the bank." In *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911, a clerk of a court, having made a general deposit of trust funds in a bank in his own name, to which he appended the word "clerk," sought to establish a lien on the money of the bank in the hands of its receiver; but it was held that the word "clerk" did not make the deposit a special one, and that the suit would not lie, the court saying: "Deposits in bank are either general or special. Upon a special deposit the bank is merely a bailee, and is bound according to the terms of the special deposit; but on a general deposit, without special agreement, the money be-

comes the property of the bank, and the depositor has no longer any claim on that money. His claim is on the bank for a like amount of money. *Coffin v. Anderson*, 4 Blackf. 395; *McEwen v. Davis*, 39 Ind. 109. Upon the insolvency of a bank, its general depositors must be paid *pro rata*." In *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142, an administrator having made a general deposit of the funds of his intestate in a bank, which subsequently became insolvent, it was held, in a suit to subject the money of the bank to an equitable lien, that he was not entitled to any preference over the other general depositors. The reason for this rule is found in the fact that upon a general deposit of money in a bank it becomes the property of the latter, and, when indiscriminately mixed and mingled with the other money of the bank which becomes insolvent, its identity is wholly lost when any portion of it is checked out, in which case it is impossible to trace the fund into the hands of the bank's assignee. The fact that Pfanner the administrator and Pfanner the banker were one and the same person, so that the bank must have known the character of the funds so deposited, affords no reason for changing the rule that a general deposit cannot be impressed with a trust after the bank in which it is placed has made a general assignment. *Shields v. Thomas*, 71 Miss. 260, 14 So. 84. Having discovered no error in the former opinion, we are compelled to adhere thereto.

TENNESSEE SUPREME COURT.

J. R. BIGHAM, *Appt.*,
v.
William MADISON *et al.*
(.....Tenn.....)

A mutual mistake as to the location of boundary lines which are pointed out by vendor to vendee, when the result is that the latter gets only about half the quantity of land bargained for and less than half in value, will justify a rescission of the contract, although there was no fraud or any intentional misrepresentation.

(October 21, 1899.)

APPEAL by plaintiff from a decree of the Court of Chancery Appeals which affirmed a decree of the Chancery Court for Polk County in favor of defendants in a suit

brought to rescind a contract for the sale of real estate. *Reversed*.

The facts are stated in the opinion.

Mr. G. G. Hyatt, for appellant:

Upon the hypothesis that the defendants innocently pointed out and sold complainant land that did not belong to them, the complainant would be entitled to his relief in this cause.

Lewis v. McLemore, 10 Yerg. 208; 1 Story, Eq. Jur. § 193.

Messrs. Ingersoll & Peyton also for appellant.

Mr. B. B. C. Witt for appellees.

Wilkes, J., delivered the opinion of the court:

This is a bill to have a rescission of a contract of sale of a small tract of land. The land is described in the deed by metes and bounds, and as "containing 25 acres, more

NOTE.—As to rescission of contract because of mistake, see also *McKinnon v. Vollmar* (Wis.) 6 L. R. A. 121; *Duncan v. New York Mut. Ins. Co.* (N. Y.) 20 L. R. A. 386.

As to reformation of contract for fraud or mistake, see also *Miller v. Powers* (Ind.) 4 L. R. A. 483, and *note*; *Page v. Higgins* (Mass.) 5 L. R. A. 152, and *note*; *Cameron v. White* (Wis.) 5 L. R. A. 493; *Eastman v. Provident* 47 L. R. A.

Mut. Relief Assn. (N. H.) 5 L. R. A. 712, and *note*; *Davis v. Ely* (N. C.) 5 L. R. A. 810; *German Ins. Co. v. Gueck* (Ill.) 6 L. R. A. 835, and *note*; *Fowler v. Black* (Ill.) 11 L. R. A. 670; *Butler v. Barnes* (Conn.) 12 L. R. A. 273; *Du Bois v. Du Bois City Waterworks Co.* (Pa.) 34 L. R. A. 92; *Vega S. S. Co. v. Consolidated Elevator Co.* (Minn.) 43 L. R. A. 843.

or less." It appears that the title to about one half of this land failed, and, upon a survey of the premises, complainant, without suit, surrendered to the superior title, and gave up so much of the land as is covered by it. It further appears that the portion surrendered, besides being about one half of the premises, was the most valuable part of it, and that upon it the vendee had erected his houses and made improvements and cut timber before the lines were fixed. The price paid for the land was \$125. The chancellor held that complainant had failed to show a superior outstanding title to the land, and that he had surrendered it voluntarily, without ejection, and was therefore not entitled to recover, and complainant appealed. The cause was assigned to the court of chancery appeals, and heard by that court; and it reversed the holding of the chancery court, that complainant could not recover because he had surrendered possession to a superior title without suit, and was of opinion the decree could not be sustained upon that ground. The court of chancery appeals finds, as a matter of law and fact, that there was an outstanding superior title that covered the land which complainant surrendered, and that complainant could not be denied relief because he surrendered to such title without suit; citing *Callis v. Cogbill*, 9 Lea, 138. This holding is sustained by the case cited, and it is not now in controversy. The court of chancery appeals was, however, of opinion that there was no fraudulent misrepresentation made by the vendor as to the quantity of the land embraced, and hence there was no ground for relief.

The facts, so far as necessary to be stated, are that the parties went upon the land and personally inspected it. The court of chancery appeals finds that the complainant and defendants differ as to what statements were made; the complainant stating that the defendant Madison pointed out on the ground and on a map where the western line ran, and where it was located. He also said that the defendant Ballew stated that he did not know where the western line was located, but that he would be bound by whatever Madison, the codefendant, said. He states that Madison, while he did not point out the exact location of the west line, told him it ran west of the place where he built his home, and stood in the road, and pointed out the lay of the lines with his hand, and said he would be positive it would come down to where he was at. Another witness states that, after the trade was made, both Ballew and Madison pointed out where the west line was, and said that it was west of the home of complainant, then being erected. The court of chancery appeals base their finding of facts mainly upon the testimony of Weeks, who was present when the trade was made. He states, in substance, that Madison showed complainant where he thought the line was, and stated that, going by the map which was referred to, it would go as far as complainant claimed and bought, and that he would be safe in saying that it ran where complainant bought to, and that it would

run to about the middle of block No. 8 of land across the line in Georgia, which appears to have been a well-known corner. Madison, after saying this, said, "Now, Joe [meaning complainant], you have bought it, much or little," to which complainant replied, "Yes, this boundary is mine, running back halfway of lot No. 8." The court of chancery appeals, upon these facts, finds that there were no false or misleading misrepresentations made by the defendants as to the true location of the line, and that they were not, therefore, liable, and the complainant was not entitled to rescind.

We think the court of chancery appeals is in error in its conclusion. We grant that its finding is conclusive that there were no false and misleading misrepresentations made by the defendants known to them to be false, and hence no actual fraud; but the facts as found by it make out a clear case of mutual mistake as to the location of the lines,—a matter material to the contract, not only as to the quantity of land, but as to the location of the lines, and the specific lands the vendors thought they were selling and the vendee thought he was buying, and which were pointed out. It is well settled that a vendee of land, when it is sold in gross, or with the description "more or less," or "about," does not thereby, *ipso facto*, take all risk of quantity in the tract. *Kerr, Fraud & Mistake*, § 65; 15 Am. & Eng. Enc. Law, p. 718; 1 Jones, Real Prop. § 407; 2 Warvelle, Vendors, p. 839; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; *Drake v. Eubanks*, 61 Ark. 120, 32 S. W. 492. It is also well established that the use of the words "more or less," or "about," or similar words, in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency. 2 Warvelle, Vendors, p. 839; 1 Jones, Real Prop. § 407; *Kerr, Fraud & Mistake*, § 65; 1 Story, Eq. Jur. § 141; 15 Am. & Eng. Enc. Law, pp. 718, 719; *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 212; *Drake v. Eubanks*, 61 Ark. 120, 32 S. W. 492; *Stebbins v. Eddy*, 4 Mason, 414. Fed. Cas. No. 13,342; *Couse v. Boyles*, 4 N. J. Eq. 212, 38 Am. Dec. 514; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 216; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614; *Newton v. Tolles*, 66 N. H. 136, 9 L. R. A. 50, 19 Atl. 1092. It has been held that such discrepancy in quantity, in order to be covered by such terms, should not exceed 10 to 15 per cent, even when sales are confessedly in gross, and 20 per cent is too great a difference to be so covered. 15 Am. & Eng. Enc. Law, p. 718. And 33 1-3 per cent is such an amount as universally has obtained relief. 4 Kent, Com. 12th ed. 467; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 212; *Harrison v. Talbot*, 2 Dana, 258. Mutual mistake of the contracting parties to a sale, in regard to the subject-matter of the sale, which is so material as to go to the essence of the contract, is, by all the cases, a ground for relief and rescission in a court of equity. *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec.

212; *Couse v. Boyles*, 4 N. J. Eq. 212, 38 Am. Dec. 514; *Camp v. Norfleet*, 83 Va. 380, 5 S. E. 375; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614; *Boyd v. Moss*, 15 Tex. Civ. App. 222, 39 S. W. 983; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; *Newton v. Tolles*, 66 N. H. 136, 9 L. R. A. 50, 19 Atl. 1092; *Hays v. Hays*, 126 Ind. 92, 11 L. R. A. 376, 25 N. E. 600; *Hosleton v. Dickinson*, 51 Iowa, 244, 1 N. W. 550; 1 Jones, Real Prop. § 407; 2 Warvelle, Vendors, pp. 339, 340. It has also been held that, even when the parties saw the premises and knew the boundaries, it cannot prevent relief when there was mutual gross mistake as to quantity. *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Newton v. Tolles*, 66 N. H. 136, 9 L. R. A. 50, 19 Atl. 1092; *Drake v. Eubanks*, 61 Ark. 120, 32 S. W. 492; *Hosleton v. Dickinson*, 51 Iowa, 244, 1 N. W. 550. And the relief will be granted in executed as well as executory contracts. *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Harrison v. Talbot*, 2 Dana, 259; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; 2 Warvelle, Vendors, p. 840. And relief will be granted when the mistake is so material that, if the truth had been known to the parties, the trade would not have been made. *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210; *Camp v. Norfleet*, 83 Va. 380, 5 S. E. 375; *Hosleton v. Dickinson*, 51 Iowa, 244, 1 N. W. 550; 2 Warvelle, Vendors, p. 227. And if quantity entered into consideration in fixing price, and price is fixed upon an estimate of quantity that proves grossly incorrect, relief will be granted. *Hill v. Buckley*, 17 Ves. Jr. 394; *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210; *Camp v. Norfleet*, 83 Va. 380, 5 S. E. 375; *Drake v. Eubanks*, 61 Ark. 120, 32 S. E. 492; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614; *Hays v. Hays*, 126 Ind. 92, 11 L. R. A. 376, 25 N. E. 600; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; *Waters v. Hutton*, 85 Tenn. 114, 1 S. W. 787; *Meek v. Bearden*, 5 Yerg. 467; 2 Warvelle, Vendors, pp. 838, 839.

It is not necessary that fraud be shown, in order to obtain relief. Innocent and mutual mistake alone are sufficient grounds for rescission and other relief. *Couse v. Boyles*, 4 N. J. Eq. 212, 38 Am. Dec. 514; *Hill v. Buckley*, 17 Ves. Jr. 394; *Newton v. Tolles*, 66 N. H. 136, 9 L. R. A. 50, 19 Atl. 1092; *Hays v. Hays*, 126 Ind. 92, 11 L. R. A. 376, 25 N. E. 600; *King v. Doolittle*, 1 Head, 78; *Barnes v. Gregory*, 1 Head, 231; *Harding v. Egin*, 2 Tenn. Ch. 41; *Cook v. Sumner Spinning & Mfg. Co.* 1 Sneed, 716; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559; 1 Story, Eq. Jur. § 155; *Helm v. Wright*, 2 Humph. 72; *Cromwell v. Winchester*, 2 Head, 390; *Horn v. Denton*, 2 Sneed, 125; 2 Pom. Eq. Jur. § 856, and note. There are differences in sales in gross, such as are evidenced by the expressions "more or less," "about," "by estimate," and sales at "hazard," when quantity is not regarded or material or estimated. In the first class of cases relief will be granted. In the latter it will not. *Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210; *Camp v. Nor-*

fleet, 83 Va. 380, 5 S. E. 375; *Waters v. Hutton*, 85 Tenn. 109, 1 S. W. 787; *Frenche v. The Chancellor*, 51 N. J. Eq. 624, 27 Atl. 140; *Harrison v. Talbot*, 2 Dana, 259; *Skinner v. Walker*, 98 Ky. 729, 34 S. W. 233; 2 Warvelle, Vendors, p. 926. It is true, a purchaser can have no relief when he sues for lands not pointed out to him, and that he did not buy. *Waters v. Hutton*, 85 Tenn. 109, 1 S. W. 787; *Moses v. Wallace*, 7 Lea, 413; *Blakemore v. Kimmons*, 8 Baxt. 473; *Meek v. Bearden*, 5 Yerg. 467. But, while this is true, if the lines are pointed out, and the parties are mutually and honestly mistaken as to their location and as to the land embraced, when the mistake is material, and when the purchaser does not get the land he intended to buy, and which the vendor thought he was selling, and had a right to sell, it will be ground for relief and rescission upon the ground of mutual mistake which was equivalent to fraud in law.

Now, in the case at bar, we have a sale of land described in the deed as "25 acres, more or less." The land is shown, the lines are pointed out, the corners located, and while the vendor said, in substance, that he would not guarantee where the lines and corners were, still he assured the vendee they would embrace the land he saw, and where he wanted to locate and did locate his house. There was a superior title to 50 per cent or more in quantity, and still more in value, of the land. Grant that the vendor was innocent of any intentional wrong, and that there was no guaranty of quantity, still there was a clear case of mutual mistake, and an evident ground for relief. In the language of Judge Story: "A court of equity would be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it." 1 Story, Eq. Jur. 10th ed. § 155. The complainant in this case sues upon these facts, and asks a rescission on these facts; and, while he insists that the act of defendants was fraudulent, the proof fails to make out a case of actual fraud, but, instead, makes out a case of mutual mistake equivalent to fraud in law. The difference between the two in a case like the present is simply the difference between a party who knowingly misstates facts, and one who innocently misstates them, believing them to be true. In either case the aggrieved party is entitled to rescind upon the facts as made out.

The decree of the Court of Chancery Appeals is reversed, and the complainant is decreed to be entitled to a rescission, and the cause is remanded to the court below, that the rights of the parties may be adjusted upon such rescission in view of the improvements put upon the land, etc. The defendants will pay all costs.

H. C. GIVAN, *Appt.*,
v.
BANK OF ALEXANDRIA
and
W. B. EASTES, *Appt.*

(.....Tenn.....)

1. A credit of checks deposited for collection, and the issuance of a deposit slip stating that all cash items not actual cash are entered subject to payment, entitle the bank to charge back a check if it proves uncollectible.
2. The selection of a suitable intermediate bank for the purpose of sending a check for collection discharges the duty of the initial bank to the person who deposited the check.
3. A bank receiving a check for collection exercises due diligence if, in accordance with its custom, it credits the check and forwards it on the following day.
4. The selection of its regular correspondent employed to transact its own business, for the purpose of sending a check for collection, indicates proper care on the part of a bank with which it was deposited for collection.
5. Sending a check directly to the drawee bank for collection constitutes negligence on the part of the collecting bank.

(November 26, 1898.)

CRoss-APPEALS by plaintiff and defendant Eastes from a decree of the Chancery Court for Dekalb County in favor of the defendant bank and against the defendant Eastes in an action brought to recover upon a check drawn by Eastes and delivered to the bank for collection, the proceeds of which were lost through the alleged negligence of the bank. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wade & Bratten for complainant.

Mr. Williams for defendant bank.

Mr. J. R. Smith for defendant Eastes.

Neil, J., delivered the opinion of the court:

The complainant seeks to recover of the defendant bank on two grounds: first, that it took from him two checks on the bank of A. Bryan & Co., of Watertown, aggregating \$121.75, and credited them to his account, as money, and thereafter refused to pay him the money thereon, on the ground that said checks had proved noncollectible; and, secondly, in the alternative, that, if it should appear that the defendant bank took the checks for collection, then that it negligently failed to collect, and should, for that reason, be held liable. The chancellor held that the bank was not liable upon either ground, and complainant has appealed, and assigned error upon this ruling. The complainant seeks to hold the defendant Eastes, the drawer of the checks, liable on the ground that, in order

to induce the defendant to take them, he personally guaranteed the payment. The chancellor held defendant Eastes liable, and he thereupon appealed, but he has assigned no errors.

We think there is no ground for complainants' first contention because it is proved that the deposit slip of the defendant bank, as well as the pass books, contained the statement that all cash items not actual cash were entered subject to payment; and, besides, the complainant admits in his deposition that the checks were taken for collection, and hence subject to be charged back, and so the cashier testified. There can be no doubt, and we so find the fact, that the bank took the checks in question merely for collection, and that the credit given therefor was not absolute, but was subject to counter charge in case the checks should prove noncollectible after the exercise of due diligence on the part of the bank. The only question remaining is whether the bank exercised due diligence. The facts bearing upon this branch of the case are as follows: On the afternoon of June 2, 1898, after banking hours, Eastes drew the two checks in question, one in favor of complainant and the other in favor of Flippen & Givan, a firm of which complainant was a member. The proof shows, however, that the beneficial interest in this latter check belonged to complainant. At the same time these checks were indorsed to defendant bank, and on the next day were credited to complainant's account, it being the custom of the bank, when papers came in after banking hours on any day, to enter it the next day. On the same day—June 3d—these checks were forwarded to the First National Bank at Nashville. Upon receiving these checks from the mail, the latter wrote defendant bank that it could not handle the checks, giving as a reason that the bank of A. Bryan & Co. at Watertown had suspended. In reply to this, defendant bank wrote the First National Bank to forward the checks, and they would be paid. Thereupon that bank did forward the checks directly to the bank of A. Bryan & Co., and that bank, on the 13th of June, 1898, marked the checks paid, charged the amount of them to the account of Mr. Eastes, leaving it due him a balance of \$55, and returned these checks to him, but did not forward the amount called for by the checks to the First National Bank. The 13th of June was Saturday, and on Monday, the 15th, A. Bryan & Co. made an assignment, and closed their doors, with only \$30 in cash on hand. On said 13th day of June the First National Bank sent their attorney to A. Bryan & Co. for the purpose of securing them against loss on checks they held against said banking concern, amounting to \$1,147, not including the checks now in controversy. This attorney obtained from A. Bryan & Co. collaterals to the amount of \$1,700 to secure the above-mentioned checks, amounting to

NOTE.—As to sending checks for collection directly to the drawee bank, see *Anderson v. Rodgers* (Kan.) 27 L. R. A. 248, and note; also *Kershaw v. Ladd* (Or.) 44 L. R. A. 236, and 47 L. R. A.

Minneapolis Sash & Door Co. v. Metropolitan Bank (Minn.) 44 L. R. A. 504.

As to banking customs in general, see note to *Schoonover v. Jacobs* (Iowa) 21 L. R. A. 440.

\$1,147, but asked for and took no security for the checks involved in this litigation, nor does it appear that he had any instructions to demand collaterals to secure these checks. According to the usual course of the mail, letters mailed at Alexandria on June 3d would reach Nashville on the same day, and a reply might be had at Alexandria by the 4th or 5th of June. So, if the First National Bank wrote by return mail its letter to the defendant bank, in which it stated that it could not handle the checks because A. Bryan & Co. had closed their bank, this letter reached Alexandria at least by the evening of the 5th of June, and, if the defendant bank promptly forwarded its letter to the First National Bank, in which it said that the checks would be paid, and instructed that bank to forward them, this letter reached Nashville not later than Saturday, June 5, or Sunday, June 7. If the First National Bank promptly obeyed the instructions given, and forwarded the checks to Watertown for collection, they ought to have reached that place not later than June 9, assuming that the First National Bank received the letter of instructions of defendant bank not earlier than June 8. In due course of mail, the First National Bank should have had returns from the checks not later than June 11, which was Thursday. The above findings are based upon the assumption that the defendant bank and its correspondent acted with reasonable promptness in conducting their correspondence and in forwarding the checks. The proof does not, however, in fact, disclose on what day the First National Bank wrote its letters to defendant bank, saying it could not handle the checks because A. Bryan & Co. had closed their doors, nor the dates of any of the subsequent correspondence. The bank of A. Bryan & Co. was closed the whole of the week ending June 6. It opened for business June 8, and continued open during the whole of that week, paying checks, but finally closed the doors, as already stated, on the following Monday, June 15, and made an assignment, leaving a large number of checks unpaid. At the time the checks in question were deposited with the defendant bank, it was known both by that bank and by the complainant that A. Bryan & Co. were embarrassed, and that the bank was then closed, but it was supposed by both parties that this embarrassment was only temporary, and during that week defendant bank lent A. Bryan & Co. without security, \$1,000, to enable them to get their bank again started. Watertown, the place where A. Bryan & Co.'s bank was located, was only 7 miles from Alexandria, and was between that point and Nashville, and there was daily mail between the two places; also telephone connection; likewise one could go from Alexandria to Watertown by private conveyance, and return within three hours. It was expected, however, by the complainant, that defendant bank would put the checks in course of collection according to its usual method of business; that is, through its correspondents. It was not contemplated or expected by either party that the bank

would send a private messenger to Watertown for the purpose of presenting the checks at the counter of the bank of A. Bryan & Co. It does not directly appear from the proof that there was more than one bank at Watertown, but we think it is a fair inference from the testimony that there was no other bank there. There is no proof showing what the custom of banks is as to the presenting of checks upon a drawee bank when there is only one bank at the place; that is, as to whether the custom of the business is to mail the check to such drawee bank. The bank of A. Bryan & Co. was insolvent when the checks in controversy were issued by defendant Eastes, but neither he nor complainant nor the defendant bank knew the fact, but, as stated, all knew that said bank of A. Bryan & Co. was embarrassed. The First National Bank at Nashville was the regular correspondent of the bank at Alexandria. The latter bank was in the habit of intrusting similar business to the former.

Is the Bank of Alexandria liable under the facts above stated? We think not. In the case of *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 618, 18 S. W. 115, it is said: "By the great weight of authority, the bank receiving a bill for collection, payable at a distant point, is impliedly instructed to send such bill to a suitable agent for collection at the place of payment; and such agent, when so selected, becomes the agent of the owner of the bill, and is not the agent of the transmitting bank. *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691. If the debt be lost by the negligence of the agent so selected, the right of action is in the owner of the paper, and not in the bank forwarding the paper. *Ibid.* The liability of the transmitting bank is only for its own negligence." In this statement of the rule it is observed that the court says the initial bank must send the paper to a suitable agent for collection at the place of payment. The case from which we have taken this excerpt exhibited an instance of where the initial bank sent directly to another bank in the place of payment. The same is true of the 8 Baxter case referred to therein. But we do not understand the court to mean that the initial bank would be bound to send the papers directly to the place of payment, or that it could not make use of intermediary banks, according to its usual course of business, for the purpose of conducting the paper to the place of payment. The rule is, where a check is drawn on a bank distant from the initial bank in which such check is placed for collection, the initial bank has the right to forward the check to the place of payment through its wonted channel of correspondence. In *Morse on Banking* the following illustration is given: A and B and their respective banks were in two distant towns, and A delivered or sent to B his check on the C Bank. B deposited it in the D Bank for collection. It is said if C Bank and D Bank are in two provincial towns, and D Bank has no correspondent in the place where C Bank is situated, it may send

to its correspondent in the nearest large town or city whose facilities for collecting from C Bank are, or might reasonably be supposed to be, greater and more available. It is true that this may result in some instances in loss to the holder of the check. Mr. Morse, in the course of stating the rule, notes this fact as follows: "This course of proceeding on the part of B's bank may be perfectly sufficient as an acquittance of its duty and liability to B. Yet it may also be perfectly consistent with B's loss of his remedy against A in case payment of the check should be lost by reason of its arriving at C Bank later by this process than it would have arrived if sent according to those ordinary requirements of the common law which govern the relations of drawer and payee. It will be seen, therefore, that the deposit of a check in the holder's bank for collection may, in a certain conjunction of circumstances, result in his total loss of the amount, without any right of action against any person or corporation for reimbursement. Several facts must combine, it is true, to produce this conjunction, to wit: First, the presentment by the collecting bank to the drawee bank for payment must be later than it would have been had the ordinary rule of presentment as between drawer and payee been followed; second, it must appear that the check would have been paid had it been presented within the time set by this rule, or, at least, that the bank was paying during that time, and that the drawer's account was good for the sum called for; third, payment must be refused, and the refusal must be by reason of the failure of the bank occurring subsequent to such time, and before actual presentment; or by some other like reason beyond the control of the drawer." But it is further said: "There can be no real necessity for the employment of any intermediate agencies where the collecting bank and the drawee bank are both in the same place. If the collecting bank, without distinct permission, sees fit to have recourse to them, it does so at its own risk of all the consequences which may result. This rule, of course, does not operate to abridge the rights of banks to make any of those transfers of debits and credits among themselves in the course of clearing, which usage has introduced for the purpose of facilitating the settlement of their mutual accounts in the most convenient manner." Again it is said: "The understanding which is assumed to be mutual and to enter into the contract of the parties is that the bank shall perform the various acts which are embraced in the business of collection in every respect according to the method which it is wont to pursue in accordance with the local law, rules, and regulation." Again, stating the question as to which bank is liable to the owner of the paper who deposited it for collection, it is said: "The question concerns the duty and liability of the several banks preceding in the chain of transmission the last one which has to effect the actual collection. Thus, if A, living in Portland, holds a note payable in New York, and deposits it in his bank in 47 L. R. A.

Portland for collection, the bank in Portland may be supposed to forward it to its correspondent bank in Boston, which in turn will forward it to its correspondent bank in New York city, where finally the collection is to be made. The question then is whether or not the Portland bank has so far fulfilled and discharged its duty to A by the due and sufficient transmission of the paper on its course for collection that it is thereby freed and absolutely relieved from all liability for defaults subsequently occurring in Boston or in New York; or whether, on the other hand, the Boston and New York banks, and any notary or other agent employed by the last bank in the business of collection (including notarial demand and protest, if made), are all subagents of the Portland bank in such a sense that the law of agency rendering it, as principal, liable to answer for any and all their defaults, will govern in the case." Morse, Banks & Banking, 2d revised ed. 391-393, 397, 404.

Assuming, then, that under the rules stated the check may be sent to the place of payment through intermediate banks, it follows, under the rule, that the initial bank discharges its duty to the person who deposits the check for collection if such intermediate bank or banks are suitable persons for the performance of the business; and, in the event such proper selections are made, such intermediate bank or banks, down to the last one in the chain, become the agents of the owner of the paper, and responsible to him as such. It is said that it would be very strong evidence on the part of the bank if it is shown to have selected the agent which it is wont to employ for the transaction of its own business of the same nature, and that the courts are accustomed to speak of such evidence as if it were substantially conclusive. Morse, Banks & Banking, 2d Revised ed. 415. It follows that under the facts found the Bank of Alexandria exercised proper care in selecting the First National Bank as an intermediary, and that its duty was then discharged to the complainant when it sent the paper by the mail of the next day to said First National Bank, and the latter became the agent of the complainant. It is true that when the First National Bank sent the check directly to the drawee bank it was guilty of negligence. The authorities upon this point in favor of the proposition stated are overwhelming. *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; *Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248, and see note to that case containing a collection of the authorities; 3 Am. & Eng. Enc. Law, p. 809, note 3. But the Bank of Alexandria, under the rules stated, is not responsible for this default of the First National Bank. For another reason, also, we must hold that the Bank of Alexandria is not liable. This is that the bank of A. Bryan & Co. was insolvent at the time the check was drawn, and it was not at all certain that the check would

have been paid even if presented. It certainly was not collectible by law. So, even if the defendant bank had been guilty of negligence, no right of action would exist. There must not only be negligence, but injury, as a result of it. *Sahlken v. Bank of Lenoire*, 90 Tenn. 221, 231-233, 16 S. W. 373; *Bruce v. Baxter*, 7 Lea, 477; *Collier v. Pulham*, 13 Lea, 114, 118.

The result is, there is no error in the decree of the chancellor, and it must be affirmed, with costs of this court and of the court below.

All the Judges concur.

Affirmed orally by Supreme Court January 10, 1899.

NANZ & NEUNER

v.

CUMBERLAND GAP PARK COMPANY *et al.*, Appts.

Attila COX, Trustee, etc., Appt.,

v.

NANZ & NEUNER.

(.....Tenn.....)

Enriching the soil and beautifying ground by planting flowers, shrubs, and trees on it, without making any erection, structure, building, or fixture, except a rustic bridge, the mode or material of constructing which is not shown, and which is an item of but little importance, will not sustain a mechanic's lien under Shannon's Code, § 3531, authorizing liens for a house, fixtures, machinery, "or improvements made" upon land, in favor of the mechanic or undertaker, founder or machinist, who does the work or furnishes the materials or puts thereon any fixtures, machinery, or material, and in favor of all persons who do work or furnish material "for the building contemplated."

(September 30, 1899.)

APPEALS by defendants in the first case and plaintiff in the second from a decree of the Court of Chancery Appeals which affirmed a decree of the Chancery Court for Claiborne County fixing a mechanic's lien upon property of the Cumberland Gap Park Company. *Reversed.*

The facts are stated in the opinion.

Mr. Jesse L. Rogers for appellant Cox.

Messrs. Luckey, Sanford, & Fowler, for appellee:

The work and labor done and materials furnished by Nanz & Neuner were such as clearly give them a lien under the statutes of Tennessee.

Shannon's Code, § 3531.

"The lien is favored by the legislature, and should not be hazarded by dangerous niceties

in its enforcement," and "a liberal construction of our mechanics' lien laws is the rule."

Barnes v. Thompson, 2 Swan, 314; *Alley v. Lanier*, 1 Coldw. 540; *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 11 L. R. A. 580, 14 S. W. 1087; 15 Am. & Eng. Enc. Law, p. 179.

Wilkes, J., delivered the opinion of the court.

The Cumberland Gap Park Company owned certain real estate at Harrogate, Tennessee, upon which was erected the Four Seasons Hotel. Nanz & Neuner are florists at Louisville, Kentucky, and made a contract with the company in writing to furnish and plant flowers and shrubbery, to build a rustic bridge, and grade the walks and ways about the premises for the aggregate sum of \$3,000. They carried out their contract, but received only part of the amount agreed to be paid, and there is a balance owing under the contract of \$2,744.33, besides interest. Nanz & Neuner insist that they have a lien upon the buildings and grounds of the company for the amount due them, by the terms and under the provisions of our statutes relating to liens of mechanics, and embodied in § 3531 of Shannon's Code. The company has become insolvent, and is being, or has been, wound up under a proceeding in the Federal court, and the purchaser under decrees in that cause, with the company and others, is resisting the right to any lien as claimed.

The chancellor held that a lien exists under the statute for the character of work done, and materials furnished, in this case, and gave decree for such lien and judgment for the amount due, and the court of chancery appeals has affirmed this holding, and there is an appeal to this court, and an assignment of error. The statute referred to, and under which the lien is claimed, is as follows: "Mechanic's Lien, and Lien for Labor and Materials. There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made, by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work or any part of the work, or furnishes the materials or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who do any portion of the work or furnish any portion of the material, for the building contemplated in this section." Shannon's Code, § 3531.

It has been held in a number of cases, in this as well as in other states, that a liberal construction should be given to mechanic's lien laws. *Barnes v. Thompson*, 2 Swan, 314; *Alley v. Lanier*, 1 Coldw. 540; *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 14 S. W. 1087; *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136; 15 Am. & Eng. Enc. Law, p.

NOTE.—On the question, Who are laborers within a statute creating liens? see *note* to *Tod v. Kentucky Union R. Co.* (C. C. App. 6th C.) 18 L. R. A. 805; also *Rogers v. Dexter* & 47 L. R. A.

P. R. Co. (Me.) 21 L. R. A. 528; and *Little Rock, H. S. & T. R. Co. v. Spencer* (Ark.) 42 L. R. A. 834.

179; *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. 104; *Harrison v. Women's Homœopathic Asso.* 134 Pa. 558, 19 Atl. 804; *Dugan Out Stone Co. v. Gray*, 114 Mo. 497, 21 S. W. 854. And this liberal construction applies to the subject-matter that is the property to which the lien attaches, and against which it may be enforced. *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 14 S. W. 1087. While we recognize these rules as well established, they only apply in favor of parties who are clearly entitled to such lien under the statute. In *Thompson v. Baxter*, 92 Tenn. 305, 21 S. W. 668, it is said: "The claimant must make it clearly appear that he has a lien. This lien is purely statutory, and unknown to the common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanic's lien law does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statutes. . . . No one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none." The mechanic's lien law being purely a creation of, and regulated by, statute, we can derive but little aid in the proper construction of our own statute from the decisions of other states, unless the statutes are identical in terms, which is not probably the case in any two states in the Union, nor are the holdings uniform. To illustrate: The decisions in many states hold that architects are entitled to the lien of mechanics. See cases collated in *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262. But in this state it is held they are not entitled to such lien. *Thompson v. Baxter*, 92 Tenn. 305, 21 S. W. 668. And this is the holding in many cases in other states. See *Stryker v. Cassidy* (N. Y.) 32 Am. Rep. 265, 266, note. The statutes in the several states are more or less specific in enumerating the kind of work done, labor and material furnished, and improvements made, and in some states, in express terms, the lien is given for fences, walls, pavements, etc. But generally terms are used which indicate that the lien is to exist only for buildings or some kind of structures of wood, stone, or metal, erected on the land, or fixtures or machinery placed in the buildings or connected therewith, and, under such statutes, it has been held that the lien does not extend to and embrace fences, walls, swings, bridges, seats, etc. See a collation of cases in *La Crosse & M. R. Co. v. Vanderpool*, 78 Am. Dec. 691, and notes, 11 Wis. 119. Thus, it has been held that a statute which gives a lien for the building, repairing, or ornamenting, any house or other building, or appurtenance thereto, gives no lien upon a lot for curbing, grading, and paving the street in front, though done under a contract with the owner of the lot. *Smith v. Kennedy*, 89 Ill. 485. In Indiana it is held that making a pavement in front of

a lot, or abutting thereto, cannot be regarded in any sense as the construction or repair of a building or such lot. *Knaube v. Kerchner*, 39 Ind. 217. So in *Yearsley v. Flanigen*, 22 Pa. 489. When, however, the pavement is laid by one who furnishes the brick and stone work about the building, including the pavement, the contract being entire, the lien will cover cost of the pavement as well as the building. *Yearsley v. Flanigen*, 22 Pa. 489; *Dugan Out Stone Co. v. Gray*, 114 Mo. 497, 21 S. W. 854; *McDermott v. Olaus*, 104 Mo. 14, 15 S. W. 995. The same principle is applied in *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 14 S. W. 1087. In *Henry v. Plitt*, 84 Mo. 237, it is held that, when walks and fences are constructed under one entire contract, the mechanic has a lien for the labor and material expended on them, if they are appurtenant to the building and constructed at the same time. In Oregon it was held that a person employed to grade, fill, and otherwise improve a lot in an incorporated city has a lien for his work in that state. *Pils v. Killingsworth*, 20 Or. 432, 26 Pac. 305. But in Minnesota it is held that a mechanic has no lien for filling in and grading earth about buildings already erected, when the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land. *Pratt v. Dunoon*, 36 Minn. 545, 32 N. W. 709. Again, in *Drow v. Mason*, 81 Ill. 498, 25 Am. Rep. 288, it is held that furnishing and fixing a lightning rod on a house is not within the statute giving a lien for labor and materials in building, altering, repairing, or ornamenting a house. In *Pratt v. Dunoon*, 36 Minn. 545, 32 N. W. 709, it is stated that the statute of Minnesota gives a lien for the erection, alteration, or repair of any house, mill, manufacturing or other building or appurtenances, and it was held that this language would not authorize a lien for improvements or operations on the soil merely, which do not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land, and which are wholly unconnected with the erection of, or work upon, such artificial structures. The lien in that case was claimed for earth furnished and labor done in banking up the basement and foundation walls of the buildings on the premises, and in filling and grading the grounds for the purpose of sodding, and the lien was in that case refused. These holdings are largely based, if not altogether, upon the special wording and phraseology of the statutes under which they are made, and, while they are instructive, they are not controlling, under our statute. In the present case, the contention is that the lien rests upon a proper construction of the term used in the statute, "improvements made." But we think it evident, from a reading of the statute, that the improvements therein referred to are such as buildings and structures. The latter part of the section uses the expression, "building contemplated in this section."

And this construction of these terms is strengthened by the use and the connection in which they are used in §§ 3533, 3534, 3540, 3542, Shannon's Code. In Missouri, where the decisions are very liberal in sustaining and extending the lien, it has been held that the word "improvements" will not cover engines, boilers, etc. *Collins v. Mott*, 45 Mo. 100. In *Brown v. Wyman*, 56 Iowa, 452, 9 N. W. 344, it is held that a person who breaks a prairie, and prepares it for cultivation, is not entitled to a lien given for any building, erection, or "improvement upon land." In this case it was said that the breaking of the prairie was an improvement of the land, and so was each annual plowing. Fertilizers cause an improvement of the land, but the party who furnishes them to be put into the land has no lien for furnishing such material to make the improvement. In the case at bar the complainants "improved" the property by putting on it flowers, shrubs, trees, and by grading, and probably graveling, the grounds and walks, but they made no erections, structures, buildings, fixtures, or machinery unless the rustic bridge may be classed as such, and there is nothing to show how or out of what it was constructed, and it was plainly but a part of the grading and furnishing the walks and drives, and an item of but little importance, as it is not separately priced, and enters into other items, valued at \$1,200. If we should hold that a mechanic's lien exists for such work as this, and such material and such improvements, we must also hold, as a logical sequence, that the person who, under a contract, fells the forest trees, and turns the soil, and puts the land in cultivation, and thus permanently improves it, has a lien for such services, and we must also hold that the dealer who furnishes the fertilizer to improve the ground also has a lien, and that the laborer who undertakes to do clearing, ditching, and grubbing has a lien. Indeed, we can draw the line nowhere, if it would exclude anyone who does any labor or furnishes any material to permanently improve the land at any time. We think the statute refers to erections, structures, fixtures, machinery, and buildings,—things constructed upon the land,—and not to the enriching of the soil and beautifying the ground by planting flowers, shrubs, and trees on it.

We are of opinion, therefore, that the chancellor and Court of Chancery Appeals were in error in fixing a lien in this case, and their holdings are reversed, and the complainants' bill is dismissed at their costs. In this view of the case, it is not necessary to consider the other questions in the case, except to say that we do not think the proceedings in the Federal court could prevent or estop complainants from asserting or enforcing their lien if they had one. They are entitled to their judgment against the company with which they contracted, but must pay all costs.

47 L. R. A.

E. G. ROBINSON

v.

W. W. BIERCE, *Appt.*

(.....Tenn.....)

1. The surrender of possession without actual eviction imposes upon a grantee under covenants of warranty and against encumbrances the burden of showing that he surrendered to a paramount title in order to recover on his warranties.
2. Eight years' unexplained delay in prosecuting suits for taxes will defeat the lien thereby acquired on the property, where, except for the suits, the taxes would be barred by statute.
3. Payment of taxes after they would have been barred except for suits instituted therefor, and after the suits have been delayed so long as to defeat the lien acquired by them, does not entitle a grantee to recover on covenants of warranty and against encumbrances.

(May 8, 1899.)

A PPEAL by defendant from a judgment of the Chancery Court for Shelby County in favor of plaintiff in an action brought to recover the amount of taxes which plaintiff had paid to remove a lien on property sold to him by defendant under covenant of warranty. *Reversed.*

The facts are stated in the opinion.

Mr. R. M. Heath, for appellant:

Covenants of seisin against encumbrances and of right to convey, if untrue, are broken immediately when made.

Kenney v. Norton, 10 Heisk. 387.

As nearly twelve years had elapsed after the deed to Robinson had been made before he paid the claimed taxes and costs, any suit upon the various covenants was barred by the statute of limitations and laches.

Galliher v. Galliher, 10 Lea, 27.

A breach of covenant of general warranty must be by eviction.

East Tennessee Nat. Bank v. First Nat. Bank, 7 Lea, 425; *Allison v. Allison*, 1 Yerg. 24; *Ferriss v. Harshea*, Mart. & Y. 48, 17 Am. Dec. 782; *Miller v. Bentley*, 5 Sneed, 675; *Callis v. Cogbill*, 9 Lea, 138.

Robinson did not personally owe these claimed taxes, and he was interfering with people who also did not admit liability, and who were endeavoring to investigate.

He committed "merely an officious voluntary act" wholly incapable of creating the relation of debtor and creditor between the parties.

NOTE.—As to the effect of laches in respect to a claim of the state, see also *State v. Spon-angle* (W. Va.) 43 L. R. A. 727.

As to the effect of delay to terminate the lien of a *Ms pendens*, see *Taylor v. Carroll* (Md.) 44 L. R. A. 479.

On the question when taxes on land become a lien or encumbrance, see note to *Craig v. Summers* (Minn.) 15 L. R. A. 286.

McNairy v. Thompson, 1 Sneed, 154; *Ferguson v. Quinn*, 97 Tenn. 46, 33 L. R. A. 688, 30 S. W. 576.

If Robinson could have defended himself he was bound to do so.

De La Cuesta v. Insurance Co. of N. A. 136 Pa. 62, 9 L. R. A. 635, 20 Atl. 505.

The inexcusable laches of the plaintiff in the tax suit, if it was ever good, furnished ample defense to E. G. Robinson.

Mann v. Roberts, 11 Lea, 57; *Collins v. North British & M. Ins. Co.* 91 Tenn. 435, 19 S. W. 525; *Angell, Limitations*, note 4, § 323; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 78, 42 S. W. 1062; *Armstrong v. Harrison*, 1 Head, 382; *Jones v. Cloud*, 4 Coldw. 236; *Maxwell v. Lea*, 6 Heisk. 247.

Messrs. Pierson & Ewing, for appellee:

The act creating the limitation provides that the institution of the suit should arrest the running of the statute, and filing the bill was certainly the institution of the suit.

Collins v. North British & M. Ins. Co. 91 Tenn. 432, 19 S. W. 525.

McFarland, Special Judge, delivered the opinion of the court:

On 16th February, 1886, C. W. Frazer, now deceased, sold to W. W. Bierce a lot in Memphis, and executed a deed to him. On the 31st July, 1886, Bierce sold this lot to E. G. Robinson, complainant herein. At the time of sale by Frazer to Bierce there were some back taxes due on this lot; and when Frazer executed his deed to Bierce he also executed to Bierce a written agreement in which it is recited that back taxes were due upon this lot, and that by this agreement Bierce agreed to take no steps about the same, nor interfere therein, and that the payment and settlement of same were to be left entirely and solely with said C. W. Frazer; and Bierce testifies that at the time of the sale by him to Robinson the latter was informed as to the arrangement between himself and Frazer in regard to the back taxes, and the original paper was turned over to him, and he was at the time fully aware that Frazer was to look after the tax matter, and take such course as he saw proper in respect thereto, without interference on his (Bierce's) part, and Robinson assented to the arrangement. In 1897 Robinson, through his agent, Avery, negotiated a sale of the lot to one Graves, but, these taxes appearing on the books as unpaid, Graves refused to complete the purchase; and therefore a correspondence ensued between the parties about them, Robinson insisting that Bierce should pay them, and Bierce referred the matter to Mrs. Frazer, executor of C. W. Frazer. On December 28, 1897, Bierce writes to Avery, agent of Robinson, in response to one from him, saying: "We are this day writing Mrs. Frazer to have Mr. Heath consult with you immediately upon his return, and we verily believe there will be no trouble whatever in obtaining a check 47 L. R. A.

from Mr. Heath for whatever amount you may expend in relieving the Calhoun St. property from any tax encumbrance." Upon receiving this letter Avery had the taxes reduced as much as possible, and paid the balance of taxes, which were state and county for the years 1873 to 1884, both inclusive, and amounting to \$422.99, including interest and costs, and thereupon filed his bill to recover the amount from Bierce. Bierce answered, claiming that these taxes were barred when paid by Robinson, and were not such an encumbrance upon the land as was covered by the warranty in his deed to Robinson. In this deed executed by Bierce to Robinson there were covenants of warranty and against encumbrances, but not of seisin. There was a decree for complainant, from which defendant Bierce has appealed and assigned errors.

The substantial question raised by the pleadings is, Were these taxes, when paid by Robinson, such an encumbrance on the land as to justify Robinson in paying off same before actual eviction, and entitle him to sue his vendor? Under the common law, where there is a covenant of seisin this covenant is broken at once if there be an encumbrance, and there can be an action at once, for the breach. *Barnett v. Clark*, 5 Sneed, 436; *Kincaid v. Brittain*, 5 Sneed, 122; *Austin v. Richards*, 7 Heisk. 665. If there be only covenants of warranty of title, these cannot be sued on without alleging and proving actual eviction. *Crutcher v. Stump*, 5 Hayw. (Tenn.) 100; *Allison v. Allison*, 1 Yerg. 16; *Ferriss v. Harsha*, Mart. & Y. 48, 17 Am. Dec. 782. Complainant insists, however, that under covenants against encumbrances the authorities in Tennessee hold that a vendee may yield to a superior title, or pay off an encumbrance or judgment or lien on the land, and sue for breach of the covenants, without eviction. *Kenney v. Norton*, 10 Heisk. 388; *Austin v. McKinney*, 5 Lea, 499; *Callis v. Cogbill*, 9 Lea, 137. In *Kenney v. Norton*, 101 Heisk. 388, Norton had conveyed to Hubbard, trustee, to secure a debt. The trustee sold to Kenney. Norton owed unpaid purchase money, and the land was sold, upon proper proceedings, for payment of this purchase money, and was bought in by Kenney, who then sued Norton on his covenants of title made to Hubbard, trustee. Held, that this covenant of warranty ran with the land, and that the purchaser could pay off the encumbrance fastened upon the land; suggesting that this was stated as the rule in *Stipe v. Stipe*, 2 Head, 171, but not definitely settled. The court adds: "It must, as a matter of course, be a valid, subsisting encumbrance fixed on the land, and one which the party would be compelled either to discharge or have enforced against the land, and which was paramount to his own title, and by law would override it." To the same effect is *Austin v. McKinney*, 5 Lea, 499. Judgment of eviction, without actual eviction, is conclusive,

where notice is given to defend. *Greenlaw v. Williams*, 2 Lea, 533; *Williams v. Burg*, 9 Lea, 455. In *Callie v. Cogbill*, 9 Lea, 137, a judgment for possession of land, recovered against the widow of warrantor, holding under warrantor, in favor of a third party, held to be such eviction as would enable a vendee of same land, purchasing from warrantor, to recover purchase money. But it is maintained in such case that the party who surrenders possession without actual eviction does so at his peril, and in a suit against the warrantor the burden of proof lies upon the plaintiff to show the paramount title.

The burden, then, being upon the plaintiff here to show this paramount title, the question is, Has the complainant done so? The complainant has assumed this burden, and has shown that the lot was assessed to one Parker for taxes of 1873 and 1874, and to C. W. Frazer for the other years; that two tax bills were filed for the recovery of these taxes; and those tax bills and the proceedings thereunder are made parts of the record. There are several defects pointed out by defendant in these two proceedings, which are not necessary, however, to be noticed. The facts important to be noticed are that Frazer is made a party to the first bill, and the complainant, Robinson, to the second. In the first case a *pro confesso* was taken against Frazer on the 19th of August, 1887, and no further steps taken as to him. He died in July, 1897; and in the second proceeding a service of process was had on Robinson on April 14, 1890, and no further steps taken in this case. With these two tax suits in this condition, Robinson voluntarily paid off these taxes January 13, 1898,—nearly eleven years after the last step taken in the first case, and eight years after the last step in the second suit. Under act 1885, chap. 24, all taxes are barred by limitation unless suit is brought within six years from the 1st January of the year on which taxes accrued. All of these taxes were barred, then, unless the bar is saved by the institution of the several suits therefor above mentioned. The institution of these suits preserved the lien of these taxes after bar operated, not as originally imposed, but by virtue of the institution of the suits themselves, and converted the statutory lien into one of *lis pendens*, and must be regarded as such at the time of the payment of these taxes; and the question then becomes one of *lis pendens*. The contention of complainant is that by the very terms of the act of 1885 itself the institution of the suit for taxes, and nothing more, suspends the running of the statute, and an ingenious argument to this effect is based upon the word "instituted" in the act, citing *Collins v. North British & M. Ins. Co.* 91 Tenn. 432, 19 S. W. 525. That case only decides that the filing of a bill in equity is the beginning or institution of a suit, and does not affect this question. The construction contended for by learned counsel for complainant, of this statute, is too narrow. 47 L. R. A.

The institution of a suit for taxes properly begun against the proper parties does stop the running of the statute, but from its institution that suit is subject to all the rules of practice and the results of laches or subsequent incidents as any other suit; and if in this case there was such laches in its prosecution as lost to the state, county, or city the lien it acquired upon this property by the institution of its tax bills, or, to put it differently, if the state, county, or city, having instituted its tax suit so as once to suspend the statute of limitations, failed to prosecute such suit so as to preserve this suspension, it lost by laches the benefits obtained by bringing the suit. This is the effect of laches in the prosecution of any suit.

This complainant, in his bill, states that when he bought this property from Bierce he had no knowledge of the existence of any back taxes thereon which were any encumbrance on the property, and consequently did not know of the existence of any tax suits. He was therefore an innocent purchaser with respect to this *lis pendens* of this tax suit. In the case of *Mann v. Roberts*, 11 Lea, 57, failure to prosecute a suit for nearly four years was held to be such laches as lost the lien of *lis pendens* as against an innocent or bona fide purchaser of the land. In *Williamson v. Williams*, 11 Lea, 355, the same principle was held; the court saying the doctrine of many cases operates harshly upon innocent purchasers, and can only be sustained on grounds of public policy, where the private mischief must yield to public convenience. See *Murray v. Ballou*, 1 Johns. Ch. 576. This being so, whenever the case is within this rule it must be enforced, but should not be extended beyond its settled requirements and well-defined conditions. The true grounds upon which the courts should decide whether there has or has not been such a prosecution of any given suit as to preserve or destroy the continuity of the *lis pendens* is by the application of the established principles of estoppel. The law imposes the duty upon the plaintiff or complainant to prosecute with proper diligence. The public have a right to expect it. If there is a failure to prosecute, the courts have a right to treat the negligence as intentional and misleading to the public. If the degree of this negligence has been so great as to have induced the public to believe that the prosecution of the suit has been abandoned, they should then hold the plaintiff or complainant estopped from claiming to the contrary. 13 Am. & Eng. Enc. Law, p. 891. No fixed or arbitrary rule can be formulated by which to define laches, nor definite time fixed, without which steps shall be taken in a given suit, or the same brought to conclusion. To have the benefit of *lis pendens*, however, there should be a close and continuous prosecution of the suit from its commencement to its close; taking into consideration the character of the case, the obstacles thrown in the way by the op-

posing litigant, and the usual law's delay. *Hayden v. Bucklin*, 9 Paige, 512. A delay of seventeen months in one case, and of three years in another, have been held sufficient to deprive the creditor of a priority of lien by levy. *Owens v. Patten*, 6 B. Mon. 489, 44 Am. Dec. 780; *Deposit Bank v. Berry*, 2 Bush, 236. This court has held that the lien of a levy on land of a justice's execution may be lost, as against an intermediate innocent purchaser, by a failure to file the papers in the circuit court for condemnation in a reasonable time. *Anderson v. Talbot*, 1 Heisk. 407; *Zook v. Smith*, 6 Baxt. 213. The lien of an attachment on land has been held to be lost by a delay of two years in the prosecution of the suit (*Petree v. Bell*, 2 Bush, 58), and of a mechanic's lien where there was a delay of four years (*Ehrman v. Kendrick*, 1 Met. (Ky.) 146). These cases are all quoted with approval in the case of *Mann v. Roberts*, 11 Lea, 57. It is true that laches in prosecution of a given suit may be explained, and, thus explained, *lis pendens* may be preserved for a great number of years, but that does not help the complainant in this cause. The rule as laid down in *Callis v. Cogbill*, 9 Lea, 137, is that when the grantee in possession surrenders possession before eviction, or suffers eviction *pro tanto* by paying off an encumbrance, he must be prepared to justify such surrender by clearly making out the facts authorizing his acts. Here the complainant seeks to justify his payment of this encumbrance by showing pendency of these suits, and, in order to do this, exhibits records which disclose the gross laches in this prosecution, while he does not attempt to explain the effect of the laches.

It is again insisted that these were tax suits, and they should be treated with great leniency, because they involve a great number of tracts of land and a great number of parties, and that the delay is generally to the advantage of the defendants, and gives them time to raise the money to pay off the taxes. We know of no rule of sovereignty or divinity which hedges a tax suit with immunity from the rules of equity and practice which control other suits. The very facts stated by complainant, of the number of parties and tracts of land involved, tend to obscure particular lots and names of individual owners, and render more secret the liens placed upon particular lots; and bring these cases clearly within the rule which requires more active diligence in the prosecution of suits which fix secret liens, in order that hurt may not fall to innocent parties.

Our conclusion is that the complainant has not shown that, at the date he paid the taxes sued for, they constituted such an encumbrance upon the lot bought by him as justified him in paying them off before even a decree adjudging them to be a lien upon this lot.

The decree of the chancellor is reversed, and the bill dismissed, at the costs of the complainant.

47 L. R. A.

E. E. BENNETT

v.

Mayor, etc., of PULASKI.

(.....Tenn.....)

1. City ordinances for the regulation of the business of retailing intoxicating liquors, which is not prohibited by the general laws of the state, cannot, under the pretext of public regulation, prohibit or harass those engaged in the business by arbitrary, oppressive, unreasonable, and vexatious restrictions.
2. An ordinance requiring the curtains to front windows and doors of the lower story of a business house to be hoisted, raised up, or otherwise removed from sunset to sunrise during night is unreasonable and invalid as applied to a retail liquor dealer, when the business is not prohibited by state law.
3. An ordinance requiring saloons to be closed between 10 P. M. and 4 A. M., and also on Sunday, is a reasonable and valid exercise of the power to regulate such business.
4. An ordinance making it a misdemeanor to let a person in or out of a saloon during the hours in which the saloon is required to be closed is unreasonable and void.
5. An ordinance requiring the insertion in every saloon license of the legal hours in which the saloon keeper is permitted to do business is not invalid, as it is harmless, though useless.
6. The motives that prompt the enactment of an ordinance cannot be considered by the court in determining whether the ordinance is reasonable or unreasonable and oppressive.

(February 4, 1890.)

CROSS-APPEALS from the Court of Chancery Appeals affirming in part a decree of the Chancery Court for Giles County in a proceeding to enjoin the enforcement of certain ordinances looking to the regulation of the liquor traffic. *Affirmed*.

The facts are stated in the opinion.

Mr. Flournoy Rivers for complainant.

Mr. John T. Allen for defendant.

Wilson, J., delivered the opinion of the court:

This bill was filed May 28, 1898, by the

NOTE.—For power to prohibit screens in bar-room, see *Champer v. Greencastle* (Ind.) 24 L. R. A. 768, and note.

As to sale of intoxicating liquors on holidays, see note to *Merchants' Nat. Bank v. Jaffray* (Neb.) 19 L. R. A. on page 317.

As to power of state to regulate sale of intoxicating liquors, see *State v. Fulker* (Kan.) 7 L. R. A. 183, and note; *State v. Creeden* (Iowa) 7 L. R. A. 295, and note; *Tragesser v. Gray* (Md.) 9 L. R. A. 780, and note; *McCullough v. Brown* (S. C.) 23 L. R. A. 410; *State ex rel. George v. Alken* (S. C.) 26 L. R. A. 345; *State v. Gerhardt* (Ind.) 33 L. R. A. 313; *Plumb v. Christie* (Ga.) 42 L. R. A. 181; and *DeWalt's Appeal* (Pa.) 45 L. R. A. 890.

complainant, who is a retail liquor dealer doing business in Pulaski, against the mayor and aldermen of the town, to enjoin them from enforcing against him certain ordinances enacted by the municipal authorities, on the ground that they are arbitrary, unreasonable, and oppressive, contrary to common rights, deprive him of his property without due process of law, and that they were passed in obedience to the edicts of the church to which the mayor and aldermen belong, to further its propaganda for the prohibition of the liquor traffic, and not to regulate it. The bill is quite lengthy, covering over twenty pages of closely written matter in the record. It exhibits the charter, ordinances, etc., of the town, and designates the ordinances or by-laws complained of, and also a number of the pronouncements of the Methodist Episcopal Church South on the whisky question. It describes Giles county and Pulaski, the number of their inhabitants, gives their race, etc., the number of saloons in each, the number of churches and peace officers, and alleges that Pulaski is in a purely agricultural section, that it is not a manufacturing, mining, river, or railroad town, having the floating population of rough people usually supposed to inhabit such towns, and that, on the contrary, its people are quiet and peaceable, sober, industrious, and law-abiding, and that complainant pays his taxes, privileges, etc., and keeps a high-toned place of business, in consonance with the general moral level of the community, where the respected and peaceable citizens, or sojourners for the time in the city, can resort and get a refreshing stimulant or recoupment, and the recreation of a game of pool or billiards, in quiet and decent comfort, during or after the labors of the day. He insists that what might be a reasonable regulation of the liquor traffic in one of these rough towns, peopled by foreigners and others not inured and educated to the standard of American freeborn folk, would be wholly unreasonable, unjust, and oppressive in a town like Pulaski, and to its self-governing, sober, and self-respecting people. In other words, the contention of the bill, in this connection, is that the reasonableness or oppressive character of a municipal ordinance directed to the retail liquor traffic depends largely upon the location and surroundings of the particular town, and the habits and characteristics of its inhabitants and of the people of the territory immediately surrounding it. As stated, the bill is quite lengthy, and sets out many details and arguments tending to present, in the view of complainant, the oppressive nature and unreasonableness of the ordinances inveighed against. But we take it that the juridical ground of relief alleged may be summed up in the statement that the ordinances assailed were all parts of a scheme to harass and prohibit his business, in which he had invested considerable capital, not to regulate it to subserve the purposes of peace and good order, and that the scheme of the ordinances was adopted under the promptings of the re-

ligious sentiment and purpose of the church to which the town authorities passing them belong, to prohibit altogether the retail liquor traffic in Pulaski, and that, therefore, they were unreasonable and oppressive, and contrary to his legal rights under the laws and Constitution of the state, and should be set aside by the court. A temporary injunction issued as prayed for in the bill, under the fiat of a judge. Upon motion, and notice thereof, the chancellor, at chambers, dissolved or dismissed the preliminary injunction as to one of the ordinances, and retained it as to the other three assailed. After this, at the succeeding term of the court, the municipality interposed a demurrer to the bill, embracing eight grounds. The chancellor overruled all the grounds of the demurrer, except the second; holding what is designated in the record as the "Curtain Law Ordinance," the "Letting In and Out Ordinance," and the "Insertion of Hours of Business in Saloon License Ordinance" to be invalid. He held the "Closing and Opening Hour Ordinance" valid. The defendant was given thirty days in which to answer the bill. It, by its counsel, stated in open court that it did not desire to, and would not, file an answer, and it was granted an appeal to the supreme court. The complainant was also granted an appeal. Both have assigned errors. While the errors assigned are several in number, they all go to the point of the validity or invalidity of the city ordinances in question. The city insists that the ordinances are reasonable, and that their enactment was sanctioned by its charter and the general laws of the state. The complainant insists that they are oppressive and unreasonable; that they are not authorized by the charter and general law; that they were not enacted to subserve any needed police end, to preserve its peace, good order, and the morals of the town, nor to regulate his traffic in the liquor business, but that they were passed in obedience to a religious sentiment to prohibit the business.

It appears from the record that Pulaski is a municipal corporation established by the legislation of this state, and that various acts have been passed since its original creation investing it with municipal powers and duties. Among its powers thus conferred, relating directly or indirectly to the question at issue in the case, is the power "to pass all ordinances and by-laws, not contrary to the Constitution and laws of the state, that may be necessary to carry out the full intent and meaning of this act [act 1879] and to accomplish the object of their incorporation; to appoint as many policemen as may be necessary; to issue warrants for the arrest of parties violating the city ordinances, and to impose and collect fines therefor; to provide ordinances for the prevention and extinguishment of fires, to organize fire companies, to prevent the erection of wooden buildings in any part of the town," etc.; "to enact all such by-laws and ordinances as may be necessary and proper to preserve the health, peace, quiet, and good order of the

town; to prevent and remove nuisances; to establish night watches and patrols; to punish breaches of the peace and good order within the limits of the corporation; to establish and regulate markets and inspection; to impose and collect fines and forfeitures for the violation of its ordinances and by-laws; to collect taxes upon property, privileges, and polls taxed by the state; to tax bowling, nine and ten pin alleys, and billiard tables, to regulate, license, and tax all grocers, merchants, retailers, taverns, brokers, coffee houses, confectioners, retailers of liquor, peddlers, hawkers, livery-stable keepers, etc.; and to pass all by-laws and ordinances necessary to suppress and prevent all and any species of disorder and immorality within the limits of the corporation: provided such by-laws and ordinances shall not be inconsistent with the Constitution of the United States, or the Constitution of the state." There are other powers conferred, in respect to operating a system of public schools, waterworks, lighting plants, the issuance of bonds, and other matters, which need not be cited, as they have nothing to do with the controversy before us. Among the ordinances passed was one designated in the arguments before us as the "Closing Ordinance." It is § 96 of the city's printed code or compilation of its by-laws or ordinances, and is to the effect that after "September 1, 1895, it shall be unlawful for any owner, keeper, or clerk of any saloon, or house in which wines, beer, spirituous or malt liquors of any kind whatever are retailed, in the town of Pulaski, to keep his or her saloon in which such beverages are sold open between the hours of 10 o'clock P. M. and 5 o'clock A. M., and to refrain from selling or giving away any of these liquors between these hours, except upon the prescription of a regular practitioner of medicine." And a violation of the ordinance subjected the party guilty to fine of from \$10 to \$25. This ordinance was amended, as is conceded, so as to allow the whisky dealers to open at 4 o'clock A. M. The city authorities passed April 30, 1898, what are designated in the record, and assailed, as the "Curtain Ordinance" and the "Letting In and Out Ordinance." They are as follows: "Be it ordained by the mayor and aldermen of the town of Pulaski, Tennessee, that the by-laws and ordinances of said town be amended by adding the following, and the same shall be § 148 of said by-laws and ordinances: Sec. 148. Be it ordained by the mayor and aldermen of the town of Pulaski, that for the better protection of the life and property in the town of Pulaski, Tennessee, against fire caused by carelessness or otherwise, and for protection against burglaries and other violations of law, that all persons and merchants doing business of any kind, in said town, in houses having glass windows or doors in front, shall keep curtains or other obstructions to the front windows or doors in the lower story of all business houses hoisted, raised up, or otherwise removed from sunset to sunrise during night. Each and every violation of

47 L. R. A.

this act or ordinance shall be a misdemeanor, for which a fine of not less than five dollars nor more than fifty dollars shall be imposed, and that this ordinance take effect immediately after passage, the public welfare requiring it. All laws in conflict with this are hereby repealed." Be it ordained by the mayor and aldermen of the town of Pulaski, Tennessee, that § 96 of the by-laws and ordinances of Pulaski be and is hereby amended so as to read as follows: That after the word 'medicine' of said § 96, it shall continue to read as follows: That any saloon in Pulaski, the owner or clerk thereof that lets a person in or out of his or her saloon between the hours of 10 o'clock P. M. and 4 o'clock A. M. during week days, and from 10 P. M. Saturday night until 4 A. M. on the following Monday, shall be guilty of a misdemeanor, and for each offense be fined according to part two of this section. And it shall be unlawful for any person found going in or coming out, except the owner or clerk, of any house where wines, beer, spirituous or malt liquors are retailed, between the hours of 10 P. M. and 4 A. M., or on Sunday, and he shall be guilty of a misdemeanor, and be subject to a fine of not less than \$10.00 to \$25.00 for each violation of this ordinance." It is averred in the bill that another ordinance was passed, directing the recorder to insert in every saloon license issued by him the legal hours in which the saloonist was permitted to do business; that is, from 10 o'clock P. M. to 4 o'clock A. M. We do not find this ordinance in the printed copy of the charter and by-laws of the city furnished us, but it is averred in the bill that such an ordinance was passed and was in force, and upon demurrer this averment must be taken as true. It is one of the ordinances assailed, and that was set aside by the decree of the chancellor on the demurrer. As before indicated, the chancellor held the 10 o'clock P. M. closing ordinance to be valid.

The question in the case is, Are these ordinances reasonable, and their enactment sanctioned by the charter of the town of Pulaski and the general law? If they are, they should be upheld by the courts. If they are not, they should be annulled, or their enforcement enjoined. The authority, power, and jurisdiction of courts of equity in this state to set aside and enjoin the enforcement of municipal ordinances not sanctioned by the charter of the municipality enacting them, and by the general law, is too well settled at this day to be open to question. Municipalities derive their power from their charters, and such powers are limited by them, and, being delegated agencies or arms of the state, their ordinances must conform to the Constitution and general law of the state. It follows that an ordinance of a municipality not sanctioned by its charter, or obnoxious to the Constitution and general law, is *ipso facto* void. This is elementary law, as announced uniformly, we believe, by all the courts. *Robinson v. Franklin*, 1 Humph. 156, 34 Am. Dec. 627, full note and cases cited; *Memphis v. Memphis Water Co.* 8 Baxt. 590; *Ward v.*

Greeneville, 8 Baxt. 229; *Smith v. Knoxville*, 3 Head, 245; *South Covington & C. Street R. Co. v. Berry*, 40 Am. St. Rep. 161, note, 93 Ky. 43, 15 L. R. A. 604, 18 S. W. 1020; *Phillips v. Denver*, 41 Am. St. Rep. 230, note, 19 Colo. 179, 34 Pac. 902; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202. It is equally well settled that municipal ordinances must be reasonable. If they are oppressive, repugnant to fundamental rights, or obnoxious to the general laws of the state, they will not be permitted to stand when questioned before the courts. Authorities *supra*; *Columbia v. Beasley*, 1 Humph. 241, 34 Am. Dec. 640; *Anderson v. Wellington*, 40 Kan. 173, 19 Pac. 719; 2 Kent, Com. 296; *New York v. Dry Dock, E. B. & B. R. Co.* 28 Am. St. Rep. 614, note, 133 N. Y. 104, 30 N. E. 563; *People v. Armstrong*, 16 Am. St. Rep. 584, note, 73 Mich. 288, 2 L. R. A. 721, 41 N. W. 275. The business of retailing whisky is not prohibited by the general laws of this state. It is recognized as legal, on condition that the retailer pays his tax and procures a license. *Ward v. Greeneville*, 8 Baxt. 228. And while municipalities in this state as a general thing, and especially the city of Pulaski, under its charter, have the right to regulate the business, they have no right, under the pretext of a public regulation, to prohibit or harass those engaged in it, by arbitrary, oppressive, unreasonable, and vexatious restrictions. *Ward v. Greeneville*, 8 Baxt. 228; *Grills v. Jonesboro*, 8 Baxt. 247; *Burge v. Dyersburg* (Jackson, April term, 1896). In *Ward v. Greeneville*, 8 Baxt. 228, it was held that an ordinance of Greeneville forbidding licensed retailers from selling liquors between the hours of 6 P. M. and 6 A. M. was unreasonable and oppressive. In the case of *Grills v. Jonesboro*, 8 Baxt. 247, in the same volume, an ordinance prohibiting the sale of liquors by a licensed dealer after 6 P. M. on the three first days of each term of the circuit court, on the days on which the county court is held, on the days when any public show takes place in the town, on the days of the college commencement, and on the days when fairs are held at or near Jonesboro, and annexing a penalty for its violation, was held to be unreasonable and oppressive. Grills filed his bill in the chancery court to enjoin its enforcement against him, as a retail liquor dealer. A demurrer was filed by the town, the demurrer was overruled, and the town appealed. The supreme court affirmed his decree, and made the injunction perpetual; Chief Justice Nicholson saying, in the opinion of the court: "The allegations of the bill in the present case make a clear case of excessive and unauthorized exercise of the police powers of the corporate authorities. Whatever may be our views as to the wisdom of prohibitory laws for the prevention or suppression of the evils of intemperance, so long as the legislature continues to legalize the traffic, and to confer on those engaged in it the rights attached to their privileges, the courts are bound to protect the exercise and enjoyment of these rights and privileges against unreasonable and oppressive ordinances passed by corporate authorities, al-

though they may, in the judgment of these authorities, be passed in the interest of morality, religion, and good order. The law of the state is paramount, and must control." In the case of *Ward v. Greeneville*, 8 Baxt. 228, the chief justice said: "It must be borne in mind that a municipal corporation has no power, under the pretext of a public regulation, to prohibit the exercise of a right conferred by the state. Whenever this is done, and to whatever extent, the prohibition, merely as a prohibition, is unreasonable, oppressive, and invalid. The only reason which we can see for restraining the trade for two hours before dark and for two hours after daylight is simply for the purpose of prohibition to that extent. The reason may be a sound one, when viewed simply as a prohibitory measure. It might be equally sound if the prohibition was total and absolute. But the state has virtually forbidden a municipal corporation to exercise its police powers for purposes of prohibition merely. To be legitimate, the prohibition must be so restricted as not to interfere unreasonably or oppressively with the rights conferred by the state."

The ordinances questioned here must be tested by these principles. The "Curtain Ordinance" is obnoxious to them. It is clearly met by the case of *Burge v. Dyersburg*, above cited. See also *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Champer v. Greencastle*, 46 Am. St. Rep. 390, note, and cases cited, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14. Consistently with the principles above announced, it has been held by our courts and those of other states that an ordinance requiring saloons, billiard halls, etc., to close at dark or at 9 or 10 o'clock P. M. has been held reasonable. *Ward v. Greeneville*, 8 Baxt. 228, and cases cited; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202; Dill. Mun. Corp. § 400. So that, nothing more appearing, the "Closing Ordinance," as it is called, is not in excess of the power of the corporation to pass. The "Letting In and Out Ordinance" is, we think, under the rules, open to the objection that it is unreasonable. The court is of the opinion that the ordinance requiring the recorder to insert in saloon licenses the hours in which the parties to whom same are issued are authorized to keep open their business places and sell is harmless, as well as useless, inasmuch as the ordinance fixed the hours of their business. The court is also of the opinion that it is wholly immaterial what the motives were that prompted the enactment of these ordinances,—whether through or under a religious sentiment in favor of prohibition individually entertained by the mayor and aldermen, or in obedience to such a sentiment propagated and enforced by the church to which they belong,—and that the court has no right to go into the motives, influences, or reasons operating upon them to pass ordinances; the function and business of the court being to ascertain and adjudicate whether the ordinances are reasonable, or unreasonable and oppressive, and therefore within or without the corporate power of the municipal authority. It

follows that, in the opinion of the court, all of the various charges and allegations of the bill relative to the pronouncements of a certain church on the whisky traffic, and the connection of the municipal authorities with the said church, and its coercive power and influence over them in procuring the passage of the ordinances for purposes of prohibition, and not to regulate his traffic in whisky as a retailer of liquor, are wholly irrelevant to the legal questions raised by the bill. The writer of this, as a member of the court, does not subscribe to this position of the court, in the broadness of its statements, as applied to the facts averred in the bill. The court is also of the opinion that it is within the province of the municipal authorities of the town to determine, in the first instance, what regulations of the whisky traffic within its limits are proper and reasonable for the preservation of peace, quiet, and good order, and that, if reasonable and in conformity to its charter and the general law, the court cannot

substitute its judgment for that of the authorities as to the need of the community in the matter.

The result is that there is no error in the decree of the chancellor in holding the "Closing Ordinance" valid, and the "Curtain Ordinance" and the "Letting In and Out Ordinance" invalid. The other ordinance assailed—the one requiring the insertion of the hours in which saloons shall be kept open and carry on the business—is one, as we have held, that is harmless and useless, one way or the other, so far as we can see. A decree will be entered here in conformity to this opinion. Each party and his surety will pay half the costs of the appeal. The cost below will be paid as adjudged by the chancellor.

The other Judges concur.

Affirmed orally by Supreme Court, March 11, 1899.

TEXAS SUPREME COURT.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY, *Pf. in Err.*,

v.

V. F. ZANTZINGER *et al.*

(.....Tex.....)

The ejection of a trespasser from the footboard of a locomotive, though his presence there does not interfere with the manipulation of the machinery by the engineer, whose position is inside the cab, is within the authority of the engineer, when he has possession and control of the engine, so as to charge the railroad company with liability for his wrongful conduct in exercising the authority.

(November 6, 1899.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the district court for Wharton County in favor of plaintiff in an action brought to recover damages for injuries to her minor son. *Affirmed.*

The facts are stated in the opinion and in the opinion on former hearing, 44 L. R. A. 553.

Mr. A. L. Jackson for plaintiff in error.
Messrs. J. V. Meek, O. T. Holt, and J. H. Davenport for defendants in error.

Brown, J., delivered the opinion of the court:

"The plaintiff, Mrs. E. S. Zantzinger, who is joined in this action by her husband, is the mother of Almer Campbell, a minor, and this

suit was in her own behalf, as well as in behalf of her son, to recover damages for personal injuries sustained by him, as it is claimed, through the negligence of the appellant, who was defendant below. The evidence adduced at the trial showed that defendant had a train of cars attached to the front end of a switch engine, which was running backward, pulling the cars after it, into the city of Houston, from a neighboring station. The switch engine had no pilot or cow catcher in front of it, but attached to each end was a footboard extending across the track. The car nearest the engine was a flat car, several feet intervening between it and the footboard. While the train was slowly moving, Almer Campbell, without permission of anyone, and contrary to the rules of the company, went upon the footboard for the purpose of riding into Houston, and stood upon it between the engine and flat car. After he had ridden a short distance, the cylinder cock of the engine was opened by the engineer, and hot water and steam were thereby thrown upon his legs and feet, whereupon he sprang from the footboard towards the flat car, intending to get upon the latter, but missed it, and fell upon the track, and was run over, and injured so that he lost, practically, the use of one of his legs. The evidence is sufficient to show that the cylinder cock was opened by the engineer for the purpose of throwing the steam and water upon the boy in order to make him get off the engine, but the evidence does not warrant the conclusion that the engineer intended more than this, or that he intended to injure Campbell in the way in which he was injured. The engineer had authority to eject persons

NOTE.—As to liability for servant's tortious injury to third person in the absence of any contractual relation, see *Ritchie v. Waller* (Conn.) 27 L. R. A. 161, and *note*; *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 47 L. R. A.

A. 483; *Pierce v. North Carolina E. Co.* (N. C.) 44 L. R. A. 316; *Baltimore Consol. R. Co. v. Pierce* (Md.) 45 L. R. A. 527. See also *Nelson Business College Co. v. Lloyd* (Ohio) 46 L. R. A. 314.

wrongfully riding upon the engine. The evidence is also sufficient to show that the fright and pain caused to Campbell by the steam and water also caused him to lose his presence of mind, and to make the leap in order to escape. He testified that he was facing the engineer, with his back to the flat car, and that, after the escape of steam and water commenced, he turned and made the leap, calculating to reach the flat car with his feet, but not with his hands; that, after he fell between the cars, he crawled 40 or 50 feet in the direction in which the train was moving, in order to avoid the brake beam under the flat car, and then attempted to get across the rail, and was caught. There is also evidence tending to show that the engineer saw Campbell fall between the cars, knew his danger, and could have stopped the train in time to have avoided the injury. The contradicted evidence shows that in getting upon the footboard Campbell was a trespasser, and was guilty of negligence, and the court below so instructed the jury. He was nearly seventeen years of age, and understood the dangers and risks of the situation."

The plaintiff in error presents a number of objections to the judgment in this case, which we think it unnecessary to discuss, except that the evidence was not sufficient to support the trial court in submitting to the jury the question of authority in the engineer to eject Almer Campbell from the footboard of the engine. If the evidence is sufficient to sustain the verdict, the objection must be overruled, although the preponderance may be in favor of a contrary conclusion. It was proved that a switch engine engaged in moving cars on the defendant's track near the city of Houston was being operated by J. D. Middleton, engineer, who, according to the testimony of the foreman of the crew, had "the absolute possession of the machinery of the engine," the foreman having the right to direct the engineer when to move or stop and where to go. The engineer occupied the cab of the engine and could not occupy the footboard while engaged in moving the locomotive. It is evident that the engineer had complete and absolute control of the movements of the engine, and, although he in fact sat in the cab while operating it, the greater part of the machinery over which he exercised control was outside of the cab. When one places his property in the possession and under the control of another, the right to protect that possession, as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it. *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 Am. Rep. 780; *Hoffman v. New York C. & H. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337. The case of *Carter v. Louisville, N. A. & C. R. Co.* cited above, is very much like this. In that case a switch engine was being operated in the yards of the railroad company, where one who had no right climbed upon the front of the locomotive under the headlight, and the engineer, who was in charge of the machinery, forcibly expelled him while the engine was in motion.

The trespasser was injured, and brought suit for damages. The railroad company claimed that the engineer acted without authority, but the court held that, being in charge of the locomotive, the engineer had authority to eject intruders, and in support of the conclusion the court said: "We think the appellee, by placing its servants in possession of a switching engine for the purpose of placing and replacing cars upon its track at Lafayette, impliedly gave them authority, not only to retain the exclusive possession of the engine while so engaged, but to remove from it all trespassers and wrongdoers. . . . Because the employer might, if present, remove from its engine a trespasser, or from its station house an intruder, so may the servant, to whom the possession, care, and use of the station house or switching engine have been intrusted, remove from the one or the other trespassers and wrongdoers. It is the right of possession in the master, and the duty of the servant to whom the property has been intrusted, to keep and maintain that possession for the master which give the latter the right to remove trespassers." We do not think that it was necessary that Almer Campbell's presence should interfere with the actual manipulation of the machinery by the engineer to authorize the latter to eject him from the footboard, but, being in the possession and control of the locomotive, it was the right and duty of the servant to protect that possession, and to use his control for the benefit of his employer. If the authority of an engineer were restricted to the cab, the greater part of the machinery operated by him would be beyond his protection, and he must sit in his place, and see the operation of the locomotive prevented, or the rights of the owner invaded, with no power to protect the property. The presence of a trespasser upon the footboard or any part of a locomotive is an invasion of the owner's rights, and the servant need not wait until his work is hindered, or the property endangered, before doing what the master could do if present. It is our opinion that there was sufficient evidence to require the court to submit to the jury the issue of authority, expressed or implied, of the engineer to eject the trespasser on this occasion. The issue was fairly and clearly submitted by the court, and found against the railroad company.

The case of *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, does not conflict with this view. In that case the trial court practically instructed the jury that the law would presume authority for a brakeman to eject trespassers from a train, and devolved upon the railroad company the burden of disproving the existence of such authority. This court said: "But whether the act in question can be implied from the general authority conferred upon the servant must, in general, depend upon the nature of the service he is engaged to perform, and the circumstances of the particular case. . . . An engineer has the charge and control of his engine, and it is necessary for the safe performance of the important duties de-

volved upon him that he should have authority to remove persons trespassing upon it," etc. In that case the issue was upon the act of a brakeman, and that portion of the opinion quoted with reference to an engineer is simply by way of argument and illustration, but we call attention to it to show that it was intended to hold that the question of au-

thority or not is one of fact to be determined by the jury like any other issue, and not a matter of law to be decided by the court.

We find no error in the judgments herein, and it is therefore ordered that the judgments of the District Court and of the Court of Civil Appeals be affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

James E. PHILLIPS, *Appt.*,
v.

RECTOR & VISITORS OF UNIVERSITY
OF VIRGINIA *et al.*

(.....Va.....)

A mechanic's lien will not attach to buildings of a state university erected in place of one that has been destroyed by fire, although authority has been given by statute to the rector and visitors of the university to raise money by deed of trust on the property, to provide for erecting such buildings, where the university is in the strictest sense a public institution owned, governed, and controlled by the state, and its property dedicated to public uses.

(September 27, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Albemarle County in favor of defendants in an action brought to enforce a mechanic's lien. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jo. Lane Stern and George Perkins, for appellant:

The statute erecting "The Rector and Visitors of the University of Virginia," a corporation (Code 1887, § 1541); the statute fixing the general law as to corporations (Code 1887, § 1068); the cases of *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163; *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977; and *Maia v. Eastern State Hospital Directors* (Va.) 34 S. E. 617, *post*, p. —, establish the fact beyond question that the defendant is a corporation.

It is in some senses, perhaps, a public corporation, but nevertheless, as to contracts within the scope of its powers it is amenable as a private individual.

The right to sue the Rector and Visitors of the University of Virginia carries with it, necessarily, the right to obtain a judgment, and the consequential right to enforce collection.

While the rector and visitors of the university could not contract any debt on account of the university without the consent of the legislature previously obtained (Code 1887, § 1556), the debt created by the contract with Langley & Co. was pursuant to and founded on the act of the legislature ap-

proved January 23, 1896 (Acts 1895-6, p. 159).

The property of a college or university is not exempt from mechanics' liens, though it be prohibited from creating any encumbrance on its property by mortgage or otherwise.

University of Louisville v. Reber, 43 Pa. 306.

Messrs. Duke & Duke and John B. Moon, for appellees:

The state in its sovereign capacity at all times jealously holds the university subject to its absolute control, thus retaining it as a part of itself,—not subject to any power but itself, and to be governed as the state itself is governed; *vis.*, by its general assembly.

The University of Virginia is in no sense a private institution. It was created by a public act, and has no charter in the ordinary sense of the word.

The buildings of the university are public buildings,—the property of the state and of the public just as much as the capitol at Richmond or the courthouse of a county. No lien can be had upon a public building belonging to the state.

Manly Mfg. Co. v. Broadus, 94 Va. 547, 27 S. E. 438; *Hicks v. Roanoke Brick Co.* 94 Va. 741, 27 S. E. 596.

The mechanic's lien does not apply to labor or materials furnished for the state, or the general or local public.

Thomas v. Illinois Industrial University, 71 Ill. 310; *Ray County Sav. Bank v. Jramer*, 54 Mo. App. 587; *Thomas v. Urbana School Dist. Bd. of Edu.* 71 Ill. 283; *Mayrhofer v. San Diego Bd. of Edu.* 89 Cal. 110, 26 Pac. 646; *Whiteside v. School Dist. No. 5*, 20 Mont. 44, 49 Pac. 445.

Riely, J., delivered the opinion of the court:

This suit was instituted to enforce a mechanic's lien asserted on buildings of the University of Virginia.

It is a well-settled rule that public property used for public purposes is not liable to sale for the payment of debts. To allow it to be done would thereby annihilate the public uses. For this reason public policy forbids a lien on public property. A lien upon property implies the right to sell it for the payment of the lien, but, public property not being liable to be sold for the payment of debts, a mechanic's lien cannot be asserted upon it, unless expressly authorized by law.

NOTE.—As to mechanics' liens on public property, see *First Nat. Bank v. Malheur County* (Or.) 35 L. R. A. 141, and *note*.
47 L. R. A.

This is the general current of decisions. Phillips, *Mechanics' Liens*, § 179; 2 Dill. Mun. Corp. § 577; *Leasard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Hovey v. East Providence*, 17 R. I. 80, 9 L. R. A. 150, 20 Atl. 205; *Thomas v. Illinois Industrial University*, 71 Ill. 312; *Patterson v. Pennsylvania Reform School*, 92 Pa. 229; and *First Nat. Bank v. Malheur County* (Or.) 35 L. R. A. 141, and note.

In *Boisot, Mechanics' Liens*, § 308, the law on this subject is thus stated: "There can be no mechanic's lien on public property, unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement, public property not being subject to forced sale. For this reason there can be no mechanic's lien on a courthouse, nor on county buildings generally. Public school buildings are also exempt from mechanics' liens. And there can be no mechanics' lien on such public institutions as the Illinois Industrial University, the Nebraska State Lunatic Asylum, the Pennsylvania Reform School, and Girard College.

And in 2 Jones, *Liens*, § 1375, the law is similarly stated. "On grounds of public policy, the mechanics' lien laws," it is there said, "do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public uses. Schoolhouses erected for the use of public schools come within this exemption. . . . Such buildings are exempt from attachment and from sale upon execution, and for the same reason are exempt from liens which might result in an adverse sale."

In *Manly Mfg. Co. v. Broadbush*, 94 Va. 547, 27 S. E. 438, Keith, P., speaking for the court, said: "The board of supervisors cannot give a lien upon a public building; nor does the contractor, nor do those who furnish materials, nor the artisans employed in its construction, acquire a lien of any kind upon it."

And in *Hicks v. Roanoke Brick Co.* 94 Va. 747, 27 S. E. 598, it was said: "It is contrary to public policy to allow a lien to be acquired on public property, and the mechanic's lien laws do not apply to public buildings or structures erected by states, cities, and counties for public uses, unless the statute creating the lien expressly so provides."

The mechanics' lien laws of this state do not in terms embrace public buildings or structures, and therefore under the law, as generally expounded, a mechanic's lien cannot be acquired on buildings erected by the state, its counties or cities, for public uses. The inquiry then is as to the nature of the University of Virginia. Is it a public or private institution, and are its grounds and buildings public or private property?

The University of Virginia was established by the general assembly, and the land upon which its buildings stand was acquired by the state through the conveyance from the Central College, in Albemarle county, to the president and directors of the literary fund. The money to defray the expenses of procur-

ing the land, erecting the buildings, and permanently endowing the university was appropriated by the general assembly. Large appropriations out of the public treasury have been and still continue to be annually made for its support by the general assembly. And all white students of the state of Virginia over the age of sixteen years are entitled to receive instruction in the academic department of the university without charge of tuition. 1 Rev. Code, p. 90, chap. 34; Id. p. 89, chap. 33, § 20; Rev. Code Supp. p. 44, chaps. 29, 30; Id. p. 46, chaps. 32, 33; Id. p. 47, chap. 34; and Code 1887, chap. 68.

The university, from its foundation, has been wholly governed, managed, and controlled by the state, through a corporation created for the purpose, under the style and title of "The Rector and Visitors of the University of Virginia," which is a public corporation, without capital or stockholders, and private individuals have no interest in or control over it. The visitors composing the corporation were originally appointed by the governor, with the advice of the council, and are still periodically appointed by him, by and with the consent of the senate. The rector is chosen by the visitors from their own body. The rector and visitors were originally required to make a report annually to the president and directors of the literary fund, to be laid before the general assembly, embracing a full account of the disbursements, the funds on hand, and a general statement of the condition of the university. This report is still required to be made, but now directly to the general assembly. 1 Rev. Code, p. 90, chap. 34, and Code 1887, chap. 68.

From the time the university was established, down to the present, the law has expressly provided that the rector and visitors should be at all times subject to the control of the general assembly, and should conform to such laws as it might from time to time enact for their government. And they are expressly prohibited from contracting any debt whatever on account of the university without the consent of the general assembly, previously obtained. 1 Rev. Code, chap. 34, § 9, and Code 1887, § 1554.

It is plain that the University of Virginia is in the strictest sense a public institution, and that its grounds and buildings are public property, the property of the state, that it is governed and controlled solely by the state, that its grounds and buildings are wholly dedicated to public uses, and that the interest of the public constitutes its ends and aims.

The fact that the rector and visitors of the University of Virginia were given authority by the act of January 23, 1896, to borrow money and issue bonds therefor, to be secured by a deed of trust on the property of the university, to enable them to erect other buildings in the place of those destroyed by fire, and that the mechanic's lien was asserted by the appellant on the buildings so erected, does not alter the case. The principle is the same. The buildings were erected on the grounds of the university, the property of

the state, and were erected for public purposes, and are so used. The general assembly, by the very act that gave the rector and visitors the authority to borrow money with which to restore the buildings, in addition to the regular annual appropriation, made an additional annual appropriation for the sole purpose, and no other, of paying the interest on the bonds as it should accrue, and of providing a sinking fund for the redemption of the principal. The authority to the rector and visitors to secure the loan by a deed of trust on the property held by the university constituted no authority to the contractor, subcontractor, or other person who did the

work or furnished materials therefor, to assert a mechanic's lien upon the buildings erected with the money so borrowed. No provision was made for any lien other than the deed of trust, which was wholly intended as security for the lender of the money, and not directly or indirectly for the benefit of anyone who might do the work or furnish materials for it.

The circuit court did not err in sustaining the demurrer of the appellee and dismissing the bill. *Its decree is affirmed.*

Keith, P., absent.

KENTUCKY COURT OF APPEALS.

PULLMAN'S PALACE CAR COMPANY,
App't.,

v.

Lucille HUNTER.

(.....Ky.....)

1. The theft of diamond rings from the finger of a woman while she is asleep in a sleeping car gives her a right of action against the sleeping-car company, if the theft result from the failure of the agents and employees in charge of the car to use ordinary care and watchfulness to protect her and her property from thieves.
2. Neglect of the duty to keep a reasonable watch over the safety of sleeping passengers and their persons is a question for the jury, where the only person whose duty it was under the rules of the company to keep a lookout in the car had taken charge of it after a long and fatiguing passage, which to some extent disqualified him for the duties of a watchman, and he on two occasions during the night, when the train stopped at stations, voluntarily absented himself for at least twenty minutes at a time.

(January 12, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover the value of property taken from plaintiff's person while a passenger in defendant's car. *Affirmed.*

The facts are stated in the opinion.

Messrs. Phelps & Thum for appellant.
Mr. Bennett H. Young for appellee.

Burnam, J., delivered the opinion of the court:

This was a suit to recover the value of three diamond rings alleged to have been stolen from appellee while she was asleep in one of the defendant's cars, and which loss she alleged resulted from the failure of defend-

ant's agents and employees in charge of the car to use ordinary care and watchfulness to protect her and her property from thieves, as was their duty to do under the law. The defendant denied that its agents were guilty of any carelessness, negligence, or misconduct in the discharge of their duties to the plaintiff, or that the loss of her rings was due to failure on their part to exercise ordinary care and watchfulness to prevent such loss. The trial resulted in a verdict and judgment for plaintiff for \$250, which the defendant moved the court to set aside, and grant it a new trial, upon the ground that the verdict was contrary to the law and evidence, and that the court erred in refusing to give a peremptory instruction.

It appears from the testimony that appellee, a young lady under twenty-one years of age, rented lower berth No. 11 of defendant's sleeping car, which left St. Louis, Missouri, on the night of September 26, 1896, for Louisville, Kentucky, over the Baltimore, Ohio, & Southwestern Railroad, paying \$2 for the use thereof, and while she was asleep three diamond rings belonging to her, and which were of the value of \$250, were stolen from her finger. The testimony of the employees of defendant shows that there were three sleeping cars attached to the train when it left St. Louis, all of which were in the charge of a single conductor, but that each car had its separate porter; that at North Vernon, Indiana, the sleeping car destined for Louisville was detached from the train with which it had been connected, and attached to another locomotive, which brought it into Louisville; that at this point another conductor took charge of the car, but that it was not a part of the duty of either conductor to keep any special watch over the person or property of the sleeping passengers; that this matter was left entirely to the porter, a colored man by the name of Greene, who testifies that this was his first trip over that route; that his regular run was from St.

NOTE.—As to liability to passenger on sleeping car for loss of property, see *Mann-Boudoir Car Co. v. Dupre* (C. C. App. 5th C.) 21 L. R. A. 289, and note; also *Pullman Palace Car Co. v. Gavin* (Tenn.) 21 L. R. A. 298; *Pullman's* 47 L. R. A.

Palace Car Co. v. Martin (Ga.) 29 L. R. A. 498; *Pullman's Palace Car Co. v. Hall* (Ga.) 44 L. R. A. 790; and *Pullman's Palace Car Co. v. Adams* (Ala.) 45 L. R. A. 767.

Louis to El Paso, Texas, which took three nights and two days, and required that he should be continually on duty eighteen hours out of each twenty-four, that he arrived in St. Louis from this trip on the morning of September 26, 1895; and that, owing to the inability of the regular porter to make the trip to Louisville, he was detailed by defendant's officers to make this extra trip. He says that, after making down the various berths, he stood in the aisle of the gentlemen's end of the car, blacking the boots of the male passengers, but that he made frequent visits to the smoking room, to see if anything was wanted; that when his car arrived at Vincennes and North Vernon, Indiana, he locked the back door of the coach, and walked out the front door, and stood on the steps of the vestibule while the train remained at each of these places for about twenty minutes; and that during this time there was no officer or agent of the company on duty inside the coach. Conductor King, who took charge of the car at North Vernon, says that when he got on the car no agent of the company, except the porter, was on duty.

The main inducement offered to the traveling public to occupy sleeping cars, and to pay the extra fee charged therefor, is that the fatigue and discomfort of railroad travel is in some degree ameliorated by being able to sleep with security; and the company, in advertising its accommodations for sleeping, and accepting compensation therefor, becomes thereby obligated to keep a reasonable watch over the safety of its sleeping passengers and their property; and this seems to be the measure of their responsibility as defined by other courts. In the case of *Plum v. Pullman Sleeping Car Co.*, (decided by the United States circuit court in Tennessee) 13 Alb. L. J. 221, it was held that "the company must take reasonable care of its guests and their property, especially while said guests were asleep." In *Palmeter v. Wagner*, 11 Alb. L. J. 149, the marine court of New York held that sleeping-car companies must, by a reasonable watch, protect a passenger and the property about his person during sleep; and in the case of *Woodruff Sleeping & Parlor Coach Co. v. Dichl*, 84 Ind. 474, 43 Am. Rep. 102, the company was held liable for the loss of a pocketbook and watch because of failure to keep a sufficient watch during the night, and to take reasonable care to prevent thefts.

It seems to us that the instructions given in this case go no further than to require at the hands of appellant a faithful performance of this duty. We are of the opinion that the motion for a peremptory instruction was properly overruled under the rule, which has been established by numerous decisions of this court, that it is improper to give a peremptory instruction for the defendant when there is any evidence which conduces to establish the right of recovery. The fact that the sole person whose duty it was, under the rules of the company, to keep a lookout in the car, had arrived in St. Louis on the morning of the day on which this train left, after a long and fatiguing passage

from El Paso, Texas, certainly to some extent disqualified him from the duties of a watchman on the succeeding night; and when there is added the fact that at least on two occasions during the night he voluntarily absented himself from the car for a period of at least twenty minutes on each occasion, it furnishes some evidence conducing to show negligence on the part of the agents of the company, and authorized the submission of the case to the jury.

For the reasons indicated, *the judgment is affirmed.*

T. L. STOVALL, *Appt.*,

v.

McCUTCHEEN & COMPANY *et al.*

(.....Ky.....)

1. **Mutual promises of merchants to refrain from engaging in business after 6:30 P. M. of each day are sufficient loss or detriment in the way of financial transaction, or are sufficient gain and advantage from a social or healthful standpoint, to support a contract to close their places of business at that hour.**
2. **The slight restraint of trade resulting from a contract between merchants to close their places of business at a certain hour each day is not illegal.**
3. **An injunction is the proper remedy to prevent the breach of a contract between merchants for closing their places of business at a certain hour each day, since it is necessary in order to prevent a multiplicity of actions or to prevent a repeated and recurring cause of action.**

(January 23, 1900.)

A PPEAL by defendant from a judgment of the Circuit Court for Logan County in favor of plaintiffs in an action brought to enjoin a violation of a contract for the early closing of business houses in Russellville. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. R. Crowder, J. S. Hooker, and John S. Rhea for appellant.

Messrs. H. S. McCutcheon, W. P. Sandidge, and Craddock & Sandidge for appellees.

White, J., delivered the opinion of the court:

In May, 1895, appellant and appellees, all merchants of Russellville, signed an agreement as follows: "We, the undersigned, merchants of Russellville, do hereby agree and obligate ourselves to close our place of business at 6:30 o'clock, beginning May 15, 1895, and lasting until the first of September." The pleadings and proof all agree that the intention of this writing was that the stores were to be closed at 6:30 P. M. of each day during the time specified, except on Saturdays. After compliance for a few evenings after the 15th of May, appellant

NOTE.—As to validity of contracts in restraint of trade, see *Trenton Potteries Co. v. Oliphant* (N. J.) 46 L. R. A. 255, and *footnote*.

notified appellees that he declined to further comply with the agreement, but would disregard it. This he did. Appellees instituted this action to obtain an injunction against appellant to prevent a violation of the agreement, or, rather, to compel him to specifically perform the agreement. A temporary injunction was granted. Appellant made defense to the action, pleading that he signed the agreement conditionally. He alleges that one of the conditions was that others, who never did sign, were also to sign the agreement. Another condition was that he, at the end of a few days' trial, could withdraw from the agreement if he so desired,—and that these conditions were left out by mistake, as were the provisions that the closing was to be daily at 6:30 P. M., and not to apply to Saturday. On these issues, presented by the answer, proof was taken, and on final hearing the temporary injunction was made perpetual, and from that judgment this appeal is prosecuted.

It is insisted by counsel for appellant that there is no consideration for the agreement; that it is against public policy and void; that, because of its uncertainty, it cannot be specifically enforced; and that the trial court erred in adjudging, on the proof, that there were no conditions omitted from the writing.

We are of opinion that the proof fails to establish that appellant signed the writing with the understanding that any others were to sign than those whose names appear thereto. We are also of opinion that the proof fails to establish appellant's contention that he had the privilege of withdrawal after trial.

We think there is sufficient consideration to uphold the contract. "Valuable considerations," says Bouvier (title, *Consideration*), "are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request, or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made;" citing *Overstreet v. Philips*, 1 Litt. (Ky.) 123; *Lemaster v. Burckhart*, 2 Bibb, 30; *Woolbridge v. Cates*, 2 J. J. Marsh. 222. Again the same author (Bouvier) says, "Mutual promises made at the same time are concurrent considerations, and will support each other, if both be legal and binding." This court, in the case of *Talbott v. Stemmons*, 89 47 L. R. A.

Ky. 222, 5 L. R. A. 856, 12 S. W. 297, held a promise to abstain from the use of tobacco to be a sufficient consideration for an agreement to pay \$500. The court of appeals of New York, in *Hamer v. Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256, held the same thing. We are of the opinion that the mutual promises to refrain from engaging in business after 6:30 P. M. of each day are sufficient loss or detriment in the way of financial transaction, or are sufficient gain or advantages from a social or healthful standpoint, to support a contract. The loss or gain is to be supposed to be alike to all parties. There is a complete mutuality. While it is true that contracts in restraint of trade are to be carefully scrutinized, and looked upon with disfavor, all contracts in restraint of trade are not illegal. The restraint here put is but partial,—very inconsiderable. It is but a few hours, at most, each day, and for three and one-half months, during the extremely hot weather. It has come within the observation of the members of this court that during this season (May 15 to September) many merchants close about 6:30 or 7 P. M. This cannot be held to be an illegal restraint of trade.

As to the question of uncertainty of the contract, appellant's position might be tenable, if it were not shown by the pleadings in the case precisely what the contract was intended to mean. The courts rarely ever reform and then specifically enforce a contract. The reason of this is that the dispute comes as to what contract was intended to be entered into. This is not so here. All parties agree that this writing was intended to say and mean that the places of business should be closed at 6:30 P. M. each day, excepting Saturdays, between May 15 and September 1.

We think that in this case injunction is a proper remedy. The recurring breach each day of the contract would require numerous actions at law, and by different plaintiffs, as well; or, if not, there would at least be a continuing damage by the breaches and violation of the contract up to September 1. It has repeatedly, if not universally, been held that injunction is proper in either of these classes of cases, to prevent a multiplicity of actions, or to prevent a repeated and recurring cause of action. *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

Thomas TAYLOR, *Appt.*,
v.
UNION TRACTION COMPANY.

(184 Pa. 463.)

1. Bicycles are not within the meaning of an ordinance giving vehicles a right of way upon street-railway tracks in the direction in which the cars usually run, over vehicles moving in the opposite direction, so that a bicyclist riding between the rails can compel an approaching vehicle to give way to him.
2. The rule requiring drivers of vehicles drawn by horses, and riders of bicycles, to regard the ordinary rules of the road for each other's convenience and safety in the ordinary occupancy of

streets, does not require the driver of a car in an open, unobstructed highway to drive to one side in order that the bicyclist may be relieved of the necessity of deviating from a straight line.

3. A bicyclist who rides between street-railway tracks towards a vehicle approaching from the opposite direction, under the erroneous impression that he can compel it to give way to him, until a collision is unavoidable, cannot hold the owner of the vehicle liable for injuries received by him from the collision.

(January 26, 1898.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant

NOTE.—*Bicycle law.*

- I. *Introductory.*
- II. *Right of bicyclists to use highways, generally.*
- III. *Validity of enactments restricting the use of highways by cyclists.*
- IV. *Reciprocal duties of cyclists and other persons traveling on highways.*
 - a. *Duty of cyclists to pedestrians.*
 - b. *Bicyclists entitled to benefits and subject to burdens of the rules of the road.*
- V. *Liability for frightening horses.*
- VI. *Duty of cyclists to carry bells and lamps.*
- VII. *Use of footpath by cyclists.*
 - a. *Under the common law.*
 - b. *Under statutes and ordinances.*
- VIII. *Right of cyclists to recover for injuries caused by defective highways.*
- IX. *Special enactments for the protection and convenience of cyclists.*
- X. *Injuries to cyclists at railway crossings.*
- XI. *Injuries to cyclists caused by street cars.*
- XII. *Injuries to bicycles left standing in streets.*
- XIII. *Payment of tolls, liability of cycles to.*
- XIV. *Cycles as a subject of taxation by municipalities.*
- XV. *Bicycles as a subject of contracts of sale or lease.*
- XVI. *The bicycle as a subject of bailment.*
- XVII. *The bicycle as a subject of insurance.*
- XVIII. *When a bicycle is a necessary for a minor.*

I. Introductory.

Among the minor heads of law which the progress of invention in recent years has created, none is of more practical importance than that which deals with the rights and liabilities arising out of the use of the cycle in its various forms. A review of the authorities on this subject, therefore, can scarcely fail to be of interest to our readers. All the available sources of information, English, Colonial, and American, have been consulted, and it is hoped that no ruling made prior to the compilation of this note has escaped notice.

II. Right of bicyclists to use highways, generally.

For a considerable period after cycles first

came into common use, attempts were occasionally made to have them placed, for judicial purposes, on a different footing from other vehicles. For example, so recently as 1889, it was still regarded as a debatable question in the United States whether the riding of a bicycle upon a public highway ought not to be pronounced a nuisance in such a sense as to make the rider absolutely liable if a horse took fright at the machine, and damage ensued. *Holland v. Barch* (1889) 120 Ind. 46, 22 N. E. 83.

But this inclination to treat a cyclist as a sort of *caput lupinum*, who was entitled to very scant indulgence in case of an accident upon the highway, has nearly, if not altogether, ceased to exercise any influence upon the courts, and the doctrine is now firmly established that a bicycle, so far as the use of the highways is concerned, is to be classed in the same category as horse-drawn vehicles. It follows, therefore, that to ride one in the usual manner, as is now done upon the public highway, for convenience, recreation, pleasure, or business, is not unlawful. *Thompson v. Dodge* (1894) 58 Minn. 555, 28 L. R. A. 608, 60 N. W. 545. The court said: "A highway is intended for public use, and a person riding or driving a horse has no rights superior to those of a person riding a bicycle."

The rights of bicyclists are referred to the simple principle that they are upon an equality with and governed by the same rules as persons riding or driving any other vehicle or carriage. *Holland v. Barch* (1889) 120 Ind. 46, 22 N. E. 83; *Emporia v. Wagoner* (1897) 6 Kan. App. 659, 49 Pac. 701; *Moore v. District of Columbia* (1898) 12 App. D. C. 537, 41 L. R. A. 208.

It may be mentioned in passing that for the purpose of assessing a tariff, bicycles have been declared by the United States government to be "carriages." See *Adams' U. S. Tariff*, ed. 1890, p. 99.

"Bicycles . . . are not an obstruction to, or an unreasonable use of, the public streets of a city, but rather a new and improved method of using the same, and germane to their principal object as a passageway." *Swift v. Topeka* (1890) 43 Kan. 671, 8 L. R. A. 772, 23 Pac. 1075.

That bicycles must also be subject to the same restrictions and disabilities as other vehicles follows readily enough from general principles. *Ibid.*

Thus, a bicycle is a "vehicle" within the meaning of § 12 of the Liverpool corporation

in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The opinion of the lower court by Willson, J., upon which the supreme court affirmed the judgment, was as follows:

"This case arose in the following manner: The plaintiff was riding his bicycle on his way home from his work. He rode down Broad street, and turned eastward into Dauphin street. While he was on his course, rain fell, making the streets wet, and requiring, as the plaintiff said, some care on his part in order to avoid the slipping of his vehicle. He rode down Dauphin street slowly. Before he reached Thirteenth street, he saw a cart drawn by a single horse on its way up Dau-

phin street. The plaintiff testified that he saw the driver of the cart coming; that he was not going to make any turn; and that the man was driving very fast. According to the plaintiff's testimony, he first saw the cart when it was 30 or 40 feet distant. The cart was occupying the tracks of the passenger railway company. The plaintiff kept on his course, and so did the driver, each evidently claiming or acting upon the theory that he had the right of way. When it was too late for the plaintiff to do it safely, he turned off. The plaintiff on his bicycle was struck by either the cart or the horse, and he was thrown and injured. The cart belonged to the defendant company, and the driver was in their employ. The plaintiff

act of 1880, which forbids the use of "any vehicle exclusively or principally for the purpose of displaying advertisements" without the consent of the corporation. *Ellis v. Nott-Bower* (1896) 60 J. P. 760. See also IV., V., *infra*.

The conclusions at which the courts, reasoning upon purely common-law principles, have thus arrived, are in many states embodied in statutory provisions, which declare that bicycles and their riders are entitled to the same rights, and subject to the same restrictions, in the use of the highways as are prescribed in the case of carriages drawn by horses. La. Acts 1890, No. 13, p. 10; Rev. Stat. p. 860; Pennsylvania act 1889, Pub. Laws, 44; N. Y. Rev. Stat. Highway Law, § 162.

The last two of these enactments cover, not only bicycles, but also tricycles and all other vehicles, propelled by hand or foot. That an act which, like that of Ontario, prescribes the relative obligations of cyclists and the drivers of other vehicles in the use of roads, is a practical recognition of the same principle, is sufficiently obvious. See IV. *infra*.

So far as turnpike companies are concerned, the Pennsylvania act just referred to has, it is held, had the effect of establishing, out of reach of the discretion of the company, the bicyclist's right upon the highway, and of placing a peremptory limitation upon the power of the company to exact excessive tolls. *Geiger v. Perkiomen & R. Turnp. Road* (1895) 167 Pa. 582, 28 L. R. A. 458, 31 Atl. 918. See XI. *infra*.

The doctrine which places cycles on the same footing as horse-drawn vehicles is really a particular application of the wider principle that it is the essential character of the vehicle itself, and not the motive power, which determines the rights and liabilities of the person using it. To this principle would seem to be referable the English decision that a motor tricycle capable of being propelled either by foot power or by steam is within the purview of § 38 of the English locomotives act of 1873, which prescribes certain regulations for the working of "any locomotive propelled by steam or any other than animal power," and that a conviction for a breach either of those regulations, or of any others prescribed by the earlier locomotives acts (24 & 25 Vict., chap. 70, and 28 & 29 Vict., chap. 83), should be sustained, although the person travelling on the tricycle was propelling it with his feet at the place where he was arrested. *Pollock, B.*, who wrote the opinion of the court, pointed out that the tricycle could not be less within this description because it was capable of propulsion in the ordinary way by the foot of the rider, and that it had been expressly found in the case that the steam power was sufficiently powerful to move it, if desired, without the foot motion. The 47 L. R. A.

argument that such a machine could not have been within the contemplation of the statutes, as these were apparently intended to be directed against the use of locomotives larger in size and heavier in weight, and therefore more dangerous to persons using the public highway than the locomotive in question, was thus disposed of: "It is probable that the statutes in question were not pointed against the specific form of locomotive which is described in this case. Indeed, such a locomotive was not known when they were passed, and possibly not contemplated. As, however, it comes within the very words of the statutes, it seems to us that we cannot, upon any true ground of construction, exclude it from their operation; and it may be observed that, even if the fullest scope be given to this argument, Mr. Bateman's [one of the witnesses] explanation that the principle of the invention was capable of extension to larger carriages, would show that a locomotive similar in construction and principle to that which is the subject-matter of this case might, by reason of its size and power, become much more dangerous; and, if this be so, the question to be considered in each case would not be whether the locomotive in question properly came within the language of the statutes, but whether, by reason of the size or weight of the particular machine, it came within the mischief supposed to be contemplated, which shows that such an argument is vicious." *Parkyn v. Preist* (1881) L. R. 7 Q. B. Div. 313, 50 L. J. M. C. N. S. 148, 50 L. J. Q. B. N. S. 648, 30 Week. Rep. 13, 45 J. P. 751.

III. *Validity of enactments restricting the use of highways by cyclists.*

The earlier cases dealing with the extent of the power of legislative bodies to place restrictions upon the use of highways by cycles reflect, as might be expected, the tendency, already noticed, to treat the new vehicle as a mere interloper. Thus, we find it laid down that an ordinance providing that no bicyclé or tricycle should be allowed in the public parks of New York city was within the discretionary power of a board of commissioners vested by statute with "the full and exclusive power to govern, manage, and direct the said parks," and "pass ordinances for the regulation and government thereof." *Re Wright* (1883) 20 Hun. 357. It was thought that there was no force in the argument that, because bicycles were admitted in the parks of other large cities like London, Philadelphia, and Boston, the court were entitled to say, as a matter of law, that the ordinance was unreasonable. The full power to govern the parks being vested in the commissioners, the courts could not interfere. In the ab-

now seeks to recover damages for his injuries. In the statement of the facts of the case, it is also to be added that the street cars which run upon the tracks on Dauphin street run eastwardly, that is, in the same direction as the plaintiff was riding his bicycle. "There may be said to be two grounds upon which the plaintiff bases his cause of action. The first of these is that the defendant's driver was driving at a high rate of speed. I do not think there is anything in the evidence which would justify an inference that the plaintiff's injuries were owing to any negligence of the driver upon that course. The other ground is that the plaintiff had the right of way. To sustain this point, reliance is had upon the statute

which gives to a bicycle the character of a vehicle, and also to an ordinance of the city which, in ordinary cases, gives to vehicles the right of way upon the tracks of the passenger railway companies in the direction in which the cars ordinarily run. The obvious reason of this ordinance, however, is that it was intended to give to the vehicles making use of the rails of the tracks a convenient and settled right of direction and occupancy upon those rails. I do not think it has any bearing whatever upon the rights of riders of bicycles. Nobody, I presume, would dispute the proposition that in the ordinary occupancy of streets, and under ordinary circumstances, the drivers of vehicles drawn by horses and the riders of bicycles must regard

sense of evidence going to prove fraud or collusion. By § 162 of the highway law of New York of 1890 the authorities having charge of highways are expressly deprived of power to exclude cycles from the use of such highways at any time when they are open to the persons using other pleasure carriages.

But this act is subject to an exception in the case of the "Driveway." According to *Doll v. Devery* (1890) 27 Misc. 140, 57 N. Y. Supp. 767, the riding of a bicycle on a public driveway in New York city established in 1893, by an act providing that no portion of it shall be used for any other purpose than for "riding by equestrians and driving of carriages," may be prohibited by the park board under the provision empowering it to make such other rules and regulations as it may deem advisable for the use of such driveway, and for the speed of drivers and riders thereon, and as to the exclusion therefrom of any kind of vehicles, the use of which may injure the driveway or render it unfit or inconvenient for the purposes thereof, notwithstanding the provision of N. Y. Laws 1890, chap. 568, § 163, providing that the authorities having charge or control of any driveway shall have no power to pass, enforce, or maintain any ordinance, rule, or regulation by which any person using a bicycle shall be excluded or prohibited from the use of any driveway at any time when it is open to the free use of persons using other pleasure carriages.

Gildersleeve, J., said that, in his opinion, the provisions with respect to the powers of exclusion conferred upon the park department, taken in connection with the purposes of the driveway, had the effect of taking it out of the general operation of the General Statute of 1890.

Four years after the *Wright Case* was decided the supreme court of North Carolina declared that a statute (N. C. Pr. Acts, chap. 14) which forbade any person "to use upon the road of the A. company a bicycle, tricycle, or other non-horse vehicle, without the express permission of the superintendent of the road" was not unconstitutional, as destroying the property of citizens or depriving them of the reasonable use of it. The argument was that, as a man has no right to use his property so as to injure another in the just use of his, there was no reason why the owner of a particular kind of vehicle should be allowed to use it on a certain road, when, on account of its peculiar form or appearance or from the unusual manner of its use, it was apt to frighten horses or otherwise to imperil passengers over the road. An enactment which had simply the effect of regulating the use of property was always a lawful exercise of the general police power of a legislature. Nor could such a statute be objected to on the ground 47 L. R. A.

that it left an arbitrary discretion to the superintendent of the road, since the true import of the provision was that the power vested in him should be honestly, fairly, and reasonably exercised for the purpose of giving effect to the law, and that it was his duty to grant permission to cyclists to use the road, on any occasions when such use is safe for others. *State v. Yopp* (1887) 97 N. C. 477, 2 S. E. 468.

So recently as seven years ago a municipal by-law prohibiting persons from riding bicycles across a public bridge was upheld on the simple ground that the *onus* of showing such a regulation to be invalid had not been satisfied by the party who attacked its validity. *Twilley v. Perkins* (1893) 77 Md. 252, 19 L. R. A. 632, 26 Atl. 286. (A case in which the plaintiff sued the highway commissioners for false imprisonment.) The particular conclusion arrived at was that, as some horses, ordinarily gentle, are apt to take fright at bicycles, when ridden along the public highways, and many never become accustomed to them, the discretionary powers of county commissioners who have full authority to make reasonable rules and regulations for the use of a certain bridge were not exceeded by the promulgation of a rule forbidding any person to "ride" a bicycle or tricycle over the bridge. The court emphasized the fact that it was only the "riding" of the bicycle that was prohibited, and said that a bicyclist had no right to insist upon the use of his property or vehicle on the public highway in a manner that might produce danger or injury to others who were lawfully exercising their rights in the ordinary use of their property.

It seems open to grave doubt whether the mere fact that such an ordinance is on its face calculated to derogate from the common right of citizens to use a public highway ought not to have been considered sufficient to shift the *onus* in this case to the defendants.

The decision of the Maryland court in *Twilley v. Perkins*, *supra*, seems to be wholly irreconcilable with another which had been rendered in Kansas three years earlier to the effect that, as a citizen has the absolute right to choose for himself the mode of conveyance he desires subject to the sole condition that he will observe all those requirements which are known as the law of the road, a municipal ordinance which attempts to forbid bicyclists to use that part of the street which is devoted to the use of vehicles is void as against common right. *Swift v. Topeka* (1890) 43 Kan. 671, 8 L. R. A. 772, 23 Pac. 1075, where the court, for the purpose of sustaining the validity of an ordinance declaring it to be unlawful to ride a bicycle within the limits of the municipality, or "across

the ordinary rules of the road for each other's convenience and safety. I do not, however, think that such a rule would require that, in an open, unobstructed highway, a vehicle like a cart, for instance, should be driven to one side in order that the rider of a bicycle might be relieved of the necessity of deviating from a straight line. Good sense and a reasonable regard for the peculiarities of such cases ought to be required, both of the drivers of vehicles and of the riders of bicycles. This is hardly necessary to say. The experience of almost everyone, in his own family, if not from his own personal use of the bicycle, emphasizes the importance of proper and reasonable regulations for the protection of the many thousands of people who use the mod-

ern vehicle known as the bicycle. At the same time, it is also to be borne in mind that that vehicle is much lighter and more under the control of its rider than vehicles of the other sort, which are drawn by horses. In many cases, therefore, it is the duty of the rider of the bicycle to regulate his course, and to make concessions, which possibly the driver of a vehicle of burden ordinarily would not be obliged to do. In this particular case it is quite evident that the plaintiff, under the notion that he had a right to compel the driver of the cart to leave the track in order to give him a free and unobstructed passage, remained in his onward course so long that the collision which occurred was unavoidable. In this he was at fault. He brought the consequences upon himself by

a bridge" specified by name, construed this provision as being merely a prohibition directed against the use of a bicycle on the sidewalks of the bridge, and not as a prohibition against riding it on any part of the bridge, including that which is used by vehicles generally.

And quite recently we find the court laying it down, *arguendo*, in *Emporia v. Wagoner* (1897) 6 Kan. App. 659, 49 Pac. 701, that "to forbid a citizen riding on a bicycle the freedom of a public street . . . would be void as against common right."

It is not disputed, of course, that the power of the municipal authorities is of sufficient extent to require cyclists to observe such rules and regulations as are reasonably necessary to secure the safety of other travelers upon highways.

Thus, where a statute gives a municipal council the power to regulate the riding of bicycles over the sidewalks of a city, a court will not pronounce invalid, as being unreasonable, an ordinance providing that bicyclists must have an alarm bell and a lamp on their wheels, and ring the former on approaching all crossings and sidewalks, whether there are any pedestrians on them or not. *Emporia v. Wagoner* (1897) 6 Kan. App. 659, 49 Pac. Rep. 701.

The commissioners of the District of Columbia have power to enact ordinances regulating the construction of bicycles used on the streets of Washington, subject to the restriction that the regulation shall be reasonable and usual. *Moore v. District of Columbia* (1898) 12 App. D. C. 537, 41 L. R. A. 208.

The ordinance under discussion was one declaring that no bicycle ridden on the streets should have a handle-bar more than 4 inches below the saddle. The court did not decide whether this ordinance was unreasonable, as it had no power, under the act of Congress, to do so, but indicated the considerations by which this point should be determined in the following passage of the opinion: "In a case such as the present, the question whether the regulation is reasonable or unreasonable and oppressive to the citizen, in the exercise of his rights and in the use of his private property, is more or less a question of fact. The bicycle is a vehicle of comparatively recent use upon our streets, and is of various construction. Its safe use upon the streets may depend greatly upon the expertness of the rider, as well as upon the construction of the vehicle itself. If the vehicle, such as that of which the defendant is accused of riding on the streets, is ordinarily safe to persons traveling the streets, when used by a person of ordinary care and skill in riding, then there would seem to be no reasonable necessity

for excluding the use of such vehicle on the streets; and the regulation by which such vehicle is excluded from the street may be said to be unreasonable, and to operate to deprive the defendant of the lawful use of his property. But, on the other hand, if the ordinary and reasonably careful use of the vehicle on the streets in any manner tends to endanger and annoy the traveling public on the streets, and this by reason of the nonconformity in the construction of the vehicle to the requirement of the regulation, then the regulation is reasonable and proper, as applied in restraint of the use of the vehicle on the streets." *Moore v. District of Columbia* (1898) 12 App. D. C. 537 (542), 41 L. R. A. 208.

The onus of showing that this ordinance was unusual and unreasonable was held to be on the person infringing its validity. The precise point on which the decision turned was that the defendant, who had been prosecuted for infringing the ordinance, was entitled to introduce extrinsic evidence to prove its unreasonableness and oppressiveness, and that it was error for the magistrate to disregard this evidence and declare the regulation to be reasonable and valid on its face. *Ibid*.

IV. Reciprocal duties of cyclists and other persons traveling on highways.

The cases dealing with the right of action for injuries inflicted or received by a cyclist, as the result of the wilful or careless acts of himself or other travelers, may be treated most conveniently by classifying them under several heads, indicating the nature of the accident from which the injury results.

a. Duty of cyclists to pedestrians.

A bicyclist is within the purview of the statute 5 & 6 Wm. IV. chap. 50, § 78, imposing a penalty upon any person who "rides any horse or beast, or drives any sort of carriage, . . . furiously, so as to endanger the life or limb of any passenger." *Taylor v. Goodwin* (1879) L. R. 4 Q. B. Div. 228, 48 L. J. M. C. N. S. 104, 40 L. T. N. S. 458, 27 Week. Rep. 489, Lush, J. said: "The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers-by. It is quite immaterial what the motive power may be. Although bicycles were unknown at the time when the act passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous."

Similarly, a bicyclist is within the provision of chap. 100, § 35, of the English highway act

his own folly. In our judgment, there was nothing in the circumstances of the case or in his duty which required the driver of the cart to leave the track to make room for the plaintiff. We are therefore of the opinion that the plaintiff made out no case, and that the instruction of the trial judge to the jury to render a verdict in favor of the defendant was proper, and should be sustained. The rule is therefore discharged."

Mr. Thomas Earle White, for appellant:

The bicycle is a two-wheeled carriage.

Geiger v. Perkiomen & R. Turnp. Road, 167 Pa. 582, 28 L. R. A. 458, 31 Atl. 918; *Com. v. Forrest*, 170 Pa. 40, 29 L. R. A. 365, 32 Atl. 652.

of 24 & 25 Vict., declaring that anyone who, "having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or wilful neglect," do any bodily harm to any person, is guilty of a misdemeanor. *Reg. v. Parker* (1895) 60 J. P. 793. There the cyclist was riding down a hill without a brake, at a rate variously computed by the witnesses at 12 or 16 miles an hour, and knocked a man down, inflicting fatal injuries. *Hawkins, J.*, said: "Cyclists seemed to think that, so long as they rang their bell or gave a warning, people were bound to get out of their way. That was not the law, and they must learn that they have no greater rights than other persons using the highway, either on horseback or driving. If people do not get out of the way they must turn aside or stop. They must know that their liability was not only a criminal one, as they were also liable to make compensation for their wrongful acts."

It is error to nonsuit a plaintiff in an action for negligence, where the evidence is that the defendant, while riding his bicycle at the rate of 5 or 6 miles an hour down a narrow, sloping path, came up, without giving any warning, behind the plaintiff, who, with many other persons was walking along the footpath in the same direction as the bicyclist, and ran the wheel against him. In such a case the defendant is not relieved from liability by the fact that the immediate cause of the accident was the striking of the wheel against an obstruction, unless, at all events, it appears that the exercise of due care would not have enabled him to avoid that obstruction. *Myers v. Hinds* (1896) 110 Mich. 300, 33 L. R. A. 356, 68 N. W. 156.

A verdict has been upheld which found the accident to be wholly attributable to the fault of the bicyclist, where he was riding at the rate of 6 or 7 miles an hour through a narrow village street in which there were a number of the inhabitants standing or walking slowly about, and, after having narrowly escaped running into a group of people which scattered at his approach, came into collision with a little girl who just then ran out of a side street, but whom he was unable to see until the other persons had got out of the way of his bicycle. The court laid down the general rule that the duty of a bicyclist to pedestrians demands that, when he is riding along and his view becomes obstructed so that he cannot see what may be in front of him, he ought either to get off altogether, or to travel at a much less rapid speed than that which he was in this case maintaining. *Foster v. Rintoul* (1891) 28 Scotch L. Rep. 636.

A girl six years of age is not negligent in failing to take measures to protect herself 47 L. R. A.

Plaintiff was riding a vehicle in a proper portion of the road, and one where he had the right of way.

The act of assembly of April 23, 1889, declares in express terms that bicycles shall have the same rights, and be subject to the same restrictions, as vehicles drawn by horses.

Mr. Thomas Leaming, for appellee:

The lighter vehicle or boat must give way for the heavier and more unwieldy one.

Beach v. Parmeter, 23 Pa. 196; *Grier v. Sampson*, 27 Pa. 183; *Philadelphia & R. R. Co. v. Adams*, 89 Pa. 31, 33 Am. Rep. 721.

Per Curiam:

Judgment affirmed.

against the occurrence of a contingency so improbable as that, when she has just emerged from a cross street, a bicyclist will suddenly scatter a group of people which had previously rendered him invisible, and dash down upon her at a rapid pace. *Ibid.*

b. Bicyclists entitled to benefits and subject to burdens of the rules of the road.

The most important practical consequence of the doctrine which places cycles on the same footing as horse-drawn vehicles is that cyclists, whether specifically mentioned or not in the enactments which define the rules of the road, are everywhere held to be subject to the burdens, and entitled to the advantages, incident to the observance of those rules.

Thus, we find it laid down that a bicycle is a "carriage or vehicle" within the meaning of R. I. Pub. Stat. chap. 66, § 1, which requires any person traveling on a highway with a "carriage or vehicle" to turn out to the right on meeting another person so traveling. *State v. Collins* (1888) 16 R. I. 371, 3 L. R. A. 394, 17 Atl. 181.

So, also, the fact that the driver of a vehicle does not turn to the right as he approaches a bicyclist riding in the opposite direction is *prima facie* evidence of negligence. *Cook v. Fogarty* (1897) 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677.

A declaration which alleges that the plaintiff, while riding his bicycle along a certain street, in the exercise of due care, was run over by the defendant's horse and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment, and was severely injured and his bicycle demolished, is not demurrable, where the grounds assigned for the demurrer are merely that it neither avers specifically that the injuries were incurred by reason of any fault or negligence of the defendant, nor that the alleged servant of the defendant was engaged at the time on the defendant's business; and that, if it states any cause of action, it joins in one count two separate causes of action, *viz.*, the injury to the rider and to the bicycle. *Braithwaite v. Hall* (1897) 168 Mass. 38, 46 N. E. 398.

The extent to which a bicyclist meeting a horse-drawn vehicle is entitled to rely upon its driver's observance of the rules of the road is a question which must be determined by the special facts of each case. On the one hand, there is no difficulty in admitting that, if the circumstances show positive heedlessness on the part of a bicyclist who rides into the pole of a wagon, it is immaterial whether the wagon was or was not on the proper side of the road. *Rowland v. Wanamaker* (1898) 7 Pa. Dist. R. 249.

VIRGINIA SUPREME COURT OF APPEALS.

JONES, *Plff. in Err.*,
v.
City of WILLIAMSBURG.

(97 Va. 722.)

A municipal corporation is not liable for injury to a person who is struck by a bicycle ridden by another person on a sidewalk, by reason of the failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks.

(January 18, 1900.)

So, too, there is no reason why bicycles should not, in a general sense, be regarded as within the scope of the doctrine laid down in an American case, that, "while the statute prescribes a general rule [as to the use of the road], it does not undertake to define what may be the duties and liabilities of travelers under all possible circumstances. A man may not remain stubbornly and doggedly upon the right of the traveled part of the highway, and wantonly produce a collision which a slight change of position would have avoided." *O'Maley v. Dorn* (1859) 7 Wis. 236, 73 Am. Dec. 403, holding that an instruction implying that, if a vehicle had been driven to the right-hand side of the traveled strip of the highway, at the time it came into collision with another, the driver was necessarily free from negligence, is rightly refused.

But it is sufficiently obvious that a rigid application of this doctrine might easily be productive of great injustice to wheelmen. In cases where it becomes necessary to determine the relative culpability of bicyclists and the drivers of horse-drawn vehicles, the manner in which the latter will commonly act, when an emergency presents itself, must be largely influenced by the fact that, if a collision does take place, the bicyclist will certainly be the principal, if not the only, sufferer. Any view of relative duties of the parties which does not take into account the tendency to recklessness which a consciousness of being in this position of advantage will be apt to induce in the average human being would be altogether too optimistic for a practical science like the law. A fairer and less one-sided principle, we think, is indicated by a New York case which holds that a bicyclist riding along his own side of a road is not negligent in acting upon the assumption that the driver of a buggy which is coming towards him on the same side of the road will obey the law and turn out before they meet, and that, if a collision occurs, owing to his misplaced confidence in this regard, he may recover damages from the driver of the buggy, although he might have escaped injury if at the last moment he had turned out towards the centre of the road, the result being the same, although he did not act with good judgment in the matter, since he is entitled to the benefit of the principle that, when a party is placed by the negligence of another in a position of danger, and compelled to act suddenly, the law does not demand that accuracy of judgment which is exacted under normal circumstances. *Schimpf v. Sliter* (1892) 64 Hun, 463, 19 N. Y. Supp. 644.

A statute declaring that bicycles and like vehicles are entitled to the same rights, and subject to the same restrictions, in their use as are prescribed in the case of persons using carriages drawn by horses, has the effect of imposing 47 L. R. A.

ERROR to the Circuit Court of James City and the City of Williamsburg to review a judgment in favor of defendant in an action brought to hold defendant liable for injuries caused by a bicycle ridden along the sidewalk in defendant city. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. N. Stubbs and B. H. Ewan for plaintiff in error.

Messrs. Munford & Anderson, for defendant in error:

A sovereign state cannot be held liable in a civil action for damages to an individual

upon a wheelman the duty of turning out for a heavy vehicle where that has previously been established as the rule of a road by earlier decisions in the country where the statute was enacted. *Taylor v. Union Traction Co.* (1898) 184 Pa. 465, 40 Atl. 159; applying the general rule laid down in *Beach v. Parmeter* (1854) 23 Pa. 196; and *Grier v. Sampson* (1856) 27 Pa. 183.

Under a statute requiring a driver to turn to the right when a vehicle is met, and give it half the road, there is no obligation to turn out for a bicyclist until he knows, or with reasonable care could have known, that the bicyclist is approaching. And in such a case a jury is justified in finding that the driver of a vehicle used due care to ascertain the approach of a bicyclist at night, where both the driver himself and a companion testify that they were both watching the road in front of them for the purpose of seeing anyone who might be on it and were not expecting to meet anyone, and did not see or hear the bicyclist until the vehicle ran against him. *Cook v. Fogarty* (1897) 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677.

Where the statute prescribing what side of the road shall be taken by vehicles cannot be construed so as to cover bicycles, the question whether the driver of a freight wagon shall turn to the right when meeting a bicyclist is one to be determined with reference to the consideration whether it is reasonably necessary, and this depends solely on what should be conducted in such a case of a driver of ordinary skill and prudence. The driver of such a wagon, therefore, who takes the wrong side of a road, preparatory to stopping at a house, is not bound to exercise the highest degree of care, but merely ordinary and reasonable care, to avoid collision with a bicyclist coming in the opposite direction. On the other hand, the fact that there is no statute defining the duties of the parties prevents the bicyclist from asserting that he has any absolute right to pass between the wagon and the curb on his own side of the street, or to assume that the driver will turn out for him towards the other side. *Peltier v. Bradley, D. & C. Co.* (1895) 67 Conn. 42, 32 L. R. A. 651, 34 Atl. 712.

It is perhaps not amiss here to remind the reader that the rules of the road which prescribe the side upon which vehicles shall pass are, on very nearly the whole of the American Continent, different from those observed in the British Isles and the English colonies generally, these being defined by the old rhyme which runs:

"'Tis a law of the road,
Though a paradox quite,
If you keep to the left
You will always be right."

An example of an unusually minute statutory definition of the relative rights of cyclists

resulting from a failure to exercise the functions of government, or neglect to perform its public duties.

Hill v. Boston, 122 Mass. 348, 23 Am. Rep. 332; Dill. Mun. Corp. § 965; 15 Am. & Eng. Enc. Law, p. 1143; *Galveston v. Posnansky*, 62 Tex. 118, 50 Am. Rep. 517.

Powers and franchises of an exceptional and extraordinary character, which are sometimes granted to municipalities, impose upon them duties and liabilities similar to those often imposed upon private corporations and individuals; and with respect to these ministerial and absolute duties municipal corporations are held liable in damages for neglect of duty, or the improper performance of the duties imposed.

and persons driving other vehicles will be found in Ont. Rev. Stat. p. 2922.

The negligence of the bicyclist himself has been held to be the proximate cause of a collision with a wagon, where the evidence showed that he undertook to ride through a space of 3 or 4 feet between that wagon and another which it was passing, rather than turn to the left and ride over a strip of road covered with fresh-laid macadam, although it also appeared that the accident would probably not have happened if the defendant, noticing what the bicyclist was trying to do, had not pulled his horse to the left so as to give more room, the first effect of the movement being that the space between the wagons was somewhat narrowed. *Rolland v. Dawes* (1898) Rap. Jud. Quebec, 13 C. S. 52.

One who drives so recklessly as to run into a bicyclist going in the same direction, and injure him and his bicycle, may be convicted of assault. *Com. v. Dooley* (1897) 6 Pa. Dist. R. 381.

V. Liability for frightening horses.

Compare also IV. b, *supra*.

In cases where a bicyclist is charged with negligently frightening horses by the use of his wheel, his responsibility is measured by the general principle that a person cannot be made to suffer for his acts, unless they were done in such a manner and at such a time as to show that he was acting in disregard of the rights of other persons. Hence, in the absence of any apparent reason for supposing that the sight of his wheel will frighten the horses of a carriage which he sees approaching, a bicyclist lawfully traveling in the ordinary manner along a public highway cannot be charged with negligence because he does not stop and inquire whether the horses will be frightened, or because he does not anticipate the contingency of their taking fright. *Thompson v. Dodge* (1894) 58 Minn. 555, 28 L. R. A. 608, 60 N. W. 545.

But by the Virginia Laws 1896, the obligation is imposed upon bicyclists of dismounting if an approaching team appears to be frightened.

Similarly, and in reliance upon the same principle, it has been held that a complaint is demurrable which simply alleges that the defendant rode his bicycle in the centre of the road, at the rate of 15 miles an hour, to and within 10 feet of the heads of the horses driven by the plaintiff, the consequence being that they took fright and ran away and upset the plaintiff's carriage. *Holland v. Barch* (1889) 120 Ind. 46, 22 N. E. 83.

The mere fact that the driver of a horse accustomed to passing bicycles, and ordinarily under his control, failed to alight and hold the animal's head on a particular occasion when a

Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; *Terry v. Richmond*, 94 Va. 537, 38 L. R. A. 834, 27 S. E. 429; 15 Am. & Eng. Enc. Law, p. 1145 *et seq.*; 2 Dill. Mun. Corp. 3d ed. §§ 27, 966, 967, 949, 950, 1046; note to *Flournoy v. Jeffersonville* (Ind.) 79 Am. Dec. 472.

Where a municipal corporation is given power to lay out streets, sewers, etc., it cannot be held liable for failure to exercise this power, but after the streets or sewers are once established the duty to keep them in proper repair becomes absolute or ministerial, and for its neglect the corporation is liable.

Dill. Mun. Corp. 3d ed. §§ 949, 1048; *Mills v. Brooklyn*, 32 N. Y. 489; *McCarthy v. Syra-*

bicycle was approaching on a narrow road, will not constitute such contributory negligence as will avail a municipality in an action for injuries caused by the horses taking fright and backing off the road. *White v. Ballard* (1898) 19 Wash. 284, 58 Pac. 159.

VI. Duty of cyclists to carry bells and lamps.

Upon general principles it would seem that, where there is no statute or ordinance prescribing the use of bells and lights, the omission of a cyclist to carry them is, in case of a collision, some evidence, at least, of negligence, the inference of a want of care being more or less peremptory according to the circumstances, such as the degree of obscurity, the number of foot passengers likely to be met upon the highway, and so forth. The supreme court of Iowa has recently laid it down, in a case where the bicyclist was injured through a collision with a bicycle, that "a person who rides a bicycle without a light or signal of warning in a public thoroughfare, where he is liable to meet moving vehicles or pedestrians, at a time when objects can be discerned readily at a distance of but a few feet is [as matter of law] guilty of negligence." *Cook v. Fogarty* (1897) 103 Iowa, 500, 39 L. R. A. 488, 72 N. W. 677.

By § 1 of the English definition of time act (43 & 44 Vict., chap. 9) it is laid down that "whenever any expression of time occurs in any act of Parliament, deed, or other legal instrument, the time referred shall, unless it is otherwise specifically stated, be held in case of Great Britain to be Greenwich mean time." By § 85 of the local government act of 1888, it is enacted that during the period between one hour after sunset and one hour before sunrise every person riding a bicycle shall carry on it a lighted lamp. A bicyclist was arrested for not having a lamp at a place where it was less than an hour after sunset by the local time, but more than an hour by the Greenwich time. The court held, adopting the argument of counsel, that the expressions of time in the later act referred to the physical facts of sunset and sunrise, and that the liabilities of bicyclists were to be determined with regard to the actual hours of darkness in different places, which varied according to longitude. *Gordon v. Cann* (1899) 68 L. J. Q. B. N. S. 434.

The above-cited section of the local government act merely has the effect of making the offenses created by the highway acts susceptible of being committed by bicyclists as well as the drivers of other vehicles. It does not operate so as to bring the new offense of omitting to carry a light within the purview of the clauses in the earlier statutes which give a constable or other person witnessing an infringement of these provisions to detain the offender without

case, 46 N. Y. 194; *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Jones v. New Haven*, 34 Conn. 1; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; note to *Perry v. Worcester* (Mass.) 66 Am. Dec. 434.

So as to abatement of a nuisance. Where the failure to abate a nuisance is a neglect of an absolute or ministerial duty, such as the duty to keep a street in repair, the city is liable, but where it is a neglect of a governmental duty, such as failure to prevent the unlawful use of the streets, there is no more civil liability upon the corporation than for failure to prevent a breach of the peace.

Dill. Mun. Corp. 3d ed. § 951; *Wilming-ton v. Vandegrift*, 1 Marv. (Del.) 5, 25 L. R. A. 538, 29 Atl. 1047.

a warrant. The court said that to construe the later statute in this manner would virtually be equivalent to drafting a new section. *Hat-ton v. Treeby* [1897] 2 Q. B. 452, 66 L. J. Q. B. N. S. 729 (action for assault by constable who stopped bicyclist).

The consequences of having no lamp, in cases where the bicyclist is seeking to hold the authorities responsible for maintaining a defective roadway are adverted to in VIII. *infra*.

VII. Use of footpath by cyclists.

a. Under the common law.

Apart from statute or ordinance, there is plainly no ground upon which it can be pronounced that any right is violated simply by taking a cycle, or indeed any vehicle, along a footpath. This strip is as much a part of the highway as that which is specially laid out to be used by horse-drawn carriages. The only obligation, therefore, imposed by the common law upon a cyclist in respect to the use of a footpath would seem to be that he shall exercise that increased measure of care which is suggested by the fact that he is traveling where foot passengers do not ordinarily expect to encounter vehicles.

Thus, in *Purple v. Greenfield* (1884) 188 Mass. 1, we find the court declining to lay it down as a universal proposition that any and every use of any kind of velocipede upon a sidewalk is unlawful, and expressing its approval of the trial judge's refusal to instruct the jury that, if the use of the sidewalk by the rider of a velocipede caused the plaintiff, while she was standing on the sidewalk, engaged in conversation, to step back to avoid being hit by such velocipede, and so fall into an opening negligently left without a railing near the outer line of the sidewalk, the defendant municipality was not liable for the resulting injuries. The trial judge told the jury that the unlawfulness of such use of the sidewalk might be established by showing the existence of a municipal ordinance forbidding it; but, as there was no evidence of any such specific prohibition, it was for them to say whether such use should be pronounced unlawful for the reason that it obstructed public travel, and was therefore a nuisance.

It may also be mentioned, though the case is not strictly within the scope of this note, that in *Reg. v. Mathias* (1861) 2 Fost. & F. 570, Byles, J., left to the jury the questions whether a perambulator was a vehicle which prevented the convenient use of a footway by passengers, and was in that sense a nuisance which one of 47 L. R. A.

The language of the statute from which the duty and power of the municipality was derived indicates that the duties which it imposes, and the powers which it confers, are discretionary and legislative in their character.

If the action complained of constituted a public nuisance at common law, then there was a remedy in the courts, and an ordinance forbidding the act, and prescribing a penalty for violation, would have been nothing more than declaratory of the law as it previously existed.

Wilming-ton v. Vandegrift, 1 Marv. (Del.) 5, 25 L. R. A. 538, 29 Atl. 1047.

Even if such an ordinance had been necessary, and it had been the duty of the city council of Williamsburg to pass it, in order to prevent the continuation of the nuisance,

the public had a right to remove, and whether, supposing the right to the use of the footway to be a mere easement, the owner of the soil was justified in removing it, on the ground that its presence was not justified by the nature of the easement. His statement of the law was that "the owner of the soil may remove anything that encumbers his close except such things as are usual accompaniments of a large class of foot passengers, being so small and light as neither to be a nuisance to other passengers nor injurious to the soil." The jury found that the perambulator was a "usual accompaniment" of foot passengers, but could not agree on the propositions submitted to it in the latter part of the direction as to size and weight and injury to the soil.

The supreme court of Indiana, applying the familiar principle that a specific design or intention at the time the act of violence is done is not a necessary element of an assault (see 4 Bl. Com. 182; Addison, Torts, p. 142), and that a malicious and criminal intent may be inferred from a wanton and reckless disregard of human life and safety, has held that, even in a case where a bicyclist would be justified in riding on a footpath, he is liable for an assault if he runs the bicycle recklessly against a person standing with his back to him, when, by the exercise of the slightest care, he might have passed such person without touching him. *Mer- cer v. Corbin* (1889) 117 Ind. 450, 3 L. R. A. 221, 20 N. E. 132.

b. Under statutes and ordinances.

But cases in which the consequences of riding or driving a vehicle on a footpath are left to be determined by common-law rules must necessarily be very rare, as the matter is almost universally regulated by statutes or ordinances.

Some few of the cases relate to enactments dealing specifically with cycles, and these are, as might be expected, usually prohibitory in their terms. Under such circumstances the duty to keep off the footpaths is of course peremptory. Hence, the fact that a person who is prosecuted for contravening the provisions of a statute prohibiting the use of a sidewalk by bicyclists was riding on it with the consent of the turnpike company upon whose land it was laid, is no defense. Such a sidewalk is as much within the purview of the statute as any other, and it is not within the power of any individual or corporation to license a violation of law. *Com. v. Forrest* (1895) 170 Pa. 40, 29 L. R. A. 365, 32 Atl. 652.

Similarly, the fact that a street is obstructed is no excuse for violating a municipal ordinance forbidding cyclists to ride upon a side-

its neglect to do so could not make the city liable in damages for injuries growing out of that neglect.

Elliott, Roads & Streets, 465; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

A municipal corporation cannot be held liable in damages for failure to perform duties of this character.

2 Dill. Mun. Corp. 3d ed. § 951; *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Shearm. & Redf. Neg.* § 262; 15 Am. & Eng. Enc. Law, p. 1145; *Wilmington v. Vandegrift*, 1 Marv. (Del.) 5, 25 L. R. A. 538, 29 Atl. 1047; *Howard v. Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058.

The "coasting" and "fireworks" cases involve the same principle as the case at bar, and the authorities are almost unanimous in

holding that in these cases there can be no recovery.

Dill. Mun. Corp. § 981, note 2; *Shearm. & Redf. Neg.* 202; *Shepherd v. Chelsea*, 4 Allen, 113; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; *Lafayette v. Timberlake*, 88 Ind. 330; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451.

Riely, J., delivered the opinion of the court:

The plaintiff was struck and injured by a bicycle that was being ridden upon a sidewalk of one of the streets of the defendant corporation, and brought this action to recover damages for the injury. There was a

walk, for such an ordinance leaves a bicyclist free to dismount and walk with his bicycle past the obstruction. It is error, therefore, in an action by a bicyclist for false arrest under such an ordinance, to admit evidence that he rode on the sidewalk because the street was obstructed. The consequence of the receipt of such evidence is that the jury are allowed to find that the bicyclist was justified in riding on the sidewalk, and that this fact was known to the defendant, and to consider such evidence as bearing on the motive of the defendant in causing the arrest of the plaintiff. *Fuller v. Redding* (1897) 13 App. Div. 61, 43 N. Y. Supp. 96. It was there held that evidence of a conversation in which the defendant, a trustee of a village, directed a police officer to watch the plaintiff and arrest him if found violating an ordinance which forbade the riding of a bicycle on a sidewalk, was not admissible in the action, as the trustee's desire to enforce the observance of the ordinance was not evidence of malice.

So, the fact that bicyclists have for a considerable time been riding on a sidewalk in contravention of a statute, without complaint on the part of those inconvenienced by the practice, avails nothing, as a defense to a suit brought for the purpose of exacting the fine imposed by the statute. *Com. v. Forrest* (1895) 170 Pa. 40, 29 L. R. A. 365, 32 Atl. 652.

In some places the officials controlling the highways have passed ordinances permitting the use of footpaths for cycling upon payment of a certain license fee, and it has lately been held in New York that, where such an enactment is within their discretionary power, and the conditions resulting from the use of the footpath do not amount to a public nuisance, they cannot be compelled to respond in damages to a person with whom a cyclist comes into collision while availing himself of the right conferred by the ordinance, unless negligence on their part is affirmatively established. *Lechner v. Newark* (1896) 19 Misc. 452, 44 N. Y. Supp. 556.

Statutes in which cycles are not specifically mentioned have been construed in the following decisions:

The English highway act (5 & 6 Wm. IV., § 72), in specifying the offenses which authorize the infliction of the penalty prescribed, begins with the words: "if any person shall wilfully ride upon any footpath . . . or shall wilfully lead or drive any horse, etc., or carriage of any description . . . upon such footpath," and, after enumerating several other misfeasances, uses the words: "to the injury, interruption, or personal danger of any person traveling thereon." This qualifying expression, it is held, refers only to certain misfeasances mentioned in that part of the section which 47 L. R. A.

immediately precedes it. Hence it is not necessary, in order to justify the arrest and conviction of a bicyclist under the opening clauses of the section, that evidence should be given showing that the use of the footpath had the effect of injuring, etc., persons traveling thereon. *Brotherton v. Tittensor* (1896) 60 J. P. 72 (action for assault against constable).

A bicycle being a vehicle in the eye of the law, a person who rides one longitudinally along a footpath is deemed to be guilty of a violation of a statute providing that "it shall be unlawful for any person to ride or drive upon" any kind of "sidewalk for the use of foot passengers, unless in the necessary act of crossing the same." *Mercer v. Corbin* (1889) 117 Ind. 450, 3 L. R. A. 221, 20 N. E. 182.

But a tricycle in which a person unable to walk is traveling on a sidewalk is not within the scope of an ordinance against leading, riding, or placing "any beast of burden or vehicle on any sidewalk," or an ordinance which prohibits riding or driving except between the curb lines of streets. *Wheeler v. Boone* (1899) 108 Iowa, 235, 44 L. R. A. 821, 78 N. W. 909.

The effect of the Pennsylvania act (April 23, 1889, P. L. 110), giving cyclists the same rights, and subjecting them to the same restrictions in regard to the use of public highways as the drivers of vehicles drawn by horses, is to bring cyclists within the purview of a later act (May 7, 1889, P. L. 44), imposing a penalty upon anyone who "wilfully or maliciously rides or drives any horse or other animal upon any footway laid along a highway." The court said: "It will scarcely be disputed that a bicyclist is within the spirit of the act; it is wholly improbable the legislature intended to exempt him. The sidewalk is for travelers, men, women, and children; a very few years of observation and experience in the new mode of traveling by bicycle has resulted in the conclusion that this vehicle is fully as dangerous to those walking on the same road as the carriage drawn by a horse. . . . No bicyclist, with due regard to the safety and rights of his fellows, should demand the use, in common with foot travelers, of a walk with such a vehicle." *Com. v. Forrest* (1895) 170 Pa. 40, 29 L. R. A. 365, 32 Atl. 652.

A general statute forbidding the passage of municipal ordinances making punishable any act which has been declared a public offense against the state (*Burns's Ind. Rev. Stat.* § 1709), does not operate so as to deprive a municipality of all power to prohibit riding bicycles on sidewalks, where the statute covering the subject merely enacts that it shall be "unlawful for any person to ride or drive upon the brick, stone, plank, or gravel, sidewalk of any town, etc." (*Burns's Ind. Rev. Stat.* § 4398).

demurrer to the declaration, which was sustained by the circuit court, and the case is before us upon a writ of error to its judgment.

The complaint is not that the injury was caused by a bicycle that was stationary upon the sidewalk, and had been negligently allowed by the city to remain there, but that it was due to the propulsion of the bicycle against the plaintiff, while in motion, under the power and will of its rider. It is obvious, therefore, that if the city be liable in damages for the injury, its liability results, not from a defective condition of the sidewalk, but from the improper and dangerous use that was being made of it by the bicyclist.

A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In

its public character, it acts as an agency of the state, to enable it the better to govern that portion of its people residing within the municipality, and to this end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate and private character there are granted unto it privileges and powers to be exercised for its own private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but minis-

Applying the principle of strict construction to such a provision, a complaint which is laid under an ordinance which prohibits in general terms the use of bicycles upon a sidewalk will be good if it shows that the sidewalk over which the defendant rode was constructed of materials other than those mentioned in the state statute. But if this is not shown, the complaint is demurrable, as, if it should be upheld the penalty might be recovered even if the sidewalk were composed of "brick," etc. *Whiting v. Doob* (1899) 152 Ind. 157, 52 N. E. 759.

A municipal by-law which provides that "no person shall by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandise, or chattels, in any way encumber, obstruct, or foul any street, . . . sidewalk," etc., is infringed by the use of a velocipede on a sidewalk, even though no one is near it. *Reg. v. Plummer* (1871) 30 U. C. Q. B. 41.

Under the Ontario consolidated municipal act of 1892, § 496, subsec. 27, empowering a municipality to "prevent the encumbering, injuring, fouling, by animals, vehicles, vessels, or other means, of any road, street, . . . or other communication," it is competent for a municipal council to pass a by-law prohibiting any person from "driving, leading, riding, or backing any horse or any other animal or wagon or other vehicle along any sidewalk," and it has been held that a bicycle is a vehicle and the use of a bicycle is "encumbering" a sidewalk within the purview of such a by-law. *Reg. v. Justin* (1893) 24 Ont. Rep. 827, Approving *Reg. v. Plummer* (1871) 30 U. C. Q. B. 41.

The word "road" in a statute is for some purposes regarded as comprehending footpaths. Thus, it has been held that the offense of "willfully preventing or interrupting the free passage" of persons on a "public road" (Irish summary jurisdiction act, § 35, subsec. 3) is committed by a bicyclist who rides along a footpath beside a country road, even though no one is in sight, and he does not intend to interfere with anyone. The court took the ground that the act was done upon a part of the road, and was clearly calculated to "prevent or interrupt" the free passage of those persons for whom a footpath is specially intended, *viz.*, foot passengers. To this conclusion it is not a sufficient answer that if the rider sees anyone coming he may get out of his way by leaving the footpath, for there may be times and circumstances when it is impossible even for the most skilled rider to avoid coming into contact with people. *M'Kee v. M'Grath* (1892) Ir. L. R. 30 Eq. 41. 47 L. R. A.

VIII. *Right of cyclists to recover for injuries caused by defective highways.*

For the purposes of the present article it will be sufficient to remind the reader that, according to the doctrine accepted in all common-law jurisdictions, a statute transferring to a public corporation the obligation to repair does not of itself render such corporation liable to an action in respect to mere nonfeasance. To produce that effect language must be used by the legislature which indicates its intention that this liability shall be imposed. *Pictou v. Geldert* [1893] A. C. 524; *Cowley v. Newmarket Local Board* [1892] A. C. 345; *Sydney v. Bourke* [1895] A. C. 433.

The comments in the first two of these cases upon *Bathurst v. Macpherson* (1879) L. R. 4 App. Cas. 256, 48 L. J. P. C. N. S. 61, shows that the ground of the decision was that the municipality had been guilty, not of a mere nonfeasance, but of the maintenance of a nuisance. For other authorities upon the general rule stated in the text, see *Shearm. & Redf. Neg.* § 387.

Usually, however, the question in cases where a traveler seeks to recover damages for a breach of the duty to keep a highway in good repair is not whether such a duty exists, but whether it has been performed, or, in other words, whether the parties admitted to be responsible for the condition of the highway have exercised that degree of care which the law requires. Upon this question, so far as it concerns the drivers of horse-drawn vehicles, much light has been thrown by a large number of decisions, especially in the United States, but up to the present time very little progress has been made towards defining the principles upon which the courts should be guided in determining whether a cyclist, under a given set of circumstances, can or cannot hold the authorities responsible for an injury caused by a defect in a road. In fact, so far as our researches extend, only one court of review has so far had an opportunity of dealing with the subject. In 1894 it was laid down by the supreme court of New York that, under the highway laws of that state, the commissioners of highways are not subject to any higher obligations by reason of the fact that a bicycle rider on an ordinary country road is exposed to greater danger than a person in a vehicle drawn by horses, and are, therefore, only bound to maintain such a road in a condition which makes it reasonably safe for general traffic. *Sutphen v. North Hempstead* (1894) 80 Hun, 409, 30 N. Y. Supp. 128.

terial and absolute; and, for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages, in the same manner as an individual or private corporation. The line of distinction between the two classes of powers and duties is clearly drawn by the courts and text writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established. 2 Dill. Mun. Corp. 4th ed. §§ 949, 966; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 401; *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Terry v. Richmond*, 94 Va. 538, 38 L. R. A. 834, 27 S. E. 429; *Moia v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617.

Cases doubtless arise in which the courts experience difficulty in determining whether the injury complained of is the result of the failure to exercise, or the negligent exercise,

The circumstances in this case, however, did not call for the enunciation of any such sweeping principle, for the road was 25 feet in width, and the accident was due to the fact that the bicyclist, finding the centre of the roadway to be too soft for easy riding, undertook to ride close to the edge of a gutter, with a vertical side and about 18 inches in depth, and that the soft soil gave way under the wheel and allowed it to drop into the excavation. The court remarked that "the accident was unusual and incidental to the character of the vehicle he was riding," and, therefore, "not one which was within the anticipation of a prudent man," or which called for "extraordinary precautions to prevent." But this point of view seems to be erroneous. Such an accident, it is clear, would be more likely to happen to the wheels on one side of a heavy wagon than to a bicycle, and the mere fact that, by reason of the different construction of the two types of vehicles, the results of the subsidence of the soil at the edge of the ditch would not be exactly the same is not a sufficient reason for maintaining that a different rule of responsibility rests upon the highway authorities in the two cases. Plainly the ground upon which the defendant's nonliability should have been rested was that, as the roadway was amply wide enough for safe, if not comfortable, traveling, a bicyclist who merely for his own convenience left the strip commonly used, and rode along the edge of the excavation like the one described, did so at his own risk. Security, not ease, is clearly all that the bicyclist has a legal right to demand.

That the broad rule laid down by the court, *arguendo*, virtually amounting to a declaration that a cyclist must take a road as he finds it, provided it would be safe for an ordinary horse-drawn vehicle, is inconsistent with sound principles, we have very little doubt. The difference between the requirements of a cyclist and of persons traveling in other vehicles, as respects the condition of a highway, is sufficiently great to invalidate any conclusion which rests upon the assumption that a condition which, in the case of ordinary vehicles, would justify the inference of a performance or nonperformance of their duty by the road officers, would necessarily justify the same inference in the case of a cycle. The fact that cycles, considered as vehicles, possess certain special characteristics of their own, involves the corollary that the conduct of such officers must often wear a wholly different complexion according as the sufferer is traveling on a horse carriage or a cycle. So 47 L. R. A.

of a governmental and public power, or is due to negligence in the exercise or performance of a ministerial and private power or duty; but, as respects the particular case before us, there is no such difficulty.

Streets, like other highways, are for the use of the public, and their use is none the less for the public at large because they are within the municipality, and subject to its supervision and control. Streets, as popularly distinguished from sidewalks, though including the latter, are principally designed for the use of vehicles and animals, and sidewalks for the use of pedestrians. Bicycles come under the definition and description of vehicles, and sidewalks are not the proper place for them. But the right to regulate the use of the highways of the state or of the streets of a city is clearly a governmental power, and its exercise, whether by the state or by a municipal corporation as an agency of the state, is legislative and discretionary;

much is manifest. But the precise effect which should be attributed to these essential differences between cycles and other vehicles is not easily defined. The rather vague principle which governs the question is that "the object to be secured is the reasonable safety of travelers, considering the amount and kind of travel which may fairly be expected on the particular road." *Kelsey v. Glover* (1848) 15 Vt. 708. *Of. Shearm. & Redf. Neg.* § 367.

Compare also the following remarks:

"It may not always be an easy matter to define the precise duty of a municipality under the statute with regard to highways, but it may be laid down generally that it has done its duty when it has prepared a roadway of suitable width in such a manner that it can be conveniently and safely traveled." *Walton v. York County* (1881) 6 Ont. App. Rep. 181, per Burton, J. A.

Commissioners of highways "must exercise proper care in their maintenance in a reasonably safe condition for all ordinary travel." *Embler v. Wallkill* (1890) 57 Hun, 384, 10 N. Y. Supp. 797, cited with approval in *Ferguson v. Southwold* (1895) 27 Ont. Rep. 68.

The extent of the duties of cities and towns is, "not that all parts of all highways shall be kept in like repair and alike smooth and free from obstruction, but that all parts of all highways shall be kept in such a condition as shall be deemed reasonably safe and convenient, having reference to the character of the way and the amount of travel over it." *Street v. Holyoke* (1870) 105 Mass. 82, 7 Am. Rep. 500.

The problem to be solved by means of this principle as a starting point is whether, in view of the peculiarities of the cycle, the principle operates so as to cast upon the road officers more onerous or lighter obligations. At first sight it might appear that the standard of care thus imposed must be higher. But a little consideration will show that this conclusion by no means follows as a matter of course. On the one hand, it is undeniable that defects which are quite innocuous to a horse-drawn vehicle are often such as to be exceedingly dangerous to a cycle. But, on the other hand, it is equally undeniable that, in fixing the measure of care incumbent upon the road officers, it would be unjust not to give them the benefit of such inferences as may reasonably be drawn from the fact that a cycle occupies a much smaller space and can be turned in any direction much more readily than other vehicles. It is impossible to contend with any show of reason that the form-

and, being legislative and discretionary, a municipal corporation, as an arm of the state, is no more liable for the failure to exercise the power, or for its improper exercise, than the state itself would be.

The defendant was empowered by its charter to lay off streets and walks, and improve the same, but it was wholly within its discretion when and where it would do so. For the omission to exercise the power, it being legislative and discretionary, it would not be liable for an injury occurring in consequence of the omission, although, when the power was exercised, the duty to keep the streets and sidewalks in a reasonably safe condition for travel would become a ministerial and positive duty, for the neglect whereof it would be liable for an injury resulting therefrom. 2 Dill. Mun. Corp. 4th ed. §§ 949, 1048. The condition of the street or walk, however, is one thing, and the manner of its use by the public is quite a different thing.

ulation of an absolutely rigid doctrine which would bind such officials to provide a roadway which should be safe for a vehicle the construction of which renders it peculiarly susceptible of injury is logically defensible, when a comparison of the same vehicle with others also shows that, owing to its compactness and mobility, its rider is often much more favorably situated than the drivers of those vehicles for avoiding a dangerous place.

The practical difficulties raised by these opposing considerations are extremely embarrassing. On the one hand, it is clear that the effect of fixing the attention too exclusively on the greater fragility and instability of the cycle will be, in most instances, to lay upon highway officials a far higher standard of care than they are now obliged to satisfy, and that an enormous additional expenditure of money would be required if every public highway is to be maintained in such a condition that a cyclist might always rely on escaping injury while holding as straight a course and exercising no greater vigilance than the driver of a horse-drawn vehicle commonly exercises. On the other hand, if an exaggerated importance should be ascribed to the small size of the cycle and its capacity for being readily guided, there will be no little danger of drifting towards a doctrine which would virtually make a cyclist the insurer of his own safety. The only course, therefore, which would seem to be open at present, in cases involving the question under discussion, is to leave the jury to settle the liability of the highway officials under instructions which will indicate clearly the various considerations which inure to the advantage or disadvantage of the cyclist, as contrasted with other travelers.

That the question whether the highway authorities were negligent is essentially one for the jury, see *Kelsey v. Glover* (1843) 15 Vt. 708.

Cases of this type may also be considered from another point of view which will often be of assistance in determining the rights of the parties. According to a familiar principle of the law of negligence, one who is under a duty to keep some material substance, like the surface of a road, in good condition for the use of another person is entitled to the benefit of the assumption that such person will, in using it, exercise ordinary care in observing and avoiding dangers. It is true that, in practice, a jury is likely to solve the problem whether road officers have provided a road reasonably safe for a prudent cyclist, considered in the abstract, by

For its safe condition the city is responsible, but for its unlawful or improper use it is not.

The peace, good order, and welfare of a community is a primary object of government, and laws are enacted by the sovereign power, and ordinances adopted by municipal corporations, for the preservation thereof; but clearly neither the state, nor the municipality, would be liable for an injury received in an affray upon one of its streets, or in a collision from fast riding or driving, in consequence of the absence of a law or ordinance prohibiting the same, or the failure of the authorities of the state or city to enforce it, if enacted or adopted, although but for the want of a proper law or ordinance, or the failure to enforce the same, the injury would not have happened. The government does not guarantee its citizens against all the casualties incident to humanity, and cannot be called upon to compensate, by way of dam-

inquiring whether the concrete specimen of the cyclist, who may happen to be the plaintiff, was guilty of negligence at the time the injury in suit was received. But as the issue of contributory negligence is invariably raised, in some form or other, in actions where the defendant is charged with a want of care, it would seem that no great inconvenience, and certainly no injustice, can result from submitting the case under both aspects to the jury.

To cases in which the accident in suit would probably not have happened if the cyclist had not been traveling when the light was dim, the test of liability here suggested would seem to be specially appropriate. It is certainly open to serious doubt whether a cyclist is justified in expecting that he will be provided with a roadway so smooth that he can safely travel over it without a lamp, and in darkness so profound that a defect does not become visible until it is too late for him to take measures for his protection. Even the generality of such a practice in any given locality ought scarcely, it would seem, to negative the inference that, even if the want of a lamp was not contributory negligence on the part of a cyclist, he must be at least charged with the consequences of an election to take all the risks which he may incur from the want of the light.

The liability of highway authorities for injuries received on strips at the side of a road deliberately left in a worse condition than the strip prepared specially for the accommodation of traffic, has as yet been very little considered with reference to the requirements of cyclists.

See *Stuphen v. North Hempstead* (1894) 80 Hun, 409, 30 N. Y. Supp. 128, the substance of which has been stated in this section, *supra*. The effect of this case is that a cyclist, who turns out of the strip of a road which is usually traveled, takes upon himself the obligation of exercising greater vigilance, the plaintiff being held guilty of negligence in failing to realize the danger of the occurrence of the accident which actually took place.

In this dearth of strictly relevant authorities we shall content ourselves with collecting some cases in which this point has been discussed in connection with horse-drawn vehicles. It will be observed that they are not quite harmonious.

In one the trial judge was held to have rightly refused an instruction to the effect that the duty of a municipality "to keep its streets in a reasonably safe condition for the passage of pedestrians and vehicles extends to the whole width of the street." This duty, it was said,

ages, its inability to protect against such accidents and misfortunes. The failure to pass a needful law or ordinance is plainly the omission by the state or city as an agency thereof of a public, governmental duty, for which no action lies. Hence, upon this principle, it has been held by the courts, and laid down by approved text writers, that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for failing to pass an ordinance prohibiting the firing of cannon or firearms in its streets, or the explosion of fireworks, or the engaging in dangerous sports, or the running at large of cattle and swine, or for suspending or neglecting to enforce an ordinance against such dangerous practices and improper use of its streets, in consequence whereof private property was destroyed or persons injured. Elliott, *Roads & Streets*, 465; 2 Dill. Mun. Corp. 4th ed. § 949; note; 1 Shearm. & Redf. Neg. 5th ed. § 262; Cool-

ey, Const. Lim. 6th ed. note to page 254; Cooley, Torts, 2d ed. 739; *Boylard v. New York*, 1 Sandf. 27; *Levy v. New York*, 1 Sandf. 465; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 846; *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Kelley v. Milwaukee*, 18 Wis. 83; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787.

The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets and sidewalks, and not from any defect in their state or condition, has been applied where persons have been injured by "coasting,"—a practice so similar to the use of sidewalks by a bicyclist that a different conclusion cannot be reached in the case of an injury caused by a collision with a bicycle. *Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Pierce v. New Bedford*, 129

could not be predicated regardless of the location of the street, the amount of travel, and other circumstances. Fullam v. Muscatine (1886) 70 Iowa, 436, 30 N. W. 861.

An earlier decision by the same courts seems to imply that a municipality has the right to leave a strip of a highway unimproved, but that it is liable for a defect existing anywhere between the sidewalks of a city which has once been opened to the public over its whole width. *Stafford v. Oskaloosa* (1882) 57 Iowa, 748, 11 N. W. 668.

Other authorities seem to exclude this qualification by laying it down that in one of the public thoroughfares of a city a traveler has the right to assume that he can drive or walk over all parts of the roadway with safety. *Buck v. Biddeford* (1890) 82 Me. 433, 19 Atl. 912; *Durant v. Palmer* (1862) 29 N. J. L. 544; *Raymond v. Lowell* (1850) 6 Cush. 524.

As regards a country road, the authorities are to the effect that it need not be made passable over its entire width for wheeled vehicles. *Shearm. & Redf. Neg.* § 352.

That a violation of the rule of the road is no defense to an action for injuries caused by a defective highway, has been held under a statute which rendered the driver of a vehicle liable to be mulcted in a fine and damages if he failed to turn to the right of a highway when he met with another vehicle, but expressly declared that "no complaint for its violation should be sustained unless made by the person injured." The effect of such a statute is merely this: that, if a traveler meeting another turns to the left, he does so at the peril of being treated as a criminal in case injury is thereby occasioned to another person; but that, if no one is harmed, he is not to be regarded as the doer of an illegal act. Hence, his having turned out to the left will not debar him from recovering damages from the parties responsible for the condition of the highway for injuries received through the overturning of his vehicle by an obstruction negligently left on the road. *Gale v. Lisbon* (1872) 52 N. H. 174.

IX. Special enactments for the protection and convenience of cyclists.

An attempt has been made in some states to check, by penal statutes, the detestable practice of dropping upon highways substances calculated to injure cycles. For illustration, see N. Y. Laws (1896) chap. 333, p. 273.

It is to be hoped that all legislatures will shortly recognize the futility of leaving a per-

son who suffers from malicious acts of this sort to exact satisfaction by a civil action.

The fact that, in some places, legislative bodies are even willing to accord special privileges to bicycles, as against other vehicles, is a very significant token of the change which, as already remarked (II. *supra*), public opinion has undergone in regard to their position among the appliances of transportation. For example, the Ontario municipal act, § 640 (Ont. Rev. Stat. p. 2633), empowers municipal councils to set apart for the exclusive use of bicyclists a portion of the highway, which cannot thereafter be used by riders of horses or drivers of vehicles drawn by horses without incurring a certain penalty.

Various other statutory provisions respecting bicycles relate to insurance upon them, to taxation of them, to their exemption from levy on execution, to the construction of bicycle paths for the exclusive use of bicyclists, to restrictions as to riding on sidewalks, and to a considerable variety of other regulations which it would not be profitable to set out in detail.

X. Injuries to cyclists at railway crossings.

When approaching a railway track a bicyclist must dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen, in the manner required of a pedestrian. What may be called a "bicyclist's stop," *viz.*, circling a wheel round and round at a distance of 5 or 10 yards from the track, is not a sufficient compliance with the requirements of the law under such circumstances, a full stop being demanded, not merely to the end that he may have time and opportunity for observation, but in order that undivided attention may be secured. *Robertson v. Pennsylvania R. Co.* (1897) 180 Pa. 43, 86 Atl. 403. There the bicyclist had waited, without dismounting; for one train to pass, and while on the crossing was caught by another, the evidence being that there was a space of 7 feet clear between the nearest track and the adjacent building which intercepted his view of the approaching train.

The fact that a railway company has provided an electric gong at a crossing, designed to warn travelers that a train is coming, will not justify a bicyclist in relying entirely upon the action of the gong when he is approaching the crossing through a deep cut. He must still exercise reasonable care to ascertain whether a train may not, in spite of the silence of the gong, be so near the crossing as to render it

Mass. 524, 37 Am. Rep. 387; *Steele v. Boston*, 128 Mass. 583; *Shepherd v. Chelsea*, 4 Allen, 113; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571; *Hutchinson v. Concord*, 41 Vt. 271, 98 Am. Dec. 584; *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215; *Ray v. Manchester*, 46 N. H. 59, 88 Am. Dec. 192; *Wilmington v. Vandegrift*, 1 Marv. (Del.) 5, 25 L. R. A. 538, 29 Atl. 1047.

The exemption of a municipality from liability for an injury resulting from the unlawful or improper use of its streets and sidewalks, with the reason therefor, is very clearly stated in *Lafayette v. Timberlake*, 88 Ind. 330, a case of injury resulting from "coasting" upon a sidewalk, where the court said: "The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances

regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that, for a failure to exercise legislative, judicial, or executive powers of government, there is no liability."

An injury caused by a bicycle ridden upon a sidewalk is not distinguishable from an injury caused by "coasting," and the ground of exemption from liability applies equally in the former case as in the latter. In *Howard v. Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058, it was held that "a municipal corporation which has merely failed to pass an ordinance forbidding bicycles to be ridden over a sidewalk of the city, not having in any way authorized it, is not liable to a person walking upon the sidewalk for injuries resulting from being run into and thrown down by a bicycle."

Our conclusion is that the declaration does not state a case of legal liability, and that the demurrer was properly sustained.

The judgment of the Circuit Court must be affirmed.

proper for him to stop. Whether he has exercised such care is a question to be determined by the jury in view of this circumstance, as well as of the rest of the evidence. *Kimball v. Friend* (1897) 95 Va. 125, 27 S. E. 901.

XI. Injuries to cyclists caused by street cars.

The contingency that a bicyclist may attempt to turn into a side street in front of a horse car which is approaching the intersection of the streets from the opposite direction is not one which the driver of the car is bound to provide for by slackening his speed, in the absence of some intimation of the rider's intention. Under such circumstances the responsibility of determining whether he shall cross the track in front of or behind the car rests upon the bicyclist. Hence there can be no recovery for injuries caused by the collision of a street car with a tandem bicycle where it appears from the testimony of the riders themselves that, when the car was approaching them rapidly, they undertook, suddenly and without any timely warning, to turn into an intersecting street in front of the car, and when it was so close that the front rider was the one struck by the horses. *Lurie v. Metropolitan Street R. Co.* (1896) 18 Misc. 81, 40 N. Y. Supp. 1120.

A bicyclist's use of the slot of a cable road is not negligence *per se*. The sole obligation, incumbent upon him is that he shall exercise the care required of one who puts himself in a place of danger. Nor is a bicyclist under such circumstances guilty of negligence, as a matter of law, because he fails to look back. He is entitled to proceed on the assumption that he is exposed to no danger through the approach of a car from behind until he receives some warning, after which he is bound to protect himself by getting off the track. Where he testifies that the first notice which reached his ears was the rumble of the car just before it struck him, it is for the jury to say whether his failure to avoid it showed, under the circumstances, a want of due care. *Rooks v. Houston, W. Street & P. Ferry R. Co.* (1896) 10 App. Div. 98, 41 N. Y. Supp. 824.

The liability of a cable-car company for injuries received by a bicyclist at a place rendered peculiarly dangerous by the fact that there was a turn-out curve leading to a cross street as well as a continuation of the main

line was quite lately discussed in *New York. Cardonner v. Metropolitan Street R. Co.* (1898) 26 App. Div. 8, 49 N. Y. Supp. 321.

There the evidence was to the effect that just north of a curve which turned to the west, a flagman was stationed between the main and branch lines to flag the cars round the curve, and that another flagman was stationed on the crosswalk of the street into which the curve led to warn persons who might attempt to cross that street while a car was rounding the curve. The plaintiff's intestate had been riding at a brisk pace behind a southwest bound car, on the main line north of the curve, and when the car stopped according to the regulations of the company, which required it to wait for a signal that the curve was clear before proceeding southward, he turned off the track towards the west, and, while attempting to cross the curve, was struck by a northbound car which was just then rounding it. The court held that there was no evidence sufficient to charge the defendant with negligence, as great care had manifestly been observed in the management of the cars, so far as the employment of persons stationed on the street was concerned, and that there was nothing to show that either of the signalmen could, in the exercise of reasonable care, have seen the bicyclist before he turned out or in time to warn him, or that the motorman of the car which struck him was guilty of any neglect as regards looking out for the bicyclist, or stopping the car when he finally observed him.

Upon a subsequent hearing of this case before the second department of the supreme court, the same conclusion was arrived at, the opinion being also expressed that there was, not only an entire lack of evidence tending to show that plaintiff was free from contributory negligence, but that the evidence rather tended to affirmative proof of such negligence. (1899) 38 App. Div. 597, 56 N. Y. Supp. 300.

Where the character of the roadway is not such as to constitute any apparent reason why a bicyclist should not get out of the way of a trolley car which, as he can ascertain by simply looking behind him, is rapidly overtaking him, the motorman is justified in assuming that the bicyclist, after being warned by the shouts of the passengers of a car coming up on the other track, will either increase his speed or

NEW YORK COURT OF APPEALS.

Mary RICE, by Edward Devine, Guardian
ad Litem, *Respt.*,
v.

William Allen BUTLER, *Appt.*

(160 N. Y. 578.)

An infant rescinding a purchase of a bicycle, and claiming the return of instalments paid upon it, must account for the use of the wheel and its deterioration in value while in his possession.

(November 21, 1899.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of the Onondaga County Court which affirmed a judgment of the Municipal Court of the City of Syracuse in favor of defend-

ant in an action brought to recover money paid by plaintiff to defendant as part of the purchase price of a bicycle. *Reversed.*

The case was certified by the appellate division to the court of appeals upon the following questions:

1. Is the contract of purchase in the above-entitled action, so far as the moneys paid upon said contract are concerned, an executed contract, and is the plaintiff unable to rescind said contract and recover back any moneys paid thereon by reason of said contract being an executed one so far as the moneys actually paid in are concerned?

2. Is the plaintiff, being an infant, and having paid money on her contract and enjoyed the benefits thereof, bound to respond to the defendant for the deterioration in the value of the property caused by her use of

leave the track to avoid a collision, and is therefore not bound to regulate the motion of his car on the supposition that he will defer leaving the track until the car is within a few feet of him. *Everett v. Los Angeles Consol. Electric R. Co.* (1896) 115 Cal. 105, 34 L. R. A. 350, 46 Pac. 889, 43 Pac. 207. Temple, J., dissented, holding that, upon the evidence adduced, the motorman should have inferred from the wheelman's persistent disregard of the warnings he received that he was not paying proper heed to his safety, and that this knowledge was obtained soon enough to have enabled him to slacken speed sufficiently to have prevented a collision. The majority of the court also held that contributory negligence was conclusively established by the evidence, the duty of a wheelman under such circumstances being to keep his faculties of sight and hearing on the alert for the purpose of ascertaining whether he is in danger of a collision.

XII. Injuries to bicycles left standing in streets.

It is not negligence for the owner of a bicycle to leave it standing in a driveway alongside a curbstone, placed in a proper manner so as not to interfere unduly with the rights of others, and the driver of a wagon who negligently runs it against a bicycle so placed must respond in damages for the injury. *Lacey v. Winn* (1894) 3 Pa. Dist. R. 811 (1895) 4 Pa. Dist. R. 409. In the latter case the trial judge said in his charge: "The defendant had no more right to drive into the bicycle there than he would have a right to drive over another man's wagon standing there."

Whether a bicyclist who leaves his wheel standing against the curbstone in front of a wagon is negligent in failing to ascertain whether the horse was unattended and unfastened is a question of fact for the jury. *Wagner v. New York Condensed Milk Co.* (1897) 21 Misc. 62, 46 N. Y. Supp. 930, where a finding of the jury that the driver of the wagon was bound to indemnify the owner of the bicycle was held to be sufficiently supported by evidence that his horse, being thus left unattended and unfastened, started forward of its own accord and drew the wagon against the bicycle.

XIII. Payment of tolls, liability of cycles to.

Whether tolls can be exacted from wheelmen is, of course, a question which must be determined, as a matter of construction, from the 47 L. R. A.

provisions of the statute which in the given case creates the right to collect the tolls. Upon the whole the inclination of the courts is against extending the operation of such statutes to cycles, and very properly so, for it is obvious that the cost of maintaining a roadway is not increased in any appreciable degree by their passage. Thus, a turnpike act, which contains one provision allowing the collection of a toll of a certain amount for horses or other beasts drawing various kinds of carriages, cycles not being included, and the specific enumeration being followed by the words "or other such carriage," and also another provision allowing the collection of a toll of different amount for "every carriage of whatever description, . . . drawn or impelled, or set, or kept in motion by steam, or other power or agency than being drawn by any horse, etc.," does not authorize the collection of a toll on a bicycle, as it is presumed that the carriages referred to in the second provision must be carriages *ejusdem generis* with the carriages specified in the first. *Williams v. Ellis* (1880) L. R. 5 Q. B. Div. 175, 49 L. J. M. C. N. S. 47, 42 L. T. N. S. 249, 28 Week. Rep. 416, 44 J. P. 894.

So, also, a statute declaring a bicycle to be a carriage, so far as regards the obligation of the rider to observe the rule of the road (3 N. J. Gen. Stat. p. 2940, § 570), does not make it a carriage within the purview of a statute empowering a turnpike company to collect tolls from "carriages of burthen or pleasure," where it is apparent from another portion of the statute that the carriages meant are those drawn by beasts. *Gloucester & S. Turnp. Co. v. Leppes* (1898) 62 N. J. L. 92, 40 Atl. 681, 41 L. R. A. 457. The court said: "A bicycle ridden by a human being no more comes within this description than a wheelbarrow drawn by a man, or a perambulator pushed by a nursemaid."

Nor can a bicyclist be charged tolls for the use of a road under How. (Mich.) Stat. § 3582, permitting a charge of two cents per mile for "any vehicle or carriage drawn by two animals," and one cent per mile for "every vehicle or carriage drawn by one animal," as well as for "every horse and rider or led horse." The court "hesitated to say" that a motor cycle could with propriety escape tolls under this statute, but considered "that a distinction may be made between vehicles propelled by man, and those depending upon animal power . . . for propulsion, and that this would not do violence to the act, which has always been con-

the same, and, where the deterioration is more in value than the moneys paid in, unable to recover back the consideration paid?

3. Is the plaintiff being an infant and having received the property and used the same, bound to respond to the defendant for the use of said property by an application of the moneys paid in upon the contract, and, where the rental value is more than the moneys paid in, unable to recover back the moneys paid in upon said contract?

4. Is the plaintiff in this action, having received the wheel in question into her possession and used it and deteriorated it in value, obliged to apply the moneys paid in upon the contract of purchase towards either the use or deterioration, and, if she is unwilling to make such application, does the law make such application for her?

Further facts appear in the opinion.

strued to permit the use of highways by persons who did not depend upon some means of conveyance besides their own powers of locomotion." This view, it was thought, received a strong support from the fact that the bicycle had been used for nearly a quarter of a century, and that it was difficult to conceive of riders submitting to a general practice of charging toll without a protest which would have led to a settlement of the question in the courts. The distinction thus drawn between carriages propelled by human agency and by motors would, it was believed, "protect the road companies from a use of their roads by substitutes for those vehicles which the law contemplated should be charged for, and at the same time protect the pedestrian in his increased power of locomotion by the aid of the wheel. *Murfin v. Detroit & E. Pl. Road Co.* (1897) 113 Mich. 675, 88 L. R. A. 198, 71 N. W. 1108.

On the other hand, a recent Pennsylvania decision has construed a general clause in a statute very strictly against bicyclists, and, as the present writer ventures to think, in a sense not easily reconcilable with the tenor of the statute as a whole. Tolls, it was held might be exacted from a bicyclist under a statute authorizing the collection of tolls from the drivers of certain specified vehicles "or other carriages of burthen or pleasure." Counsel for the bicyclist argued that the effect of these words, though they were undeniably comprehensive enough to include bicycles, was cut down by a subsequent clause which declared that the basis of the computation of the amounts payable as tolls was to be "the number of wheels and horses drawing the same." The court, however, considered that the designation of this special method of computation did not negative the power expressly given to collect the tolls from persons traveling by carriage, but merely introduced a limitation on that power, in such a sense that the amount demanded must be a reasonable one, not, in any event, exceeding the sums specified for the animals and vehicles actually enumerated. *Geiger v. Perkiomen & R. Turnp. Road* (1895) 167 Pa. 582, 28 L. R. A. 458, 31 Atl. 918.

XIV. Cycles as a subject of taxation by municipalities.

The decisions relating to the validity of taxes imposed by municipalities upon bicycles are difficult, if not impossible, to reconcile, but as it would appear that no court of review has yet had an opportunity of expressing its opinion upon the subject, it will be sufficient for our present purposes if we note the substance of the

Messrs. Thomson, Woods, & Smith, for appellant:

This action being an action to recover money had and received, it is equitable in nature, and the rule that "he who seeks equity must do equity" applies to this case.

Rathbone v. Stocking, 2 Barb. 145; 1 Parsons, Contr. p. 332.

An infant cannot damage property he has received, and then demand the full price on offering to restore.

Schouler, Dom. Rel. § 446 A.

It is necessary, upon an infant's rescinding a contract, to place the party with whom he makes the contract in *statu quo* so far as it is within the infant's power.

Wait, Law & Pr. 72; *Gray v. Lessington*, 2 Bosw. 257; *Bartholomew v. Finnemore*, 17 Barb. 428; *Hangen v. Hachmeister*, 17 Jones & S. 34; *Wheeler & W. Mfg. Co. v. Jacobs*, 2

rulings which have appeared in the reports. These rulings are all those of American judges, the question, so far as we have been able to ascertain, not having been raised at all in England or Canada.

In a recent Maryland *nisi prius* case, it was held that the commissioners of a town were not authorized to pass an ordinance imposing a license tax of \$1 upon bicycles, the judge taking the position that, while the commissioners could undoubtedly regulate the use of bicycles in any reasonable manner, the ordinance in question was unreasonable, the reverse of beneficial to the town, and inconsistent with the policy of the state, which was that the residents of a town and all strangers who might happen to pass through it should enjoy the right of free passage over its streets, whether on foot or in private vehicles. See 4 Am. & Eng. Enc. Law, 2d ed. p. 31.

Under a constitutional provision that taxes shall be uniform on the same class of subjects, a license tax imposed on bicycles alone is not invalid, as discriminating between bicycles and other vehicles. *Green v. Erie* (1897) 6 Pa. Dist. R. 697.

Nor is a license tax of \$1 per year, imposed by a borough upon each bicycle owned by a resident, invalid because limited to resident owners. *Ibid.*

On the other hand, a municipal ordinance requiring every owner of a bicycle resident in the city to pay an annual sum of \$1, and be furnished with a tag placed upon the upright underneath the handle-bar, is not a proper exercise of the police power, and is illegal as a revenue measure, where there are about 7,000 resident bicycle owners in the city, and the streets are used by many nonresident bicyclists, and the cost of the tags is less than four cents apiece. *Densmore v. Erie City* (1898) 7 Pa. Dist. R. 855.

An Illinois court has granted an injunction to restrain the enforcement of an ordinance requiring the payment of a license fee, and the procuring of a license for all vehicles and bicycles in public and private use. *Collins v. Chicago* (1897) 4 Det. L. N. No. 20. 29 Chicago Legal News, 426. The grounds upon which the very lengthy and elaborate judgment of the court was based were in brief as follows: (1) That, as the city of Chicago was only empowered by its charter to license certain specified occupations, the principle, *Expresso unius est exclusio alterius*, negated the existence of this power as regards anyone who was not pursuing one of these occupations; (2) that the validity of the ordinance could not be sustained un-

Misc. 236, 21 N. Y. Supp. 1006; *Crummey v. Mills*, 40 Hun, 370; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Heath v. Stevens*, 48 N. H. 251; *Cheshire v. Barrett*, 4 McCord, L. 241, 17 Am. Dec. 735; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801.

This contract, so far as payments were made, was an executed contract, and the infant cannot recover back money paid on an executed contract.

Wheeler & W. Mfg. Co. v. Jacobs, 2 Misc. 236, 21 N. Y. Supp. 1006; *Parsons, Contr. 322*; *Crummey v. Mills*, 40 Hun, 370; *Bartholomew v. Finnemore*, 17 Barb. 428; *Gray v. Lessington*, 2 Bosw. 257.

Mr. George F. Quinn, for respondent:

An infant can acquire a contract made for the purchase of an article which is not a necessity.

Green v. Green, 69 N. Y. 553, 25 Am. Rep.

der the power conferred in the charter to regulate the use of the streets, for the question to be decided was not one of the power of the city to exact a license fee from persons using the streets for business purposes; (3) that the exercise of the power claimed could not be sustained under the article of the general act relating to the incorporation of cities, which allowed the laying of special assessments for street improvements; (4) that the ordinance, on its face, was clearly an attempt to raise a special fund for the improvement of the streets, and a license fee exacted for a general or special revenue purpose was void as an exercise of the licensing power, (5) that the license fee was essentially a tax on specific articles of personal property, which were conceded to have been already assessed for general taxation at their value, and that a second taxation of such property by declaring that it should not be used until it paid another tax levied, as in the ordinance, without regard to values, was open to the two-fold constitutional objection of being double taxation and of violating the principle of equality and uniformity

XV. Bicycles as a subject of contracts of sale or lease.

One who sells a bicycle on the instalment plan, retaining the title to it until the purchase price is paid, and takes it back for repairs while some instalments remain unpaid, loses his lien for such repairs when it is returned, and if he subsequently obtains possession of the wheel against the will of the purchaser, he has no right to hold it until he is paid the price of the repairs in addition to the balance of the purchase price. *Block v. Dowd* (1897) 120 N. C. 402, 27 S. E. 129.

The special rights which the vendor acquires under such a contract of sale, as a result of a default in one of the payments, are not waived by an offer of the vendor's agent to return a portion of the bicycle which has been placed in his hands for repairs, if the vendee will pay the defaulted instalment and the one next due. Such an offer is merely the tender of a new agreement based upon a fresh consideration, and the consequences of the default are left unaffected. *Equitable General Providing Co. v. Stein* (1898) 16 Misc. 582, 38 N. Y. Supp. 774.

Where a third person guarantees the periodical payments to be made by the lessee of a bicycle under a contract which provides that the residue of the purchase money is due immediately upon the lessees being in default as to any of the payments, and that the bicycle is to become the property of the guarantor when he

233; *Kane v. Kane*, 13 App. Div. 544, 43 N. Y. Supp. 602; *Jackson v. Brown*, 70 Hun, 41, 27 N. Y. Supp. 583; *Clark, Contr. 228*; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *New York Building Loan Bkg. Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. Supp. 152; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204; *Allen v. Lardner*, 78 Hun, 603, 29 N. Y. Supp. 213; *Wiser v. Lockwood*, 42 Vt. 720; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891; *Petrie v. Williams*, 68 Hun, 595, 23 N. Y. Supp. 237.

An infant is only liable for a reasonable value for the necessities of life at the most. A bicycle is not such a necessity.

Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; *Beardsley v. Hotchkiss*, 96 N. Y. 210.

This is not an equity action for money had and received.

has paid that money, the fact that the bicycle has been returned to the lessor for repairs, and is still in his hands when a demand is made upon the guarantor for the balance of the price, will not avail him as a defense, where it is shown that the lessor offered the bicycle to him, and told him he might take it any time. Such a tender is a sufficient compliance with the provision of the contract by which the property in the bicycle was to pass to him in the eventuality specified. *McLean v. Whitjen* (1899) 23 Misc. 742, 55 N. Y. Supp. 632.

Where a bicycle is rented to an expert wheelman with a thorough knowledge of bicycles for a certain number of months at so much per month, and is to become the property of the lessee upon the payment of a specified number of these sums, the doctrine of *caveat emptor* applies, in the absence of an express warranty, whether the transaction be regarded as a lease or as a conditional sale. Hence the purchaser, if he discovers it to be defective after using it for a portion of the five months, cannot rely on this defect as a defense to an action by the vendor for the residue of purchase price, or as a basis for a counterclaim for return of the rent already paid. *Smadback v. Wolfe* (1897) 21 Misc. 82, 46 N. Y. Supp. 968.

The lessee of a bicycle is entitled to recover damages from the lessor upon proof of averments that it collapsed, while in ordinary use, by reason of defective materials or faulty construction, although he also alleges and fails to prove that he received a warranty from the prove that he received a warranty from the of the former averments, evidence in support of the warranty becomes unnecessary and immaterial. *Moriarty v. Porter* (1898) 22 Misc. 586, 49 N. Y. Supp. 1107.

XVI. The bicycle as a subject of bailment.

Whether a bailee of a bicycle left with him for repairs has used such care in its custody as is demanded by the circumstances is for the jury, where it is stolen by burglars, and it is shown that they entered through a back door, secured merely by a screw-driver passed through two hasps, and the evidence also raises the question whether the gate leading to the rear of the premises was kept closed. *Hoffmann v. Coughlin* (1899) 26 Misc. 24, 55 N. Y. Supp. 600.

The general obligations of a carrier to forward goods with reasonable promptitude are illustrated, in respect to bicycles, by the recent New York decision, that a contract, by which a carrier agrees to deliver in the month of June, at a point in New Brunswick, a bicycle which

He who deals with an infant deals at his peril.

Patterson v. Brown, 32 N. Y. 81; *Minturn v. Seymour*, 4 Johns. Ch. 497.

The contract is not an executed contract, but must be considered in its entirety.

Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co. 27 U. S. App. 1, 61 Fed. Rep. 993, 9 C. C. A. 659, 4 Inters. Com. Rep. 578; *Cooper v. Allport*, 10 Daly, 352.

An infant can elect to avoid a contract which is not for necessities without putting the defendant in *statu quo*.

Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Walsh v. Young*, 110 Mass. 396; *Dubé v. Beaudry*, 150 Mass. 448, 6 L. R. A. 146, 23 N. E. 222;

the shipper, a resident in New York, intends to use during his vacation, is not complied with by an offer to forward it to him two months after the specified date. The carrier is liable, as for conversion, at any time before he actually tenders the bicycle to the shipper, the measure of damages being the cost price, where it is shown to have been purchased just before delivery to the carrier, and to have never been used. *Mitchell v. Weir* (1897) 19 App. Div. 183, 45 N. Y. Supp. 1085.

To wheelmen, however, the most interesting aspect of a carrier's duties is that which involves the question whether they are entitled to have their bicycles transported on the same terms as the ordinary baggage of a passenger. Before the courts had an opportunity of handling this question, two writers in legal periodicals discussed it upon general principles, and offered some plausible reasons why it should be answered in a sense favorable to the bicyclist. (See 12 Harvard Law Rev. 119; 48 Cent. L. J. 863.) Some legislation has also been enacted, embodying this view, and doubtless the controversy will ultimately be terminated everywhere by the same means. For example, by N. Y. Laws 1896, chap. 883, p. 273, bicycles are declared to be baggage, and the passenger is not required to cover them.

Meantime it must be admitted that the weight of such judicial authority as we have at present is decidedly against the view that a bicycle falls into the category of baggage.

In a case in an English county court the judge ruled that a bicycle could not be treated as ordinary passenger's luggage, but his reasons are not reported. *Great Western R. Co. v. Edwards*, noticed in the Solicitor's Journal, Nov. 7, 1896, by a writer who doubts the correctness of the ruling next referred to regarding the obligations of cabmen, for the reason that the act prescribing their duties contains no words justifying the inference that the load which they are obliged to carry free must consist of "ordinary luggage."

In 1897 at one of the London police courts a magistrate held that a bicycle is not luggage which a cabman is bound to carry free. See *Law Journal* (Eng.) Oct. 9, p. 484.

The same conclusion was arrived at in a nisi prisu case in which it was necessary to determine the meaning of the expression "ordinary luggage" in a railway act limiting the amount which a passenger might take free of charge. *Britten v. Great Northern R. Co.* [1899] 1 Q. B. 243, 68 L. J. Q. B. N. S. 75, 15 Times L. R. 71 (an action to recover back a sum paid for the bicycle under protest). Counsel for plaintiff argued that the bicycle was as much for a man's personal use as his walking-stick or umbrella, 47 L. R. A.

Boody v. McKenney, 23 Me. 517; *Moras v. Ely*, 154 Mass. 458, 28 N. E. 577; *Mordecai v. Pearl*, 63 Hun, 563, 18 N. Y. Supp. 543.

Haight, J., delivered the opinion of the court:

The appeal in this case is based upon the certificate of the appellate division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the municipal court of Syracuse to recover the sum of \$26.25, paid by the plaintiff, a minor seventeen years of age, upon a contract for the purchase of a bicycle. The contract price was \$45; \$15 were paid upon the execution of the contract, and the remainder was to be paid in weekly instalments of \$1.25. The

that the expression "ordinary luggage" was not limited to clothes, but would clearly cover, for example, such articles as roller skates, between which and a bicycle there was no essential distinction, and that the argument based on the fact of the large space occupied by a wheel was equally applicable to things which were unquestionably luggage, such as a lady's trunk. Counsel for defendant, on the other hand, laid stress upon the fact that the statute, as it only mentioned limits of weight and not of size, could not mean that passengers could take anything of any size. He put the case of boating men, demanding that their skiffs should be carried as luggage. Channell, J., in delivering judgment, said: "I am clearly of opinion that a bicycle cannot be considered as ordinary luggage within the meaning of the statute."

I think that there are certain requirements which articles must meet in order that they may be regarded as ordinary luggage. First, they must be for the personal use of the passenger; secondly, they must be for use in connection with the journey—i. e., must be something habitually taken by a person when traveling for his own use, not merely during the actual journey, but for use during the time he may be away from home. . . . It is not necessary to say that the expression 'ordinary luggage' includes everything which is taken by the passenger for his personal use. I think that in the word 'luggage' is involved the idea of a package or something of that sort. A bicycle requires special care, and is not packed in that way, and I think that a thing taken loose like a bicycle is subject to rather different considerations. . . . I do not think . . . that a passenger could require a gun apart from the case to be taken as luggage, although, if packed in its case it might be ordinary luggage. . . . The things must be those kind of things usually denominated luggage in addition to being for personal use. . . . In one sense I do not think that the date of the act of Parliament is very material. The habits of people alter. . . . But when it is considered that a bicycle is an article of a totally different character from any of those which could have been included in the expression 'ordinary luggage' at the date of the passing of the act, it becomes clear that it is excluded."

Similarly, in an American case, it has been held that a bicycle of 80 pounds in weight was not ordinary baggage within the meaning of a statute requiring railway companies to carry such baggage free up to the weight of 100 pounds, and that a rule of the defendants fixing a special charge for bicycles was therefore valid. *State ex rel. Bettis v. Missouri P. R. Co.* (1897) 71 Mo. App. 385. The court took the ground

plaintiff purchased the wheel in June, and used it until about the 20th of September, and then returned it to the defendant, asserting that she had been defrauded, and demanded repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show that the use of the wheel and its deterioration in value equalled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory; and that, being such, the plaintiff had the right to rescind, and recover back the amount paid. The appellate division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in

that the mere circumstance of a bicycle's being useful and convenient at the end of the journey (see the well-known opinion of Cockburn, Ch. J., in *Macrow v. Great Western R. Co.* (1871) L. R. 6 Q. B. 612, 40 L. J. Q. B. N. S. 800, 24 L. T. N. S. 618, 19 Week. Rep. 873), was not of itself a differentiating factor sufficiently precise for the purpose of determining whether a vehicle of this description was or was not baggage. The acceptance of this test, it was said, would involve the result that a light buggy within the statutory limit of weight would often fall into the category of baggage. To the argument that the lesser size of the bicycle might fairly be allowed to distinguish it from other vehicles, it was deemed a sufficient answer: to say that, owing to its delicate construction, exceptional care and skill were demanded in handling it, as well as ample space to preserve it from injury by contact with other articles. The court also thought that, as to the case before it, in which the bicycle had been presented for transportation without any boxing, another special consideration was applicable, *viz.*, that the law did not recognize as baggage the things contained, as ascertained from the receptacle which contained them, and did not cast any duty on a carrier to receive personal baggage until it had been placed in a position of reasonable security for handling and transportation. Much stress was also laid on the fact that many bills had been introduced in the legislatures of the various states requiring the carriers to transport bicycles as ordinary baggage.

XVII. *The bicycle as a subject of insurance.*

A person who is injured while riding in a bicycle race cannot be said, as a matter of law, to be disabled from recovering under a policy of accident insurance which provides that it "shall not extend to or cover . . . injury resulting from . . . voluntary over-exertion, either voluntary or unnecessary exposure to danger, or to obvious risk of injury." *Keefe v. National Acci. Soc.* (1896) 4 App. Div. 392, 83 N. Y. Supp. 854 (non-suit held to have been properly denied).

In a Scotch case, briefly referred to in the *Law Times* (English) July 11, 1896, p. 252, the payment of a policy of insurance upon the life of a bicyclist who was killed while riding was successfully resisted, the trial judge holding the terms "passenger train, passenger steamer, omnibus, tramcar, dog-cart, waggone, coach, carriage or other passenger vehicle" did not cover a bicycle any more than a pair of skates.

A corporation which is chartered "for the purpose of the accumulation of a fund by assessments for the protection of its members

from loss by reason of injury to or the losing of bicycles," and which does not agree to pay money for any loss, but merely to clean and repair the wheels, and replace them, if lost or stolen, is not an insurance company. Hence the fact that it was not chartered under the provisions of a statute under which alone the business of insurance can lawfully be carried on is not a ground for forfeiting its charter. *Com. ex rel. Hensel v. Provident Bicycle Assn.* (1897) 178 Pa. 636, 36 L. R. A. 589, 86 Atl. 197. The court relied both upon the general consideration that the prevailing feature of insurance policies, as they exist in practice, is that, for a certain specified premium, the insurer undertakes to pay a certain sum on the happening of a definite event, and on the particular consideration that this was the aspect of insurance which was emphasized in the insurance statute of Pennsylvania. It was regarded as manifest that, in view of the terms of this legislation, an association which did not specify any amount in its policy could not successfully ask for a charter thereunder, the necessary consequence being that the defendant was not obliged to have a charter which it could not obtain.

XVIII. *When a bicycle is a necessary for a minor.*

A judge sitting both as court and jury may properly find that a racing bicycle worth \$12 is a necessary for the infant apprentice of a scientific instrument maker, earning 21s. a week and boarding with his parents, where it is in evidence that the use of bicycles by persons in his position was common in the neighborhood. *Clyde Cycle Co. v. Hargreaves* (1898) 78 L. T. N. S. 296.

In *Pyne v. Wood* (1888) 145 Mass. 559, 14 N. E. 775, an action to recover money paid for a bicycle, it was held that it was not a necessary for a boy of seventeen who worked in a shoe shop, although he lived a mile away, and if obliged to walk home for his dinner would have been obliged to spend about half of the hour allowed for that meal in going to and from the house.

In *Rick v. Butler*, it will be observed the New York court of appeals did not express any opinion upon the general question whether a bicycle was an article of necessity for one of the defendant's age and position. This question had been answered in the negative by a majority of the judges of the fourth department of the supreme court, the dissent of Adams and Ward, JJ., being based on the theory of the case which was adopted by the higher court.

C. B. L.

the future, and the title was only to pass to the minor upon making all of the payments stipulated; but, in so far as the payments made were concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (vol. 2, p. 240), says: "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other." In the case of *Gray v. Lessington*, 2 Bosw. 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract, and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for her [an infant] to go into a court of equity to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit or benefit equivalent to such deterioration." In the case of *Medbury v. Watrous*, 7 Hill, 110, an action was brought by an infant to recover for services performed, of the value of \$70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of \$600. He had not entered into the possession of

the house and lot, and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a *quantum meruit* for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent and then to the case of *Holmes v. Blogg*, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise, she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and under the evidence in this case and as found by the trial court, the use equalled the sum paid. Our attention has been called to the cases of *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775, and *McCarthy v. Henderson*, 138 Mass. 310; but we think the rule suggested by us is more equitable, and that they should not be followed.

The judgment of the Appellate Division should be reversed, and that of the trial and county court affirmed, with costs, and the second, third, and fourth questions certified to us answered in the affirmative. An answer of the first question is not deemed necessary, further than intimated in the opinion.

All concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

James T. HOLMES, *Plff. in Err.*,
v.

PHENIX INSURANCE COMPANY of
Brooklyn.

(98 Fed. Rep. 240.)

1. A policy of insurance against loss or damage by wind storms, cyclones, or tornadoes does not cover damage by hail, though accompanied by damage caused by wind, under a provision of the policy denying liability for damage "from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles, unless

other damage occur," since the words "unless other damage occur" are restricted to the last member of the sentence referring to damage by wind, and do not affect the clause as to damage from hail or lightning.

2. Punctuation marks do not control the words of a contract, but are controlled by the words.
3. The rule that an insurance policy is to be construed in favor of the insured does not apply when there is no ambiguity in the policy, no inconsistent or conflicting provisions, and nothing requiring construction or interpretation.

(November 20, 1899.)

NOTE.—The above case represents one of the new phases of insurance business.

For various modern kinds of insurance, see also *People ex rel. Kasson v. Rose* (Ill.) 44 L. 47 L. R. A.

R. A. 124, and footnote thereto; also *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* (N. J. L.) 44 L. R. A. 218, and *Re Hogan* (N. D.) 45 L. R. A. 166.

ERROR to the Circuit Court of the United States for the Western Division of the Western District of Missouri to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of insurance against loss or damage by storms, cyclones, or tornadoes. *Affirmed.*

The facts are stated in the opinion.

Before *Caldwell*, *Sanborn*, and *Thayer*, Circuit Judges.

Messrs. John O. Gage, Sanford B. Ladd, and Charles E. Small, for plaintiff in error:

The natural construction of the provision fastens upon the defendant liability for the damages sued for. Primarily the contract is one of indemnity against wind storms. Hail sometimes accompanies wind. It may, however, fall in the absence of a storm of wind. The object of the policy was to insure the property against damage done by wind storms and all their accompaniments, including hail, but it was not intended to insure against damage done by hail unless it were an incident of a wind storm or accompanied by wind.

Although a court will often disregard, or even change, the punctuation of an instrument to be construed, and refuse to be led by it to adopt such a construction of the instrument as would give it an effect evidently not intended by the parties to it, it is yet true that the punctuation of an instrument is sometimes resorted to by a court as an aid to arriving at the intention of the parties, as expressed in the language used by them.

Phoenix Ins. Co. v. Slaughter, 12 Wall. 404, 20 L. ed. 444.

If the meaning of the provision were doubtful, and the language employed susceptible of two interpretations,—if its construction were a question upon which intelligent minds might honestly differ,—in that case the one should be adopted which is most favorable to the assured.

First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Moulor v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 681, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Thompson v. Phoenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Imperial F. Ins. Co. v. Coös County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Wallace v. German-American Ins. Co.* 41 Fed. Rep. 742; *Brink v. Merchants' & M. Ins. Co.* 49 Vt. 442; *Wilson v. Conway F. Ins. Co.* 4 R. I. 141; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 8 Am. Dec. 337; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 597; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182; *Herrman v. Merchants' Ins. Co.* 81 N. Y. 184; *Palmer v. Warren Ins. Co.* 1 Story, 360, Fed. Cas. No. 10,698; *Blackett v. Royal Exch. Assur. Co.* 2 Crompt. & J. 244; *Teutonia F. Ins. Co. v. Mund*, 102 Pa. 80; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Olson v. St. Paul F. & M. Ins. Co.* 35 Minn. 47 L. R. A.

432, 59 Am. Rep. 333, 29 N. W. 125; *Stout v. Commercial Union Assur. Co.* 12 Fed. Rep. 554; *Guarantee Co. v. Mechanics' Sav. Bank & T. Co.* 47 U. S. App. 91, 80 Fed. Rep. 766, 26 C. C. A. 146; *American Credit Indemnity Co. v. Wood*, 38 U. S. App. 583, 73 Fed. Rep. 81, 19 C. C. A. 264; *Tebbets v. Mercantile Credit Guarantee Co.* 38 U. S. App. 431, 73 Fed. Rep. 95, 19 C. C. A. 281; *London & L. F. Ins. Co. v. Fischer*, 92 Fed. Rep. 500; *Piedmont & A. L. Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *May, Ins.* 3d ed. § 175; *Wood, F. Ins.* 2d ed. § 58.

Messrs. M. A. Fyke, Ed. E. Yates, C. V. Fyke, and E. L. Snider, for defendant in error:

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first take the instrument by its four corners, in order to ascertain its true meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.

Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; *Bishop, Contr.* enlarged ed. § 402; *Weatherly v. Mister*, 39 Md. 620.

Caldwell, Circuit Judge, delivered the opinion of the court:

The *Phenix Insurance Company* of Brooklyn, New York, insured "James T. Holmes against loss or damage by wind storms, cyclones, or tornadoes" to the building described in the policy. The policy contains this provision: "This company will not be liable for any loss or damage that may occur from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles, unless other damage occur." The building insured was damaged by a wind and hail storm, the chief damage occurring from the hail. The insured brought this action against the insurance company to recover for the damage done to the building by the hail as well as by the wind. The lower court instructed the jury that "all damage done to this building which was the result of the injury done by hail is not recoverable in this action for the reason that the policies exempt the company from damage or loss from hail." The giving of this instruction was duly excepted to by the plaintiff, and is the only error assigned.

The contention of the learned counsel for the plaintiff in error is that, when it was shown that damage was done to the building by the wind, the company was also liable for the damage done by the hail; that the words in the clause of the policy last quoted, "unless other damage occur," are not restricted to the last member of the sentence, namely, to damage done by the wind other than that done "to chimneys, loose clapboards, weather vanes, and shingles," but that those words relate back to the first member of the sentence, and include damage done by "hail and lightning." The clause will

not admit of any such construction. The words, "unless other damage occur," are manifestly restricted to the last member of the sentence, and refer to damage occurring from the thing insured against, namely, "wind storms," and are operative when the wind has damaged the building over and above "the blowing down of chimneys," etc. The obvious meaning of these words is precisely the same as if the clause read, "unless other damage occur" from wind. The last two words which we have italicized are plainly implied, and what is implied in a contract is as much a part of it as what is expressed. When the meaning of a statute or contract is perfectly plain and unambiguous, any ratiocination to make it plainer simply serves to make that which was before plain obscure.

But it is said that in the policy the two members of this clause are divided by a comma only, and stress is laid upon this fact. But in a contract the words, and not the punctuation, are the controlling guide in its construction. Punctuation is no part of the English language. The supreme court says that it "is a most fallible guide by which to interpret a writing." *Ewing v. Burnet*, 11 Pet. 41, 54, 9 L. ed. 624. The Century Dictionary tells us, what is common knowledge, that "there is still much uncertainty and arbitrariness in punctuation." It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and after that has been done, punctuation may be used to more readily point out the division in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words. If there was not a punctuation mark in this whole clause, its meaning would be plain, and, whether a comma or a semicolon is

placed between the two members of the sentence, the two members are there, separate and distinct, as a result of the obvious meaning of the words and their arrangement. The comma and semicolon are both used for the same purpose, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma; but at the last it is the sense of the words, taken together, that dictates where the punctuation marks are to be placed, and what they shall be.

Another contention of the plaintiff in error is that the insertion of the provision regarding hail is tantamount to a declaration on the part of the company that, without it, the policy would have bound the company to pay for damage done by hail. There is no ambiguity in either clause, and no conflict between them. The insurance clause plainly states what it insures against, namely, "wind storms, cyclones, and tornadoes,"—not hail or hail storms. The two clauses are cumulative, but in no sense inconsistent or conflicting.

The rule for interpretation and construction of policies of insurance is pressed upon our attention to the effect that, "if a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one because those instruments are drawn by the company." *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1023.

Many other decisions of the Supreme Court of the United States and other courts, to the same effect, are cited. We recognize in the fullest manner the binding obligation of these settled canons of construction. But when, as in the case at bar, there is no ambiguity in the policy, and no inconsistent or conflicting provisions and nothing requiring construction or interpretation, there is no room for their application.

The judgment of the Circuit Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ella M. HOUGHTON

v.

Ella M. RICE, *Appt.*

(.....Mass.....)

A wife has no right of action against another woman for the alienation of her husband's affections, unaccompanied by adultery.

(October 19, 1899.)

NOTE.—That a married woman may maintain an action for alienation of her husband's affections. see *Bennett v. Bennett* (N. Y.) 6 L. R. A. 553, and *note*; *Foot v. Card* (Conn.) 6 L. R. A. 829; *Warren v. Warren* (Mich.) 14 L. R. A. 545; *Haynes v. Nowlin* (Ind.) 14 L. R. A. 787; 47 L. R. A.

APPEAL by defendant from a judgment of the Superior Court for Middlesex County in favor of plaintiff in an action brought to recover damages for alienation of the affections of plaintiff's husband. *Reversed.*

The facts are stated in the opinion.

Messrs. Samuel K. Hamilton and Ralph E. Joslin, for appellant:

In *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 312, 38 L. R. A. 631, 46 N. E. 1063,

Clov v. Chapman (Mo.) 26 L. R. A. 412; *Hodgkinson v. Hodgkinson* (Neb.) 27 L. R. A. 120; *Price v. Price* (Iowa) 29 L. R. A. 150; *Brown v. Brown* (N. C.) 38 L. R. A. 242; and *Gerner v. Gerner* (Pa.) 40 L. R. A. 549.

For cases denying such right of action, see

this court stated: "It is argued by the defendant, that, if a husband has a right to recover for the loss of *consortium* through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at common law; but whether she has by statute we do not now consider."

The decisive point against the right to maintain an action of this kind is found in the fact that such a right does not exist at common law.

Kelley v. New York, N. H. & H. R. Co. 168 Mass. 312, 38 L. R. A. 631, 46 N. E. 1063; *Doe v. Roe*, 82 Me. 503, 8 L. R. A. 833, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420, 45 N. W. 522; *Lellis v. Lambert*, 24 Ont. App. Rep. 653; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

Messrs. Charles F. Chamberlayne and William M. Prest, for appellee:

The plaintiff has stated a good cause of action.

The allegations of the first count of the declaration are the usual allegations of the action of tort *per quod consortium amisit*—the action which protects the marriage relation from the interference of a third party.

The term *consortium* has been well defined in *Bigaquette v. Paulet* (1883) 134 Mass. 123, 45 Am. Rep. 307, as "the right to the conjugal fellowship of his wife, to her company, co-operation, and aid in every conjugal relationship."

While this statement concerns the right of the husband to the *consortium* of the wife, the rights of a wife to the *consortium* of the husband are the same as those of a husband in the *consortium* of his wife.

The decided weight of authority is to the effect that a wife may maintain an action for the alienation of her husband's affections, or other loss of his *consortium*.

Haynes v. Nowlin, 129 Ind. 581, 14 L. R. A. 787, 29 N. E. 389; *Postlewaite v. Postlewaite* (1891) 1 Ind. App. 473, 28 N. E. 99; *Holmes v. Holmes* (1892) 133 Ind. 386, 32 N. E. 932; *Bassett v. Bassett* (1886) 20 Ill. App. 543; *Waldron v. Waldron* (1890) 45 Fed. Rep. 315; *Seaver v. Adams* (1889) 66 N. H. 142, 19 Atl. 776; *Bennett v. Bennett* (1889) 116 N. Y. 584, 6 L. R. A. 553, 23 N. E. 17; *Baker v. Baker* (1885) 16 Abb. N. C. 293; *Breiman v. Paasch* (1879) 7 Abb. N. C. 249; *Warner v. Miller* (1885) 17 Abb. N. C. 221; *Jaynes v. Jaynes* (1886) 39 Hun, 40; *Manwarren v. Mason* (1894) 79 Hun, 592, 29 N. Y. Supp. 915; *Olow v. Chapman* (1894) 125 Mo. 101, 26 L. R. A. 412, 28 S. W. 328; *Nichols v. Nichols* (1896) 134 Mo. 187, 35 S. W. 577; *Foot v. Card* (1889) 58 Conn. 1, 6 L. R. A. 829, 18 Atl. 1027; *Williams v. Williams* (1894) 20 Colo. 51, 37 Pac. 614; *West-*

lake v. Westlake (1878) 34 Ohio St. 621, 32 Am. Rep. 397; *Mehrhoff v. Mehrhoff* (1886) 26 Fed. Rep. 13; *Warren v. Warren* (1891) 89 Mich. 123, 14 L. R. A. 545, 50 N. W. 842; *Hodgkinson v. Hodgkinson* (1895) 43 Neb. 269, 27 L. R. A. 120, 61 N. W. 577; *Price v. Price* (1894) 91 Iowa, 693, 29 L. R. A. 150, 60 N. W. 202; *Lockwood v. Lockwood* (1897) 67 Minn. 476, 70 N. W. 784; *Tucker v. Tucker* (1896) 74 Miss. 93, 32 L. R. A. 623, 19 So. 955.

The enabling statute of this state (Stat. 1874, chap. 184, § 3, Pub. Stat. chap. 147, § 7), that "a married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife,"—seems about as broad as language can make it, and the decisions of this court indicate no unwillingness to adopt the reasoning upon which the decisions in other states have been based.

Hadley v. Heywood, 121 Mass. 236; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Bigaquette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654; *Harmon v. Old Colony R. Co.* 165 Mass. 100, 30 L. R. A. 658, 42 N. E. 505; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L. R. A. 631, 46 N. E. 1063.

As in natural justice no reason exists why the right of the wife to maintain an action against the seductress of her husband should not be coextensive with his right of action against her seducer, nothing but imperative necessity would justify a decision to the contrary.

Seaver v. Adams (1889) 66 N. H. 142, 19 Atl. 776.

Lathrop, J., delivered the opinion of the court:

We do not think that the declaration in this case sets forth any cause of action at common law, if the husband had been the plaintiff instead of the wife; and no statute of this commonwealth gives the wife any greater right than the husband in cases of this nature. The acts charged are that the defendant did "ingratiate herself into the affections of the said William Houghton [the defendant's husband]; cause him incessantly to frequent her society, to give her various large sums of money, to execute to her various conveyances of property, to make large expenditures of money on her behalf, and to transfer to her, the said defendant, the courtesy and generosity, love and affection, previously bestowed by him upon the plaintiff as his said wife." It is then charged that by reason of these unlawful acts her husband ceased to have regard, respect, or affection for the plaintiff, and became cross, irritable, ill tempered, and penurious towards her, denying her suitable support and

Duffies v. Duffies (Wis.) 8 L. R. A. 420; and *Doe v. Roe* (Me.) 8 L. R. A. 833.

The right of a married woman to maintain an action against another woman simply in the nature of crim. con. is denied in *Kroessin v. Keller* (Minn.) 27 L. R. A. 685
47 L. R. A.

As to the right of a parent to advise a son to separate from his wife, see *Tasker v. Stanley* (Mass.) 10 L. R. A. 463, and *Tucker v. Tucker* (Miss.) 32 L. R. A. 623.

maintenance; was guilty of cruel and abusive treatment towards her; that his affections for her were wholly alienated from her, and her home and married state broken up and destroyed; that her husband, while living during certain months under the same roof with her, separated himself "virtually" from her, refused to live or cohabit with her as husband and wife, or to give her the benefit of his society, or to perform any of the duties due from him as her husband, but, on the contrary, for part of the year openly, and during the rest of the year secretly, lavished his property, society, love, and affection upon the defendant. It is further alleged that "by reason of the matters and things hereinbefore set forth" the plaintiff has suffered great pain and distress of mind and body, has lost her home, and the society and comfort of her husband, etc. No adultery is alleged, and therefore the action is not for criminal conversation, where the allegation, when a husband sues, is that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affection in such a case is a mere matter of aggravation, and the loss of the wife's consortium is the actionable consequence of the injury. Adultery was the essential fact to be proved, and, if this was not proved, the action failed. At common law, also, a husband could maintain an action against one who "persuaded, procured, and enticed his wife to continue absent and apart from him, and to secrete, hide, and conceal herself from him, whereby during the time she continued absent he lost her comfort and society, and her aid and assistance in his domestic affairs." He could also maintain an action against one for receiving his wife, and unlawfully harboring, concealing, and secreting her from him, and refusing to deliver her to him. In such cases adultery need not be alleged. We do not see anything in the substantive allegations which brings the case within any form of action known to the common law. The case in this respect is like that of *Lellis v. Lambert*, 24 Ont. App. Rep. 653,—a case very similar to this, and where the whole subject-matter was ably considered by the court of appeals; the judges delivering their opinions *seriatim*. Judge Osler, on page 664, said: "The loss of a wife's affections, not brought about by some act on the defendant's part which necessarily caused or involved the loss of her consortium, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery, and no 'procuring and enticing' or 'harboring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband."

47 L. R. A.

In the case before us, we are of opinion that the substantive allegations of the declaration do not state a cause of action, and that *the demurrer should be sustained*. So ordered.

Harriette F. NEVINS

v.

Inhabitants of FITCHBURG.

(.....Mass.....)

A city has no right to discharge a sewer into a tailrace belonging to an individual, where it runs through a culvert under a highway.

(November 29, 1899.)

REPORT after judgment in plaintiff's favor by the Superior Court for Worcester County for the opinion of the Supreme Judicial Court of an action brought to recover damages for wrongfully emptying a sewer into the race carrying the water from plaintiff's mill. *Affirmed*.

The facts are stated in the opinion.

Mr. Edward P. Pierce, for defendant:

The municipality could not by contract authorize a private individual to so encumber its public streets as to in any manner restrict it in its use of such streets for public purposes.

Eddy v. Granger, 19 R. I. 105, 28 L. R. A. 517, 31 Atl. 831.

When a way has been located over private land, if the owner afterward opens a watercourse across the way, it will be his duty at his own expense to make and keep in repair a way over the watercourse.

Perley v. Chandler, 6 Mass. 457, 4 Am. Dec. 159; *Woburn v. Henshaw*, 101 Mass. 199, 3 Am. Rep. 333.

The right of the owner depends upon mere sufferance.

Dygart v. Schenck, 23 Wend. 446, 35 Am. Dec. 575.

Assuming that the board of aldermen were, in laying out the sewer, acting within their jurisdiction, the sewer, as constructed, performed its function in the manner in which it was designed and purposed to operate, and in the only manner in which it could operate, and the results following therefrom would seem to fall into that class of cases founded upon *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680, in which it has been repeatedly held that no action lies against a city for results arising from the original plan of construction.

Bates v. Westborough, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

If the discharge of the sewer within the limits of the public way would necessarily work an interference with the plaintiff's

NOTE.—As to the liability of municipal corporations for sewers, see *Seymour v. Cummins* (Ind.) 5 L. R. A. 126, and *note*; *Bates v. Westborough* (Mass.) 7 L. R. A. 156, and *note*; *Nashville v. Comer* (Tenn.) 7 L. R. A. 465, and *note*; *Bulger v. Eden* (Me.) 9 L. R. A. 205, and *note*; *Fuchs v. St. Louis* (Mo.) 34 L. R. A. 119; *Jordan v. Benwood* (W. Va.) 36 L. R. A. 519.

right of flowage, and if the plaintiff had a right superior to the right to so discharge the sewer, the decree operated as a legal taking of such rights, and the plaintiff's remedy for such consequential injury would be, under the statute, by petition.

Pub. Stat. chap. 50.

Assuming that the discharge into the culvert under any conditions could be lawful, the city could only be liable to the plaintiff upon proof that it was negligent either in the construction or maintenance of the sewer.

Constitution Wharf Co. v. Boston, 156 Mass. 397, 30 N. E. 1134.

The acts done did not constitute a tort, and compensation for such damages must be sought in the manner pointed out by law.

Flagg v. Worcester, 13 Gray, 604.

When a public officer, in the line of his duty, does a public work for the public benefit or use, the town, in the absence of any direction to him, is not liable for his or his servants' acts of misconduct.

Prince v. Lynn, 149 Mass. 103, 21 N. E. 296; *Hennessey v. New Bedford*, 153 Mass. 260, 26 N. E. 999; *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

Messrs. Charles E. Ware and W. S. B. Hopkins, for plaintiff:

A millowner has the sole right to the unimpeded flow of water from his mill wheel through his private tailrace.

Haskell v. New Bedford, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Emery v. Lowell*, 104 Mass. 13; *Page v. Young*, 106 Mass. 313; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223.

If the millowner receive an injury special and particular to himself, he may maintain his action.

Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470.

The defendant is responsible for negligence or other fault in care and management of the sewer.

Emery v. Lowell, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Merrifield v. Worcester*, 110 Mass. 221, 14 Am. Rep. 592; *Tindley v. Salem*, 137 Mass. 172, 50 Am. Rep. 289; *Stanchfield v. Newton*, 142 Mass. 115, 7 N. E. 703; *Constitution Wharf Co. v. Boston*, 156 Mass. 397, 30 N. E. 1134; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694.

The city of Fitchburg has no right to collect surface water into an artificial stream, to wit, a sewer, and discharge it into the plaintiff's private watercourse where it would not naturally have gone (although said private watercourse conducts the waters of a natural stream), if in so doing deposits are made and the land (to wit, the water-wheel and mill privilege) of the plaintiff is injured by the consequent backing up of the water.

Jackman v. Arlington Mills, 137 Mass. 283; *White v. Chapin*, 12 Allen, 520; *Ourtis v. Eastern R. Co.* 98 Mass. 428. 47 L. R. A.

The defendant city was notified more than once of the condition of affairs, but neglected to remedy what a reasonable examination and inspection would have made it aware of.

It is therefore the duty of the city to remove the outlet from the land of the plaintiff, and carry the sewer where it shall not deliver its deposits upon the land of a private individual.

Allen v. Boston, 159 Mass. 324, 34 N. E. 519; *Bates v. Westborough*, 151 Mass. 179, 7 L. R. A. 156, 23 N. E. 1070; *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320; *O'Brien v. Worcester*, 172 Mass. 353, 52 N. E. 385; *Hill v. Boston*, 122 Mass. 358, 23 Am. Rep. 332.

The city had gained no right by prescription to discharge upon the plaintiff.

Middlesex Co. v. Lowell, 149 Mass. 509, 21 N. E. 872; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Haskell v. New Bedford*, 108 Mass. 208.

If the city has diverted surface water from its natural course to an artificial drain and series of catch basins, and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it is liable to an action.

Manning v. Lowell, 130 Mass. 21; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

Lathrop, J., delivered the opinion of the court:

There is nothing in the bill of exceptions to show by what authority the board of aldermen passed the vote in this case authorizing the laying out of the sewer. The answer sets up that it was done under the Public Statutes, and the defendant, in its brief, states inferentially that it was under Pub. Stat. chap. 50, which, by § 1, gives to the mayor and aldermen of a city the right to lay, make, and maintain such main drains or common sewers as they adjudge to be necessary for the public convenience or the public health, through the lands of any persons or corporations. Assuming that the vote was passed by the board of aldermen under this statute, the defendant concedes that, if a board of public officers should decree that a sewer should be so constructed that it would discharge upon private lands, a remedy by injunction or otherwise could be afforded, because the act done or to be done would be without the jurisdiction of the board, and would, in effect, be the taking of private property for public uses without proper condemnatory proceedings. We think that this concession was properly made. Thus, in *Hill v. Boston*, 122 Mass. 344, 358, 23 Am. Rep. 332, it was said by Chief Justice Gray: "So, if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another, to his injury, it is liable to him in an action of tort;" citing, among other cases, *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223, and *Haskell v. New Bedford*, 108 Mass. 208. In *Proprietors of Locks & Canals v. Lowell*, it was held that a canal corporation could maintain an action of tort against a city for laying down sewers and drains through

lands purchased by the corporation for the use of their canal, and emptying into the canal, although the city was authorized by its charter "to cause drains and common sewers to be laid down through streets and private lands," and though the canal was constructed in the channel of an ancient watercourse. See also *Boston Rolling Mills v. Cambridge*, 117 Mass. 396. So, too, if a sewer is legally laid out and constructed by a city, but is maintained in such a manner as to create a private nuisance, an action at law may be maintained against the city by the persons injured. *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470. It has also been held that if a city, by a system of drains, artificially diverts surface water from its natural course, and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it is liable to an action. *Manning v. Lowell*, 130 Mass. 21, 25; *Brayton v. Fall River*, 113 Mass. 218, 226, 18 Am. Rep. 470; *Bates v. Westborough*, 151 Mass. 174, 182, 7 L. R. A. 156, 23 N. E. 1070.

In the case at bar the plaintiff owned the land on each side of the Bemis road, and presumably owned the fee of the road. Its tailrace ran under the road by means of a culvert, and was on the plaintiff's land. This condition of things existed prior to 1845. The culvert had never been interfered with by the defendant or by the town of Lunenburg, in whose municipal limits it once was. We need not consider what would have been the rights of the plaintiff if the city had seen fit to extend its sewer so as to injure the plaintiff's rights in the tailrace, as nothing of this sort was attempted. The order ends the sewer at the raceway. So long as the city did not lay a sewer across the tailrace, the plaintiff had a right to the use of the land under the way. *Allen v. Boston*, 159 Mass. 324, 336, 34 N. E. 519. Even if it had not acquired a prescriptive right so to use it, the defendant had no right to have its sewer end on the plaintiff's land, and pour the sewage thereon. The order, therefore, was of no effect, and the judge rightly ruled that the action could be maintained.

Judgment affirmed.

Hosea M. KNOWLTON, Attorney General,
v.

Henry Bigelow WILLIAMS *et al.*

(.....Mass.....)

1. The restriction of the height of buildings adjacent to Copley square, made by Stat. 1898, chap. 452, if intended to benefit the public by promoting the beauty and attractiveness of a public park and preventing unreasonable encroachments upon the light and air which it had previously received, justifies the expenditure of public money to

NOTE.—For public purposes for which money may be appropriated or raised by taxation, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474, and note; also later cases cited in footnote to *Fritchard v. Magoun* (Iowa) 46 L. R. A. 381, 47 L. R. A.

pay compensation for property rights thereby injured by thus creating an easement of light, air, and view, annexing it to the park in the exercise of eminent domain.

2. A city may be required by the legislature to pay the expense of acquiring an easement for a public park in the city, such as an easement of light, air, and view created by limiting the height of adjacent buildings.
3. An approval of certain sculptured ornaments on the face of the wall on two sides of a building above the lawful height, made by park commissioners under Stat. 1898, chap. 452, authorizing them to approve sculptured ornaments extending above the permitted height of the building, does not relieve the building from the prohibition of the statute, when its solid brick walls extend 6 feet above the limit, and its roof is at the top.
4. A building erected above the height limited by statute in front of a public park is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance, and to be dealt with in equity as such.
5. An information in equity by the attorney general is the proper form of proceeding for the enforcement of public rights against a building erected above the height permitted by statute in front of a public park.
6. A statutory remedy for enforcing building laws, given by Stat. 1894, chap. 257, to the city of Boston, does not exclude a suit by the attorney general to enforce Stat. 1898, chap. 452, prohibiting the erection of buildings adjacent to Copley square above a certain height, and requiring the city to pay damages for the interest in lands thus taken, thus giving the city a pecuniary interest against the enforcement of the law.

(October 30, 1899.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench on an information by the Attorney General to prevent the construction and maintenance of a portion of a building facing Copley square in Boston. *Demurrer and pleas overruled.*

The facts are stated in the opinion.

Messrs. Elder, Wait, & Whitman, for plaintiff:

Inasmuch as this limitation by statute affects real estate for the benefit of the public, and incidentally gives the public certain rights to real estate, the attorney general is not only the proper, but the only, officer to enforce those rights.

The right of the attorney general in cases where real estate is involved is in analogy to his right to interfere in cases of purpresture where persons have intruded upon lands belonging to the commonwealth, where he proceeds by writ of intrusion.

Pub. Stat. chap. 17, § 4; *Atty. Gen. v. Boston Wharf Co.* 12 Gray, 553; *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Wood, Nuisances*, 3d ed. § 82; *Jenks v. Williams*, 115 Mass. 217; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Macy*, 62 How. Pr. 65; *Atty. Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380.

The basis of the attorney general's interference is his right to protect the public or an indefinite portion of the public.

Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Atty. Gen. v. Clark*, 167 Mass. 201, 45 N. E. 183; *Atty. Gen. v. Boston*, 123 Mass. 460.

The attorney general has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief.

Atty. Gen. ex rel. Branstow v. Birmingham & O. Junction R. Co. 3 Macn. & G. 453; *Atty. Gen. v. Mid-Kent R. Co.* L. R. 3 Ch. 100; *Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co.* L. R. 21 Ch. Div. 752.

It is not necessary to show any injury.

Atty. Gen. v. Cockermouth Local Board, L. R. 18 Eq. 172.

This court has already clearly laid down grounds sufficient to warrant the interposition of the attorney general in this case.

Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 346; *Atty. Gen. v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358; *Deerfield v. Connecticut River R. Co.* 144 Mass. 325, 11 N. E. 105; *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605; *Atty. Gen. v. Algonquin Club*, 153 Mass. 447, 11 L. R. A. 500, 27 N. E. 2; *Atty. Gen. v. Gardiner*, 117 Mass. 492; *Atty. Gen. v. Williams*, 140 Mass. 329, 54 Am. Rep. 468, 2 N. E. 80, 3 N. E. 214.

There are a number of cases in this commonwealth where the attorney general has intervened to protect various rights of the public, where no nuisance *per se* could be said to exist and where his authority to intervene has not been questioned.

Atty. Gen. v. Cambridge, 16 Gray, 247; *Atty. Gen. v. Old Colony & N. R. Co.* 12 Allen, 404; *Atty. Gen. v. Boston & M. R. Co.* 109 Mass. 99; *Atty. Gen. v. Boston*, 123 Mass. 460, 142 Mass. 200, 7 N. E. 722; *Atty. Gen. v. Salem*, 103 Mass. 138; *District Attorney v. Lynn & B. R. Co.* 16 Gray, 242; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 204; *Atty. Gen. v. Consumers' Gas Co.* 142 Mass. 417, 8 N. E. 138.

If the city of Boston has an exclusive right to enforce this act, the rights of the whole public must go without enforcement, because the city is interested to refuse to proceed with such enforcement.

Atty. Gen. v. Consumers' Gas Co. 142 Mass. 417, 8 N. E. 138; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Atty. Gen. v. Boston*, 123 Mass. 460.

There are serious doubts whether there is such special damage to the city of Boston from the violation of the statute as enables it to maintain the bill filed by it at all.

Needham v. New York & N. E. R. Co. 152 Mass. 61, 25 N. E. 20; *Deerfield v. Connecticut River R. Co.* 144 Mass. 325, 11 N. E. 105.

The city of Boston has at best nothing more than a concurrent remedy with the attorney general.

47 L. R. A.

People v. Macy, 62 How. Pr. 65; *People v. Vanderbilt*, 26 N. Y. 287.

The American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions.

Cooley, Const. Lim. 6th ed. pp. 49, 104; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *Cooley*, Const. Law, 31; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1120; *Dingley v. Boston*, 100 Mass. 544; *Opinion of the Justices*, 163 Mass. 589, 28 L. R. A. 344, 40 N. E. 713; *Wurts v. Hoagland*, 114 U. S. 806, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 353.

Great weight has always been given to the construction by the legislature of its own constitutional powers.

Kendall v. Kingston, 5 Mass. 524; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Norwich v. Hampshire County Comrs.* 13 Pick. 60; *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The right of the legislature to enact laws for the proper policing of the state is unquestioned, although the effect of such acts may be to deprive a citizen of his property. The only limitation upon such acts is that they must be "wholesome and reasonable."

Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; *Com. v. Alger*, 7 Cush. 53; *Salem v. Maynes*, 123 Mass. 372.

It is not essential that a police regulation should be applicable to all parts of the commonwealth, if density of population is an element which may justify the interference of the legislature.

Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; *Com. v. Colton*, 8 Gray, 488; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79.

It is certainly a public use to take private property, when a result of that order inures to the comfort and pleasure of the whole people.

Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Foster v. Boston Park Comrs.* 133 Mass. 321; *Atty. Gen. v. Abbott*, 154 Mass. 328, 13 L. R. A. 251, 28 N. E. 346; *Kingman v. Brockton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998; *Higginson v. Nahant*, 11 Allen, 530; *Atty. Gen. v. Gardiner*, 117 Mass. 492; *Re Bushwick Avenue*, 48 Barb. 9; *Mount Washington Road Co.'s Petition*, 35 N. H. 134.

The establishment of a public institution in a community brings benefit to the people in the neighborhood, but that local benefit does not make taxation to pay for such institution for a private, and not a public, use.

Merrick v. Amherst, 12 Allen, 500; *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Holt v. Somerville*, 127 Mass. 408; *Com. v. Tewksbury*, 11 Met. 55; *Com. v. Alger*, 7 Cush. 53; *Brayton v. Fall River*, 124 Mass. 95; *Olmstead v. Camp*, 33 Conn. 551, 89 Am. Dec. 221.

The power of the legislature to make and to authorize local laws for the administration of local affairs is beyond question.

Opinion of the Justices, 138 Mass. 601; *Com. v. Alger*, 7 Cush. 53; *Com. v. Breed*, 4 Pick. 460; *Norwich v. Hampshire County Comrs.* 13 Pick. 60; *Atty. Gen. v. Cambridge*, 18 Gray, 247; *Com. v. Tewksbury*, 11 Met. 55; *Dorgan v. Boston*, 12 Allen, 223; *Denham v. Bristol County Comrs.* 108 Mass. 202; *Goddard, Petitioner*, 16 Pick. 504, 28 Am. Dec. 259; *Clinton v. Weloh*, 166 Mass. 133, 43 N. E. 1116; *Com. v. Goodnow*, 117 Mass. 114; *Cushing v. Boston*, 122 Mass. 173; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Kingman, Petitioner*, 153 Mass. 560, 12 L. R. A. 417, 27 N. E. 778; *Rice v. Parkman*, 16 Mass. 326; *Sohier v. Massachusetts General Hospital*, 3 Cush. 483; *Clarke v. Hayes*, 9 Gray, 426.

Mr. A. E. Pillsbury for defendants.

Knowlton, J., delivered the opinion of the court:

This is an information by the attorney general to prevent the erection and maintenance of that portion of a building on Copley square, in the city of Boston, which is above the limit of height prescribed by Stat. 1898, chap. 452. Section 1 of this statute is as follows: "Any building now being built, or hereafter to be built, rebuilt, or altered in the city of Boston upon any land abutting on Saint James avenue between Clarendon street and Dartmouth street, or upon the land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce Building, so called, or upon land abutting upon Dartmouth street now occupied by the Boston Public Library Building, or upon land at the corner of Dartmouth street and Boylston street now occupied by the New Old South Church Building, may be completed, built, rebuilt, or altered to the height of ninety feet and no more; and upon any land or lands abutting on Boylston street between Dartmouth street and Clarendon street may be completed, built, rebuilt, or altered to the height of one hundred feet and no more: provided, however, that there may be erected on any such building above the limits hereinbefore prescribed, such suitable towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve." Section 2 repeals Stat. 1896, chap. 313, and Stat. 1897, chap. 379, so far as they limit the height of buildings erected along the line of streets, parkways, or boulevards bordering on public

parks; § 3 provides for the payment of damages to any person owning or having an interest in an uncompleted building begun before the 14th day of January, 1898, which is affected by the act; and § 4 provides for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act. The case is reported upon the information, demurrer, pleas, and certain facts found at the hearing on the pleas.

The first question raised by the report is whether the statute is constitutional. The streets mentioned in the statute are adjacent to Copley square. On the case as now presented, we must assume that Copley square, in the language of the information, "is an open square and a public park, intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable." Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. *Salem v. Maynes*, 123 Mass. 372; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27. See *Talbot v. Hudson*, 16 Gray, 417. In view of the kind of buildings erected on the streets about Copley square, and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject, in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property for the benefit of the public who use Copley square. It adds to the public park rights in light and air, and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct tax-

ation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries, or were altogether unknown, have now become necessities. It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. *Foster v. Boston Park Comrs.* 133 Mass. 321; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361. Many statutes have been passed in this commonwealth allowing taxation for purposes affecting the health, comfort, pleasure, and recreation of the people, and thus conducing to their welfare. In *Kingman v. Brookton*, 153 Mass. 255, 11 L. R. A. 123, 26 N. E. 998, the court said, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: "The statute . . . may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates, or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments designed merely to promote the general welfare, either by providing for fresh air, or recreation, or by educating the public taste, or inspiring sentiments of patriotism or respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles." See also *Higginson v. Nahant*, 11 Allen, 530, and *Hubbard v. Taunton*, 140 Mass. 467, 6 N. E. 157. In *Olmstead v. Camp*, 33 Conn. 551, 89 Am. Dec. 221, the court, in discussing the line between public and private uses, says: "From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and, in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts." The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature, in the varied forms which the change in seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them, to make them beautiful and enjoyable. Their æsthetic effect never has been thought 47 L. R. A.

unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not always justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed, and whose love of beauty is being cultivated. We have already quoted from the information the language in regard to the surroundings of the square. The counsel on both sides referred in argument to the well-known buildings which constitute these surroundings. Trinity Church, the Museum of Fine Arts, the Boston Public Library, the New Old South Church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology all face the beholder who stands on Copley square and looks around him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been beneficiaries of the commonwealth on account of their quasi-public character, and the public certainly feels an interest in them. It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property. While such a determination should not be made without careful consideration, and while the growing tendency towards an enlargement of the field of public expenditures should be jealously watched and carefully held in check, a determination of this kind, once made by the legislature, cannot be lightly set aside.

It is contended that, if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the political subdivisions of the commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778, and cases and statutes there cited. It

does not depend upon the clause of the Constitution which authorizes the imposition of taxes, but upon the more general provisions defining the power of the legislature. While the interest to which this statute looks is public, it is largely local. A very large part of the public who are affected by the statute are citizens of Boston. The valuation of Boston is a large proportion of the valuation of the whole commonwealth. The legislature might well put the whole of this public burden upon the city of Boston.

It appears that on October 31, 1898, the board of park commissioners voted "that the sculptured ornaments erected on the building . . . above the height of 90 feet, as shown in the plans thereof submitted to the board and in the building as now erected," be approved. The building is rectangular, and the height of its walls to the roof is 96 feet. The ceilings of the rooms in the upper story are a few inches above a horizontal line of the height of 90 feet. Above these rooms there is an open-air space extending to the roof, a distance of about 4 feet, measured on the inside of the outer walls of the building. The walls of the building are of brick, and on the two sides fronting on the streets there is an ornamental facing of terra cotta, partly in relief, and extending from a line 90 feet in height upward to the roof, constituting the architrave, frieze, and cornice of the building, which are referred to in the vote of the park commissioners as "sculptured ornaments." On the other two sides of the building the walls of a corresponding height are of plain brick. The question arises whether the approval of these ornaments by the park commissioners relieves the building from the prohibition of the statute. It seems to us very clear that it does not. The prohibition against erecting a building above the height of 90 feet is absolute, except that certain erections, which are usually above the substantial parts of a building, may, with the approval of the park commissioners, be put "on any such building" above that height. These are "steeple, towers, domes, sculptured ornaments, and chimneys." It is only as these become a part of the building by their erection upon it that any part of the building can be built to a greater height than 90 feet. All other parts of the building are left within the prohibition. But the ornaments put upon this building are not "erected on" a building constructed within the limits prescribed for it. We have a building with its solid brick walls extending 6 feet above the prescribed limit, and its roof at the top, and an inclosure within. The park commissioners, by their approval of certain sculptured ornaments on the face of the wall on two sides of the building, did not assume to approve of other parts of the building which constitute the solid structure; and the statute gave them no authority to approve of other parts of it, or of the building as a whole. The statute intended that the main structure of the building should not extend above the prescribed line, and that only the specified parts which should project above the building proper might, if

approved, be erected on the building. It does not even permit roofs to be built above the line, as did the statute of 1897, chap. 378, which it repeals. What the park commissioners were authorized to do was to approve sculptured ornaments surmounting a 90-foot building. What they have done is to approve the ornamentation of the architrave, frieze, or cornice of two of the four walls of a 96-foot building, leaving the other two walls, unornamented, 96 feet in height. In reference to the building proper, as distinguished from the ornamentation on the face of two of its walls, the defendant can derive no advantage from the vote of the park commissioners.

It is contended by the defendants that the attorney general cannot maintain a suit in equity to enforce this statute. His right depends upon the construction put upon the statute. We hold that the statute gives rights in the nature of an easement over lands facing Copley square, which easement is annexed to the square for the benefit of the public for whose use and enjoyment Copley square was laid out, and that these rights are similar in their nature to rights in highways, in great ponds, and in the navigable waters of the commonwealth. For a deprivation of such public rights, an individual, unless he has suffered damages different in kind from those to the public generally, cannot maintain an action. The attorney general, as a public officer, represents the public, and may bring all proper suits to protect their rights. The wrong alleged in the present case, if permitted, would work a permanent injury to the public, depriving them of that which the statute gives them. It is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance, and is sometimes called a public nuisance, and in equity is to be dealt with as a public nuisance. *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Atty. Gen. v. Boston Wharf Co.* 12 Gray, 553; *Jenks v. Williams*, 115 Mass. 217; *Atty. Gen. v. Woods*, 109 Mass. 436, 11 Am. Rep. 380; *Atty. Gen. v. Old Colony R. Co.* 100 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *People v. Vanderbilt*, 26 N. Y. 287. In regard to the enforcement of rights given to the public and to other landowners in lands reserved for their use by the commonwealth, see *Atty. Gen. v. Algonquin Club*, 153 Mass. 447-454, 11 L. R. A. 500, 27 N. E. 2; *Atty. Gen. v. Gardiner*, 117 Mass. 492-499; *Atty. Gen. v. Williams*, 140 Mass. 329-331, 54 Am. Rep. 468, 2 N. E. 80 and 3 N. E. 214. In England it is held that "the attorney general has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief." *Atty. Gen. ex rel. Branston v. Birmingham & O. Junction R. Co.* 3 Macn. & G. 453; *Atty. Gen. v. Mid-Kent R. Co.* L. R. 3 Ch. 100; *Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co.* L. R. 21 Ch. Div. 752; *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172. In *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361-364, it was

said, in reference to a great pond, that, where an aqueduct corporation proceeds to draw off water to such an extent "as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the government and of the public." The case of *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L. R. A. 251, 28 N. E. 346, under facts very similar to those of the present case, sustains the right of the attorney general to maintain an information in equity for the protection of public rights in land dedicated to the use of the public as a park. Of similar purport is *Atty. Gen. v. Tarr*, 148 Mass. 309-314, 2 L. R. A. 87, 19 N. E. 358. His right in *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605, —a similar case,—was assumed. See also *Atty. Gen. v. Consumers' Gas Co.* 142 Mass. 417, 8 N. E. 138; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264. We are of opinion that the attorney general is the proper party, and that an information in equity is the proper form of proceeding for the enforcement of public rights against encroachments like those threatened in the present case.

There remains to be considered one other objection to the right of the attorney general to maintain this suit. It is argued that by the statute of 1894, chap. 257, the city of Boston is given the right to enforce its building laws, that this remedy excludes all others, and that it applies to violations of the statute of 1898, chap. 452. It is true that, when a statute provides a remedy for violations of it, the remedy is generally exclusive; but, if it provides no remedy, relief from wrongs against it is to be sought at common law. *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 40-44, 4 Am. Dec. 80; *Wiley v. Yale*, 1 Met. 553; *Elder v. Bemis*, 2 Met. 599-604; *United States v. Laeschi*, 29 Fed. Rep. 699, and cases cited. Stat. 1894, chap. 257, is as follows: "The supreme judicial court, or any justice thereof, and the superior court, or any justice thereof, in term time or vacation, shall on the application of the city of Boston by its attorney, have jurisdiction in equity to enforce or prevent the violation of provisions of the acts relating to the erection or alteration of buildings or other structures in the city of Boston, and may on such application restrain the erection, alteration, use, or occupation of any such building or structure which is being, or has been, erected or altered in violation of any of the provisions of said acts." It was passed in reference to the elaborate statutes then in force, enacted under the police power of the legislature for the regulation of the erection of buildings in the city of Boston. When it was passed, no such statute as that invoked by the attorney general was contemplated. Whether the words "acts relating to the erection or alteration of buildings or other structures in the city of Boston" were intended to include any new and independent acts of a kindred character that might afterwards be

passed, as distinguished from existing acts and amendments of them, may well be questioned. The natural construction of the words would make them apply only to conditions then existing. The statute under which this information is brought, as we construe it, materially differs from the acts relative to the erection of buildings in the city of Boston existing when the previous statute was passed. It was enacted for a different purpose. It creates public rights annexed to public property. It calls for the payment of damages for the taking of an interest in lands, and exacts the payments from the city of Boston. The city has a pecuniary interest against the enforcement of the law. The statute does not provide a remedy for its enforcement, and therefore the remedies must be sought at common law. The kind of remedy provided by the statute in regard to the building laws gives no security to the public for the protection of their rights, for the party to enforce it has an adverse interest, and cannot be compelled to proceed. We are of opinion that Stat. 1898, chap. 452, was not intended to create rights enforceable only under Stat. 1894, chap. 257, but creates rights which are enforceable under general laws. In the opinion of a majority of the court, the entry must be: *Demurrer and pleas overruled.*

Re William T. JANVRIN et al., Selectmen of Revere.

(.....Mass.....)

1. The authority to establish maximum water rates, conferred upon judges of the supreme judicial court by Stat. 1897, chap. 336, § 1, authorizing the judges, on petition of the selectmen of a town or any persons deeming themselves aggrieved by the price charged for water, to fix maximum rates once in five years, which shall be binding upon the water company until revised or altered by the court, does not make of the court a legislative commission to determine what rules shall govern people who are not yet in relation to each other, but requires the court to fix the extent of actual, existing rights primarily for the party aggrieved, although secondarily it fixes a general rate for all parties and for the future as well as the past.
2. The assistance of a master, when needed by the court in hearing such matters as have always been heard by masters under the equity practice of the court, will be presumed to have been intended by the legislature, when it has authorized a novel proceeding not known to the common law, without stating whether it shall be deemed a proceeding at law or a proceeding in equity.

(November 28, 1899.)

NOTE.—For legislative power to fix tolls, rates, or prices, see *Winchester & L. Turnp. Road Co. v. Croxton (Ky.)* 83 L. R. A. 177, and note; *San Diego Water Co. v. San Diego (Cal.)* 38 L. R. A. 460; and *Indianapolis v. Navin (Ind.)* 41 L. R. A. 337.

As to power of courts to fix rates, see *Nebraska Telenh. Co. v. State ex rel. Yeiser (Neb.)* 45 L. R. A. 118.

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a demurrer to a petition by the selectmen of Revere to fix the rates to be charged for water supply by the Revere Water Company under the provisions of the statute of 1897. *Demurrer overruled.*

The facts are stated in the opinion.

Mr. Benjamin N. Johnson, for Revere Water Company, in support of demurrer:

The statute is in conflict with the 30th article of the Declaration of Rights, prefixed to the Constitution, in that it involves an attempted assignment or delegation by the legislative department to the judicial department of the government, of powers which are distinctively legislative, and not judicial.

Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; *Cooley*, Const. Law, p. 44; *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L. ed. 253, 263; *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107.

Power to determine the maximum charge to be made for the use of such property has been invariably deemed to be a legislative power.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Statute 1897, chap. 336, must be construed in one of two ways: (1) The court is directed to fix the rates of the water companies in question upon such a basis as to the court itself shall seem reasonable, or (2) the court is given by the legislature a standard by which those rates must be measured and determined.

If the first construction of the statute is adopted, then clearly there is nothing in it beyond a naked delegation to this court, or its judges, of functions not of a judicial nature. If the legislature deems it necessary to fix the maximum charges of water companies, it must itself fix them either directly or through a commission empowered to do so. It cannot delegate that duty to another department of the government.

Locke, Civil Government, § 142; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *Rice v. Foster*, 4 Harr. (Del.) 479; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Cooley*, Const. Lim. 6th ed. pp. 137-140.

If the second construction of the statute in question shall be held to be the correct one, it is open to the additional objection that the only power which could devolve upon the judges, under its provisions, would be that of accountants or commissioners, whose sole duty would be to ascertain and tabulate the rates charged for all the va-

rious kinds of water service in other cities and towns in the metropolitan district, and then write them against the name of the water company in question.

Such a power would not be judicial.

The statute in question is open to the still further objection that it is not the supreme judicial court, but two or more judges of said court, who are to determine the matters thereby delegated.

If the power to be exercised is not judicial, it cannot be given to a judge; if judicial, it must be vested in a court, and not in one or more judges thereof.

Note to Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42; *Re Cleveland*, 51 N. J. L. 311, 17 Atl. 772; *Cases in Albany Law Journal*, May, 1889, p. 350.

Messrs. Dewing & Cutler, for petitioners:

The legislature, not only in providing for and furthering the general scheme for providing and maintaining a general supply and system of pure water within a certain district, but in regulating the charges for water within such district with a view of equalizing such charges among the inhabitants of such district, is within the well-recognized police power of the legislature.

Sawyer v. Davis, 136 Mass. 239; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 550, 36 L. ed. 257, 12 Sup. Ct. Rep. 468.

Under the police power the legislature has a right to fix the rates to be charged for service where the business affected is not one in which any person may engage at will, but is aided by special privileges in the public streets, highways, etc., when it is one of public importance, but is such as to become a virtual monopoly in the hands of one or a few, and is thus capable of being made the means of unlimited oppression or extortion.

Cooley, Const. Lim. 594; *Black*, Const. Law, 309; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Com. v. Gilbert*, 100 Mass. 157, 22 L. R. A. 439, 35 N. E. 454; *Com. v. Gage*, 114 Mass. 328; *Com. v. Duane*, 98 Mass. 1; *Com. v. Page*, 155 Mass. 231, 29 N. E. 512.

It is an exercise of police power for the legislature to pass "statutes intending to secure a wholesome and sufficient supply of pure water for cities, including the purchase or maintenance of water works."

1 Dill. Mun. Corp. § 146, and cases cited; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

At common law, irrespective of statute, it had been held from the earliest times that parties situated as the respondents are situated could only recover for services such as the respondents in this case render, could only recover a reasonable compensation therefor.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Allnutt v. Inglis*, 12 East, 527; 1 Har- graves, Law Tracts, 78; Bacon, Abr. title, Carriers, D; *Kirkman v. Shawcross*, 6 T. R.

17; *Pickford v. Grand Junction R. Co.* 10 Mees. & W. 415.

The powers conferred upon the supreme court by the statute in question are judicial powers.

To compare the claims of parties with the law of the land, before established, is in its nature a judicial act.

Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; *Forsythe v. Hammond*, 68 Fed. Rep. 774.

It is within the scope of judicial power to inquire whether rates of compensation fixed by municipalities and corporations for the use of appropriated water operated to deprive the owner of his property without just compensation.

San Diego Land & T. Co. v. National City, 74 Fed. Rep. 79; *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322.

Unless charges are regulated in such a manner as to enable the questions and issue involved in regulation of charges and the inquiry and investigation incident thereto to be considered and carried on by some duly constituted and properly organized judicial body, the statute providing therefor would be open to the objection of depriving a person of property without due process of law.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The question of what powers are judicial in their nature is settled, so far as concerns the present inquiry, by repeated decisions of this court.

Salem Turnp. & C. Bridge Corp. v. Essex County, 100 Mass. 282; *Haverhill Bridge Proprs. v. Essex County Comrs.* 103 Mass. 120; *Stone v. Charlestown*, 114 Mass. 214; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

Holmes, Ch. J., delivered the opinion of the court:

The only question raised by the demurrer is the constitutionality of the provision of Stat. 1897, chap. 336, § 1, under which the petitioner proceeds. This section amends § 23 of the metropolitan water supply act (Stat. 1895, chap. 488). It embodies a scheme which forbids cities or towns within 10 miles of the state house to use water for domestic purposes from any source not now used by them, except under the statute. This prohibition, standing alone, might seem to put into the hands of a water company now supplying any such town or city the power to make exorbitant charges by

giving it a monopoly. Therefore, with a view, no doubt, of dealing with the danger, the section just referred to provides as follows: "The selectmen of a town, or any persons deeming themselves aggrieved by the price charged for water by any such company, may, in the year eighteen hundred and ninety-eight and every fifth year thereafter, apply by petition to the supreme judicial court, asking to have the rate fixed at a reasonable sum, measured by the standard above specified; and two or more judges of said court, after hearing the parties, shall establish such maximum rates as said court shall deem proper; and said maximum rates shall be binding upon said water company until the same shall be revised or altered by said court pursuant to this act."

When we first read this sentence, the impression of some of us was that it was an attempt to make out of this court a commission for the taking of one step in fixing a legislative rule of future conduct, irrespective of any present relation between the parties concerned, and that it was no more competent for the legislature to impose or for us to accept such a duty than if the proposition were to transfer to us the whole law-making power. See *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852. But upon further reflection it seems to a majority of the court that the act can be sustained. If we can do so without perverting the meaning of the act, we are bound to construe it in such a way that it will be consistent with the Constitution, and we think that this can be done without any wresting of the sense, even if we should doubt (which we do not intimate that we do) whether the legislature had the limit of its power distinctly in mind.

The statute goes upon the footing that every taker of water from the companies in question has a right to be furnished with water at a reasonable rate. No one questions the power of the legislature to require these water companies to furnish water to the takers at reasonable rates. (*Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 86, 87, 22 L. R. A. 112, 35 N. E. 252; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 354, 28 L. ed. 173, 176, 4 Sup. Ct. Rep. 48; *Budd v. New York*, 143 U. S. 517, 537, 549, 552, 36 L. ed. 247, 253, 257, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468); and this statute does require the companies to do so, and thereby gives to water takers a corresponding right, or declares that they have it. It is with the relations between actual water takers and the companies that the statute calls on this court to deal. It does not undertake merely to make of the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down. It calls on us to fix the extent of actually existing rights. With regard to such rights, judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and, if

not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future.

But it has been regarded as competent for a court to pass on the reasonableness of a rate, even when established by the legislature, to the extent of declaring it unreasonably low. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Chicago & N. T. R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. *A fortiori* when the rate is established by the company, and it has undertaken to charge the plaintiff a sum which he alleges to be unreasonable, and the legislature, in terms, has referred him to this court, this court has "jurisdiction to inquire into that matter, and to award to the . . . [plaintiff] any amount exacted from him in excess of a reasonable rate." *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, 1054.

It is true that in *Reagan v. Farmers' Loan & T. Co.* it was said, also, that "it is not the function of this court to establish a schedule of rates" (154 U. S. 400, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1055); and to that proposition we fully agree. But it will be observed that the proposition is laid down in connection with the statement that "the challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods." Probably to prepare a new schedule or to rearrange the old one would have gone beyond the scope of the rights immediately affected or threatened in the case before the court, into the realm of abstract lawmaking for the future, and so beyond the power of the court; and, if it had not been beyond the court's power, still very possibly it might have been refused, in the court's discretion, the court leaving it to the proper body to undertake the task. But it is implied that, if the challenge had been of a single rate threatened to be charged for a service demanded, the court might have determined the question between the parties for the immediate future, as it is stated three pages earlier that the court would determine it with regard to a charge for past services. When you are prepared to say that a given charge is too high or too low, it hardly would be consistent to say that you had not power or ability to say what is a proper charge.

It is true that the phrase, "shall establish such maximum rates as said court shall deem proper," and the following provision, that such "maximum rates shall be binding upon said water company until the same shall be revised or altered by said court," etc., suggest that the legislature had in mind the establishment of a rate to be charged to

all parties for the use of water for domestic purposes, and not merely a rate to be charged the petitioner. It may be that the former was the main object which the legislature had in mind. But, although we cannot doubt that the meaning of the words last quoted is that the rate shall be binding as a general rate, even that is not said distinctly; and we feel bound to assume, in support of the act, that the legislature is dealing primarily with the rights of the party aggrieved before the court, and only secondarily adopts in advance the rate thus fixed between the parties as a general rate for all. If this is so, the question whether such a legislative consequence can be attached to the decision is not before us. Even if it should fail, the failure would not necessarily affect the constitutionality of sending "persons deeming themselves aggrieved to this court to get their rights settled; but, as it is not likely that a rate thus established for a given moment after full investigation would be departed from upon the application of a second person similarly circumstanced, it may be questioned whether there is anything to prevent the legislature from sanctioning without further hearing a rate which once has been declared judicially to be reasonable. It is to be remarked in this connection that the decisions which we have cited for the proposition that the legislature may require rates to be reasonable establish the further proposition that the legislature may fix what the rates shall be, subject only to judicial inquiry whether they are so unreasonably low as to deprive the company of its property without due compensation.

It will be understood from the reasoning on which we sustain the act that the court would not regard itself as warranted or called on to undertake the fixing of rates, except so far as they concern interests actually and legitimately before the court.

The liberty to apply to this court is confined to the year 1898 and every fifth year thereafter, so that seemingly it is contemplated that the rate, when fixed, will remain unchanged for five years. This is another indication that the legislature had its attention directed to the establishment of a general rate. But, supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed; and, if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong. It is true that the party aggrieved is not given an injunction, in terms, by the act; and this is another peculiarity in the procedure, looking as it does to a decree affecting the future. Of course, it is assumed, and no doubt rightly, that a company would not venture to disregard the decree. But if a company should prove recalcitrant, in case such disregard should not

be construed as *ipso facto* a contempt, undoubtedly the decree could be enforced by injunction.

There is still one peculiarity in the statutory proceedings which adds a little to the difficulty of the question before us. We have construed the statute to deal primarily with existing rights and grievances. But the proceedings are given to "the selectmen of a town or any persons deeming themselves aggrieved." So far as the alternative mention of the selectmen should be used as an argument that the primary purport of the act was not to deal with present rights, we should answer that it does not appear that the towns within the 10-mile radius do not all of them take water in their corporate capacity; and if it was assumed by the legislature that they did, as they probably do, the argument would lose its force. It may be that the legislature thought of the selectmen rather as representing the whole body of water takers in the town. Whether they could be made compulsory agents to represent private interests in that way, it is not necessary to inquire. We may add that we understand the demurrer to be intended to raise the single question of constitutionality, and therefore we do not consider whether the petition, in strictness, ought not to show that the town, or whoever may be represented by the petitioning selectmen, is a water taker, and, in short, disclose enough to make out a present grievance. If there is any defect of form,—which we do not intimate,—probably it could be amended.

One question remains. The fixing of a reasonable rate is not left at large to the court. The rate is to be "a reasonable sum, measured by the price ordinarily charged for a similar service in other cities and towns in the metropolitan district." Of course, it is argued that this is an attempt to let one company fix a price for another. To a certain extent the standard runs in a circle, since the price charged by water companies in the other towns within 10 miles of Boston also may come before this court for revision. But, leaving that consideration on one side, it is evident that the legislature regarded the cities and towns referred to as constituting a class; and, while a mere accumulation of instances is not evidence of what is reasonable, the general practice in the class to which a case belongs stands on a different footing, and, if the circumstances are sufficiently similar, may be instructive. See *McMahon v. McHale*, 174 Mass. —, 54 N. E. 854; *Veginan v. Morse*, 160 Mass. 143, 148, 35 N. E. 451.

As has been said, the cases establish the power of the legislature to fix rates, subject to the qualification that they shall not be unreasonably low. It cannot be assumed on demurrer, as against the implied opinion of the legislature, that the circumstances are not similar, or that all the prices in the 10-mile circuit will be unreasonable. If, in the opinion of the court, at any time they should be so, no doubt in that event it would be bound to disregard the standard of comparison set for it by the act. The governing rule 47 L. R. A.

requirement is that the price should be reasonable. But, especially in view of the fact that companies furnishing the standard have before them the possibility of a petition like the present, such a possibility is not to be feared.

It is suggested that the duty to be done by the court, sitting with two justices, under this statute, calls for an investigation of details and the consideration of matters of administration which cannot properly be required of the supreme judicial court. If an extended investigation of accounts or an examination of minute details is necessary in the hearing upon this petition, it will be in the power of the court to appoint a master, in accordance with the practice of the court in equity, to hear the parties and report the facts. The statute authorizes a novel proceeding, not known to the common law. It does not say whether it shall be deemed a proceeding at law or a proceeding in equity. In some particulars it is more nearly analogous to suits in equity than to suits at law. It is a judicial investigation in aid of a legislative regulation. In actions at law, when accounts are involved, an auditor may be appointed. The legislature must be presumed to have intended that the court should have the assistance of a master when needed in hearing such matters as have always been heard by masters under the equity practice of the court.

Demurrer overruled.

Minnie T. SMITH, *Appt.*,

v.

POSTAL TELEGRAPH CABLE COMPANY
of Massachusetts.

(.....Mass.....)

No recovery can be had for sickness due to the purely internal operation of fright caused by a negligent act, even if the negligence was gross and the party in fault ought to have known that the result would follow his act.

(November 29, 1899.)

APPEAL by plaintiff from a judgment of the Superior Court for Essex County in

NOTE.—The above case strengthens the line of conservative authorities against a right of action for damages resulting from mere fright.

For the conflict on this subject, see *note* to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 606, the case annotated being, like the present, against the right of action.

On the same side, see also *Halle v. Texas & P. R. Co.* (C. C. App. 5th C.) 23 L. R. A. 774; *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* (Mass.) 38 L. R. A. 512; *Braun v. Craven* (Ill.) 42 L. R. A. 199; and *Spade v. Lynn & B. R. Co.* (Mass.) 43 L. R. A. 832.

For cases in addition to those contained in the *note* in 14 L. R. A. 606, which sustain such a right of action, see *Sloan v. Southern California R. Co.* (Cal.) 32 L. R. A. 193; *Mack v. South Bound R. Co.* (S. C.) 40 L. R. A. 679; and *Gulf. C. & S. F. R. Co. v. Hayter* (Tex.) *post*, 825.

favor of defendant in an action brought to recover damages for injuries caused by fright which resulted from negligent blasting by defendant. *Affirmed.*

Plaintiff's cause of action to which the demurrer was sustained was stated as follows:

"The plaintiff says that the defendant is a corporation operating and controlling a telegraph system, a part of the property of said defendant used for said purpose being located in Lynn, in said county; that on or about the 1st day of October, 1896, the defendant was locating telegraph poles on Western avenue, in said Lynn, within 10 feet of the building occupied by the plaintiff for a dwelling house, and for said purpose was engaged in blasting a ledge at said place, and that reasonable care in said work required that the ledge so being blasted should be covered and protected, and that the plaintiff should be warned that it was the purpose of the defendant to explode said ledge, but that the defendant did not cover or in any way protect, the said ledge at the time the same was exploded, and did not in any way warn or notify the plaintiff of its purpose to explode said ledge, and by reason of the aforesaid conduct of the defendant said ledge exploded with a great noise, and large quantities of rocks were thrown high into the air, and fell upon and against the house, in which the plaintiff was at said time, with great force and violence; and the plaintiff, on account of said explosion, and the great force and violence with which said rocks fell upon and struck said house, was made sick, and for a long time suffered great mental and bodily pain, and was unable to perform her usual work, and lost the wages thereof, and incurred expenses for medicine and medical attendance. And the plaintiff says that at said time she was in the exercise of due care. And the plaintiff says that at said time the defendant knew, or in the exercise of due care ought to have known, that the plaintiff was in said dwelling house, and that the aforesaid results would follow from said acts of the defendant, but that the defendant acted in the premises with gross carelessness and recklessness, and with utter indifference to the consequences that it knew would follow from its aforesaid acts. And the plaintiff further says it was the duty of the defendant to exercise proper care in performance of the aforesaid work, so that persons rightfully at said place and in the exercise of due care might not get hurt by reason of said blasting."

Mr. Eugene T. McCarthy, for appellant:

The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated.

Derry v. Flitner, 118 Mass. 134; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125; *Fillebrown v. Hoar*, 124 Mass. 580.

When one is engaged in an act which the circumstances indicate may be dangerous to others, and the event whose occurrence is necessary to make the act injurious can be

readily seen as likely to occur under the circumstances, the defendant is liable if he does not take all the care which prudence would suggest, to avoid the danger.

McGrew v. Stone, 53 Pa. 436; *Fox v. Bockey*, 126 Pa. 164, 17 Atl. 604.

Mr. Roger F. Sturgis, for appellee:

The case comes directly within the rule that in an action for negligence there can be no recovery for physical injury caused by fright, terror, alarm, anxiety, or distress of mind where there is no injury to the person from without.

Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; 172 Mass. 489, 43 L. R. A. 832, 52 N. E. 747; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Haile v. Texas & P. R. Co.* 23 U. S. App. 80, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 47 N. E. 694.

In order to maintain an action for assault or wilful injury, there must be some consistent form of averment that the injurious act was purposely done with the intent on the part of the defendant to inflict wilfully and purposely the particular injury.

Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 47 N. E. 694.

Holmes, Ch. J., delivered the opinion of the court:

The point decided in *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88, and *White v. Sander*, 168 Mass. 296, 47 N. E. 90, is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds. See, further, *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 43 L. R. A. 832, 52 N. E. 747, and *Silbee v. Webber*, 171 Mass. 378, 380, 381, 50 N. E. 555. If the rule is to be adhered to that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross, and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence means that the consequence ought to have been foreseen; and, although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it. The decisions leave open the question whether, if the harm to the plaintiff was actually foreseen and intended, that would make a difference. It is possible that in some cases motive and actual intent would be more considered in this commonwealth than they would be in England. That question may be left until it arises.

Judgment for defendant.

TEXAS SUPREME COURT.

GULF, COLORADO, & SANTA FÉ RAILWAY COMPANY, *Plff. in Err.*,

v.

J. O. HAYTER *et al.*

(.....Tex.....)

A physical injury resulting from a fright or other mental shock caused by the wrongful act or omission of another entitles the injured party to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural or probable consequence thereof.

(January 15, 1900.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Hunt County in favor of plaintiff in an action brought to recover damages for mental shock to plaintiff by reason of a collision of defendant's train on which plaintiff was riding. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Terry, for plaintiff in error:

Damages which are attributable to mere mental fright or shock are not recoverable when the same are accompanied by no physical injury or disturbance.

Haile v. Texas & P. R. Co. 23 U. S. App. 80, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419.

Injuries, the result of mere fright, are so rare and infrequent that the same cannot be reasonably anticipated by the wrongdoer, and hence are not, within the contemplation of law, the proximate result of the negligence complained of.

Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602; *International & G. N. R. Co. v. Folliard*, 86 Tex. 603, 1 S. W. 624; *International & G. N. R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 306, 89 N. Y. 627, 125 N. Y. 299, 26 N. E. 327; *Haile v. Texas & P. R. Co.* 23 U. S. App. 80, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Eames v. Texas & N. O. R. Co.* 63 Tex. 660; *Jones v. George*, 61 Tex. 346, 48 Am. Rep. 280; *Sellers v. Richmond & D. R. Co.* 94 N. C. 654; *Western R. Co. v. Mutch*, 97 Ala. 194, 21 L. R. A. 316, 11 So. 804.

Messrs. Neyland & Neyland, T. D. Montrose, and Lee A. Clark for defendants in error.

NOTE.—For the conflict of authorities on the right of action for injuries caused by fright, see footnote to preceding case of *Smith v. Postal Tele. Cable Co.* (Mass.) *ante*, 323. 47 L. R. A.

Gaines, Ch. J., delivered the opinion of the court:

This suit was brought by the defendant in error against the plaintiff in error. He recovered a judgment, which, upon appeal, was affirmed by the court of civil appeals. The plaintiff was a passenger on a train of the Missouri, Kansas, & Texas Railway Company, which was struck by a freight train of the defendant company at a point where the road of the former company is crossed by that of the latter. He was seated in the smoking car, and the train upon which he was riding was passing the crossing at the time the collision occurred. It was struck about the coupling between the chair car and the sleeping car. Among other things, he testified as follows: "That the M., K. & T. train had stopped for the crossing, and was just moving forward, when he saw the Santa Fé train approaching the crossing at a rapid rate of speed, at a distance therefrom of about ¼ of a mile. I did not think at this time that there would be a collision. About the time the Katy train started over the track at the crossing, it suddenly moved forward with a jerk, and increased speed. The whole of it got across the crossing except the chair car and the sleeper. The Santa Fé train ran into the Katy train about the coupling between the chair car and the sleeper. The Katy train came to a sudden stop, jarring plaintiff considerably, but he did not realize that he was hurt until he got off the train. . . . The coach that plaintiff was sitting in did not leave the track, but the chair car, which was next behind the car in which plaintiff was riding, and the sleeping car, which was the rear car of the train, both left the track,—were derailed. That plaintiff was not knocked off his seat, nor did the collision tear his hands loose from the hold he had taken, nor knock him from the seat, nor disturb his position any that he could tell, but it frightened him greatly." There was testimony tending to show that a serious nervous affection, known as "traumatic neurasthenia," resulted from the accident, and that this may have been caused either by the physical shock or by the mental shock produced by fright, or by both. The trial court ruled, and in effect charged the jury, that, if the negligence of the servants of the defendant company caused a collision between the two trains, "and . . . that, as a direct result of said collision, plaintiff received a mental shock, or a physical injury, or both, that caused a disease or sickness to develop from which plaintiff has suffered physical pain and mental anguish, and . . . such negligence of the Santa Fé Company was the proximate cause of such disease or sickness," they should find a verdict for him.

The only error assigned in this court is "that the court of civil appeals erred in holding that the plaintiff can recover for injuries, the result of mere shock or fright, when the defendant had not inflicted any bodily injury, and had caused no other disturbance

to the plaintiff than such fright or shock." The question thus presented is one upon which there is a decided conflict of authority. It is generally held that for mental suffering accompanying physical injuries, negligently inflicted, damages may be recovered; but many courts hold that for sickness, impairment of the mental faculties, or physical lesions which merely result from a mental emotion caused by the wrongful act or omission of another, but which do not accompany such mental emotion, no recovery can be had. This court has held that there can be no recovery for mere fright neither attended nor followed by any other injury. *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419. But in *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 618, 13 S. W. 59,—which presented a similar question to that before us,—we held that a recovery could be had for a miscarriage alleged to have been caused by a mental shock, unaccompanied by any physical violence whatever to the person of the injured woman. That, however, was a very strong case, and when we granted the writ of error we were in doubt whether that decision justified the ruling of the trial court and of the court of civil appeals in the present case, 55 S. W. 128. We have, therefore, re-examined the question in the light of the very numerous authorities which have been presented by counsel, with the result that we have been unable to discover any substantial difference between the case where an injury has been inflicted through physical agencies and one in which a mental emotion constitutes one of the links in the chain of causes which have led to the injurious result. As has been pointed out by the supreme court of South Carolina, the courts which deny the right of recovery in the latter case are not in accord as to the ground upon which their conclusion is based. *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905. By some it is held that a physical injury is not a natural and probable consequence of a mental emotion, however potent, and that the injury in such a case is one not reasonably to be anticipated. Others content themselves by saying, in effect, that a contrary ruling would result in a multiplication of damage suits, and in intolerable and vexatious litigation. The uncertainty and obscurity attending the facts, and the consequent difficulty of administering the law, are also urged as an objection to allowing damages for such injuries. To our minds, neither proposition affords a sufficient reason for denying a recovery in these cases. This court has announced the doctrine that, in order to constitute negligence, the act or omission must be the proximate cause of an injury which, in the light of the attending circumstances, ought to have been foreseen as a natural and probable consequence of such act or omission. *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 102. But, in the light of modern science,—nay, in the light of common knowledge,—can a court say, as a matter of law, that a strong mental emotion may not produce in the subject bodily or mental injury? May not epi-

lepsy or other nervous disorder or insanity result from fright? May not a miscarriage result from a mental shock? In several of the adjudicated cases in which the question under consideration has been passed upon, there was a miscarriage, caused by fright or other mental emotion. *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Rock v. Denis*, M. L. Rep. 4 Super. Ct. 356; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645. On the other hand, the reported cases would indicate that the litigation arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation; so that this objection, as it seems to us, rests upon an imaginary ground. It is true that in most cases it may be difficult to determine the extent of a mental shock, and its result upon the physical system. But, in our opinion, this is not a sufficient reason for refusing a remedy for damages resulting from a wrong. The same difficulty exists in many other cases in which that objection has never been urged as a reason why a recovery should be denied. We conclude that, where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. In our opinion, as a general rule these questions should be left to the determination of the jury. The following cases are in accord with our views: *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645. In the following the contrary doctrine is laid down: *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Braun v. Oraven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657.

For the reasons given, we think that the assignment points out no error, and therefore the judgment of the District Court and that of the Court of Civil Appeals are affirmed.

W. L. BULLOCK, *Plff. in Err.*,
v.

Frank V. SPROWLS.

(.....Tex.....)

A conveyance by an infant may be disaffirmed and the land recovered by

NOTE.—On the question, What acts are necessary to disaffirm an infant's contract? see

him on his coming of age, without restoring the consideration received for it, when it is not in his possession or control on arriving at full age, but has been dissipated by him while still a minor.

(December 18, 1899.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Dallas County in favor of plaintiff in an action brought to recover land sold by plaintiff to defendant while plaintiff was under disability as a minor. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. H. Field and Jeff. Word, for plaintiff in error:

Where a minor sells and conveys property, and, after arriving at the age of majority, elects to disaffirm his said sale and conveyance, and brings suit against his vendee to set the same aside, he must offer to restore, and restore, the consideration received by him; and it is the duty of the court to provide in its decree for the protection of such vendee in the recovery and return to him of the consideration so received by said minor.

Bingham v. Barley, 55 Tex. 281, 40 Am. Rep. 801; *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451; *Rutherford v. Stamper*, 60 Tex. 447; *O'Connor v. Vineyard*, 91 Tex. 496, 44 S. W. 485.

Mr. Harry P. Lawther, for defendant in error:

It is not a condition precedent to the disaffirmance by one, upon coming of age, of a sale of land made during infancy, that he shall return the consideration received, if during infancy he has spent, consumed, or wasted the same, so that upon coming of age, and to disaffirm his act, he has it not in his possession, nor under his control, and cannot restore it.

Tyler, Infancy & Coverture, 2d ed. § 37; *Bishop, Contr.* §§ 921, 940; 10 Am. & Eng. Enc. Law, 1st ed. p. 654; 1 Devlin, Deeds, § 96; 1 Minor, Inst. pp. 493, 494; *MacGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 293; *Shuford v. Alexander*, 74 Ga. 293; *Brandon v. Brown*, 106 Ill. 519; *Reynolds v. McCurry*, 100 Ill. 356; *Dill v. Bowen*, 54 Ind. 204; *Carpenter v. Carpenter*, 45 Ind. 142; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Miles v. Lingerian*, 24 Ind. 385; *Pitcher v. Laycock*, 7 Ind. 398; *Hawes v. Burlington, C. R. & N. R. Co.* 64 Iowa, 315, 20 N. W. 717; *Jenkins v. Jenkins*, 12 Iowa, 195; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Richardson v. Linney*, 7 B. Mon. 571; *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Tiffany, Persons & Domestic Relations*,

p. 393; *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12; *Harvey v. Briggs*, 68 Miss. 60, 10 L. R. A. 62, 8 So. 274; *Brantley v. Wolf*, 60 Miss. 420; *Monumental Bldg. Assn. No. 2 v. Herman*, 33 Md. 128; *Browner v. Franklin*, 4 Gill, 463; *Boody v. McKenney*, 23 Me. 517; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Lacy v. Pizler*, 120 Mo. 383, 25 S. W. 206; *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. Rep. 569, and note, 13 S. W. 906; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040; *Englebert v. Trowell*, 40 Neb. 195, sub nom. *Englebert v. Pritchett*, 26 L. R. A. 177, and note, 58 N. W. 852; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Cresinger v. Weloh*, 15 Ohio, 156, 45 Am. Dec. 565; *Shaw v. Boyd*, 5 Serg. & R. 309, 9 Am. Dec. 368; *Lane v. Dayton Coal & I. Co.* 101 Tenn. 581, 48 S. W. 1094; *Nichol v. Steger*, 2 Tenn. Ch. 328; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

Where, upon a sale of land by an infant, the consideration was paid, not to the infant, but to another who delivered the deed for the infant, but who did not pay over the money to him, the infant is not bound to restore the consideration when, upon coming of age, he elects to disaffirm the sale.

Vogelsang v. Null, 67 Tex. 465, 3 S. W. 451; *Stull v. Harris*, 61 Ark. 294, 2 L. R. A. 741, 11 S. W. 104; *Fox v. Drewry*, 62 Ark. 316, 35 S. W. 533; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Law v. Long*, 41 Ind. 586; *Robinson v. Weeks*, 56 Me. 102; *Englebert v. Trowell*, 40 Neb. 195, sub nom. *Englebert v. Pritchett*, 26 L. R. A. 177, and note, 58 N. W. 852; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Griffis v. Younger*, 41 N. C. (6 Ired. Eq.) 520, 51 Am. Dec. 438; *Ruchizky v. DeHaven*, 97 Pa. 202; *Bedinger v. Wharton*, 27 Gratt. 857.

Williams, J., delivered the opinion of the court:

The facts affecting the question on which this writ of error was granted are the following: Defendant in error, Sprowls, on the 3d day of February, 1894, being a minor seventeen years of age, agreed with his stepfather, E. J. Allen, to buy a fifth interest in a mercantile business which the latter owned, and, in order to raise money to pay for it, proposed to sell to plaintiff in error, Bullock, the one-sixth interest now in controversy in land which he had inherited from his father. The parties met and discussed the proposition to sell the land to Bullock, who at first demurred on account of Sprowls' minority, but finally consented to buy, upon Sprowls and Allen agreeing to execute a bond, with security, binding Sprowls to obtain the removal of his disabilities; or, if he failed in that, to ratify the sale when he attained his majority; and, in the event

McCarty v. Woodstock Iron Co. (Ala.) 12 L. R. A. 136, and note.

As to the necessity of returning the consideration in order to disaffirm a contract made by 47 L. R. A.

an infant, see *Englebert v. Pritchett* (Neb.) 26 L. R. A. 177, and note; also *Johnson v. Northwestern Mut. L. Ins. Co. (Minn.)* 26 L. R. A. 187.

of his failure to do both, to refund the money expended on the land, etc. The deed and bond were then executed by Sprowls, and delivered to Allen, to be by him carried and delivered to Bullock. Sprowls, at the same time, authorized Allen to receive from Bullock the purchase money of the land, and retain it as payment for the interest in the mercantile business, and gave Allen an order on Bullock, authorizing the latter to pay to the former the money for the purpose stated. The transaction was thus closed. Allen received and used the money (\$666.66), and admitted Sprowls into the business as joint owner. While this joint business continued, Sprowls drew out of it \$100. In a short time Allen bought Sprowls' interest in the business in exchange for a tract of land worth \$1,200, encumbered by mortgages amounting to \$900, besides interest. Not being able to discharge the liens, Sprowls sold his interest in the land for some personal property, which he disposed of for \$150. All of these transactions occurred while he was still a minor, and the money received for the personal property was likewise spent—for what, he states, he does not remember—before he reached his majority. In the opinion of the court of civil appeals, it is stated that this money was expended for clothing and support, but there is no evidence in the record to this effect. What the \$100 received by him out of the store consisted of, and the disposition made of it, are not stated. Sprowls had none of it when he became of age. During the whole time covered by these transactions, Sprowls' mother was living, and was his legal guardian. This action was brought by Sprowls upon reaching majority, having for one of its objects the setting aside of his deed to Bullock, and the recovery of the interest thereby conveyed. A judgment in his favor was affirmed by the court of civil appeals. The writ of error was granted upon the assignment that the judgment was erroneous in allowing plaintiff to recover without restoring the consideration received by him; our impression being that he should, at least, have been required to restore the \$150 which the court of civil appeals stated had been used by him in obtaining support and clothing. Since the record does not bear out that statement, it is unnecessary to consider what would have been the proper judgment if the fact stated had existed.

The question presented is whether or not the plaintiff was required as a condition of disaffirming his conveyance and recovering the land, to restore a consideration received for it which was not in his possession or control when he arrived at full age, but had been dissipated by him while still a minor. If he is to be required to restore, without inquiry as to the disposition made by him of such consideration, we can see no reason why the exaction should not be a restoration of the whole sum paid by Bullock. He would not, in our opinion, be exempted from this requirement by the principle laid down in *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451. In that case the minor never received the

purchase money, but it went into the hands of, and was appropriated by, those who joined with her in the conveyance. Here, while the money was not paid into the minor's hands, it was paid to Allen, with his consent and in accordance with his agreement. He received it in the way in which he stipulated to receive it. The transaction was, in effect, the same as if the money had been paid to him, and by him turned over to Allen, as the price of the interest in the business, and the question is exactly the same as would have arisen had such been the facts. He thus completely disposed of the money during his minority, and, in the same way, he disposed of the property received for the business, and the money eventually received for the property. There can be no reason for holding him bound to restore the avails of the property which would not equally authorize the requirement that he restore the original purchase money. He disposed of all during minority, without substantial or enduring benefit to himself.

In many of the opinions of this court, the general rule has been broadly announced that an attempt by the maker of a deed to disaffirm it, on the ground that it was executed while he was under the disability of minority, must, in order to be successful, be accompanied by a restoration of the consideration received for the property conveyed. *Cummings v. Powell*, 3 Tex. 88; *Womaok v. Womack*, 8 Tex. 417, 58 Am. Dec. 119; *Kilgore v. Jordan*, 17 Tex. 356; *Stuart v. Baker*, 17 Tex. 421; *Bingham v. Barley*, 55 Tex. 285, 40 Am. Rep. 801; *Graves v. Hickman*, 59 Tex. 383; *Harris v. Musgrove*, 59 Tex. 403; *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451; *Wade v. Love*, 69 Tex. 522, 7 S. W. 225; *Ferguson v. Houston, E. & W. T. R. Co.* 73 Tex. 344, 11 S. W. 347; *Houston, E. & W. T. R. Co. v. Ferguson*, 73 Tex. 349, 13 S. W. 57. But we think these decisions do not go further than to state a general principle, the facts of the cases under consideration not requiring a more particular consideration of the subject for the purpose of defining the qualifications to which the rule might be subject. In all of them in which the right to disaffirm was denied, except *Ferguson v. Houston, E. & W. T. R. Co.*, other reasons for the judgment besides the failure to restore existed, and in several of them the rule was stated in general terms only by way of argument or illustration of other propositions. In none of them does any question appear to have been raised as to the disposition made by the minor of the consideration during his minority. In the case of *Ferguson v. Houston, E. & W. T. R. Co.* there was evidence to justify the conclusion that the party whose land was sold under a power of attorney executed by him while a minor received and appropriated the proceeds of property, in which the money received by the agent for the land had been invested for his benefit, after he had arrived at full age, and that he then delayed action to disaffirm the transaction for two years. The case was decided upon all of the facts, of which the failure to restore the purchase money was only one.

That one disaffirming his deed on the ground that it was executed when he was a minor must restore the consideration, if it is still in his possession or within his control, is a proposition about which there can be no doubt. It may also be true that, if he has used it during minority for purposes for which the law would permit him to charge his estate, as for obtaining necessities, he must restore or account for its equivalent. *Searcy v. Hunter*, 81 Tex. 646, 17 S. W. 372; *Womack v. Womack*, 8 Tex. 417, 58 Am. Dec. 119. If he has retained it until he reached full age, and then appropriated it, this may be a sufficient reason, ordinarily, to preclude him from disaffirming the contract; or, if not to preclude him absolutely, to, at least, require him to pay its equivalent, without inquiry as to the purposes to which he has devoted it. What are the proper rules in such cases, as well as in those in which minors have deceived persons honestly dealing with them into buying their property in the belief that they are of full age, are questions which have no bearing upon this inquiry. The trade in this case was made with full knowledge by all parties that Sprowls had no power to bind himself by his conveyance. The effect of it, if it is to stand, was to convert property, which the law put it beyond his power to waste by injudicious management, into money, which he could waste, and has wasted.

If a recovery of the land is to be denied him until he shall restore an equivalent for the money which he has thus been enabled to dissipate, the purpose of the law will be defeated, and his estate will be taken to make good the money which the person dealing with him has put it in his power to squander through his lack of discretion. The disability laid upon minors to sell their property will afford small protection if purchasers may pay them money upon it, and after it has been lost through extravagance or indiscretion, hold the property as a security for the return of the money. Proper consideration for the interests of parties who thus knowingly deal with minors does not demand that the purposes of the law in imposing the disability should be defeated. Losses which occur in such dealings are only what persons

buying property from, and paying money to, minors should expect from their presumed incapacity to judiciously manage business affairs, and they are natural consequences of such risks, which can furnish no good reason for denying to the minors the protection which it is the purpose of the law to give them. We do not think it was ever the purpose of the learned judges who wrote the opinions in the cases cited to lay down a rule so broad that, in its operation, it would conflict with the leading principle which renders minors incapable of conveying away their property, but that it was only meant to state a general principle, under which all persons would be protected from loss, as far as this could be done consistently with the protection designed to be given to the interests of the minor. Other courts have stated the rule quite as broadly as has been done in the previous cases in this court, and some of their decisions are cited in *Cummings v. Powell* and *Kilgore v. Jordan*; but, when circumstances such as exist in this case have arisen, the same courts have generally admitted the qualification that, where the consideration has been wasted by the minor during his minority, he is not required to pay its equivalent as a condition of recovering property conveyed by him. *Badger v. Phinney*, 15 Mass. 363, 8 Am. Dec. 105; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Holden v. Pike*, 14 Vt. 405; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Roof v. Stafford*, 7 Cow. 182; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Hill v. Anderson*, 5 Smedes & M. 210; *Harvey v. Briggs*, 68 Miss. 60, 10 L. R. A. 62, 8 So. 274; *Brantley v. Wolf*, 60 Miss. 420; *Craig v. Van Bebber*, 100 Mo. 583, 13 S. W. 906. The great weight of authority, and, we think, the clear reason, are in favor of this proposition. *MacGreal v. Taylor*, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961, where many of the authorities are cited.

We therefore conclude that the courts below rightly held that the plaintiff was not, under the circumstances appearing, required to pay to the defendant any sum before recovering the land.

Affirmed.

ARKANSAS SUPREME COURT.

H. F. AUTEN, Receiver, etc., of First National Bank of Little Rock, Appt.,
v.

MANISTEE NATIONAL BANK.

(.....Ark.....)

1. A bank receiving for collection a note on which it is an indorser is not relieved of liability by reason of its own failure to make demand and give notice of dishonor.

NOTE.—As to the power of agents to indorse negotiable paper, see *Gates City Bldg. & L. Asso. v. National Bank of Commerce* (Mo.) 27 L. R. A. 401.

47 L. R. A.

2. A cashier of a national bank has authority to indorse negotiable paper for the bank to parties dealing with it in good faith.
3. A subsequent misuse or misapplication by bank officers of the proceeds of notes bought from the cashier of a national bank and deposited to the credit of such bank, by its direction, in a New York bank, will not affect the rights of the purchaser, if it was innocent.
4. A demand and notice upon a Federal examiner in possession of an insolvent national bank may be sufficient to bind the bank as an indorser, when he is by operation of law in charge of its books.

and papers, so that there is no other person upon whom to make the demand at the place appointed in the note.

(December 9, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to hold defendant liable as indorser on certain promissory notes. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cockrill & Cockrill, for appellant:

The defendant bank was sued only as an indorser. There can be no recovery upon either of the notes, because notice of dishonor was not given to the bank.

Wood's Byles, Bills, *306; 1 *Morse, Banks & Banking*, § 232; 1 *Dan. Neg. Inst.* § 331; *Story*, Bills, § 232; *Bank of United States v. Goddard*, 5 *Mason*, 366, *Fed. Cas. No. 917*.

The fact that the note was sent to the First National Bank for collection is itself evidence that the Manistee Bank looked to the maker and prior indorser for payment, and not to the First National Bank, for it is not the usage to send a note to the obligor for collection from himself.

Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co. 117 *Ill.* 100, 57 *Am. Rep.* 855, 7 *N. E.* 601; *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 *Mo. App.* 451.

The bank's indorsement was an accommodation indorsement; it was made by the cashier without authority, and not in the course of the bank's business. There is no presumption, therefore, that the cashier communicated the fact to the bank.

City Electric Street R. Co. v. First Nat. Exch. Bank, 62 *Ark.* 33, 31 *L. R. A.* 535, 34 *S. W.* 89; *Gunster v. Soranton Illuminating, H. & P. Co.* 181 *Pa.* 327, 37 *Atl.* 550; *Graham v. Orange County Nat. Bank*, 59 *N. J. L.* 225, 35 *Atl.* 1053; *Seaverns v. Presbyterian Hospital*, 173 *Ill.* 414, 50 *N. E.* 1079.

If the First National Bank knew of the indorsement, and failed to make demand or give notice, the plaintiff's cause of action was in tort for negligence, and not an action on the note.

The plaintiff could not sue on one cause of action and recover upon another.

Brown v. St. Louis, I. M. & S. R. Co. 52 *Ark.* 120, 12 *S. W.* 203; *St. Louis, I. M. & S. R. Co. v. Leigh*, 45 *Ark.* 368, 55 *Am. Rep.* 558.

But if the First National Bank knew of the indorsement and of the dishonor of the note, that would not dispense with the necessity of giving it notice of dishonor.

Benjamin's Chalmers, Bills & Notes, p. 182, art. 188; *Story*, Bills, §§ 376, 377; *Magruder v. Union Bank*, 3 *Pet.* 87, 7 *L. ed.* 612, *Affirmed* in 7 *Pet.* 291, 8 *L. ed.* 689; *Juniata Bank v. Hale*, 16 *Serg. & R.* 157, 16 *Am. Dec.* 558; *Groth v. Gyger*, 31 *Pa.* 271, 72 *Am. Dec.* 745; *State v. Churchill*, 48 *Ark.* 426, 3 *S. W.* 352, 880.

If it was the first National Bank's fault that it did not receive the notice from the Manistee Bank immediately after the dis-

honor, it could take no advantage of that fact, that is all.

Benjamin's Chalmers, Bills & Notes, p. 205, art. 201, note.

There was no legal notice given to the bank of the dishonor of any note.

The suspension of the bank's business did not suspend the corporate existence of the bank.

The bank examiner had no connection with the bank or receiver; he had simply the statutory authority to examine the bank's books when directed by the comptroller.

U. S. Rev. Stat. § 5240.

If he was in fact in charge of the bank's assets, he was no more than a statutory custodian, and as such could not receive the notice of dishonor any more than a stranger.

House v. Vinton Nat. Bank, 43 *Ohio St.* 346, 54 *Am. Rep.* 813.

The president of the bank remained in its service at least up to the day on which the receiver (not the examiner) took possession of its books, papers, and assets.

American Surety Co. v. Pauly, 170 *U. S.* 161, 42 *L. ed.* 988, 18 *Sup. Ct. Rep.* 563.

Notice should have been given to him or someone who represented the bank.

House v. Vinton Nat. Bank, 43 *Ohio St.* 346, 54 *Am. Rep.* 813.

Borrowing money is out of the usual course of a legitimate banking business, and one who loans must at his peril see that the officer or agent who offers to borrow for a national bank has special authority to do so.

Western Nat. Bank v. Armstrong, 152 *U. S.* 346, 38 *L. ed.* 470, 14 *Sup. Ct. Rep.* 572; *Chemical Nat. Bank v. Armstrong*, 31 *U. S. App.* 75, 65 *Fed. Rep.* 573, 13 *C. C. A.* 47, 28

L. R. A. 239; *Blanchard v. Commercial Bank*, 44 *U. S. App.* 556, 75 *Fed. Rep.* 249, 21 *C. C. A.* 319; *United States Nat. Bank v. First Nat. Bank*, 49 *U. S. App.* 67, 79 *Fed. Rep.* 296, 24 *C. C. A.* 597; *National Bank of Commerce v. Atkinson*, 55 *Fed. Rep.* 466; *Adams v. Cook Nat. Bank*, Ball, *National Banks*, p. 54; 1 *Morse, Banks & Banking*, §§ 116, 117; *Ex parte Winsor*, 3 *Story*, 411, *Fed. Cas. No.* 17,884; *Silver Hook Road v. Greene*, 12 *R. I.* 164.

Borrowing is one of the functions which the directors cannot shift from themselves.

Western Nat. Bank v. Armstrong, 152 *U. S.* 346, 38 *L. ed.* 470, 14 *Sup. Ct. Rep.* 572; *National Bank of Commerce v. Atkinson*, 55 *Fed. Rep.* 466; *Chemical Nat. Bank v. Armstrong*, 31 *U. S. App.* 75, 65 *Fed. Rep.* 573, 13 *C. C. A.* 47, 28 *L. R. A.* 239; *Blanchard v. Commercial Bank*, 44 *U. S. App.* 556, 75 *Fed. Rep.* 249, 21 *C. C. A.* 319; *United States Nat. Bank v. First Nat. Bank*, 49 *U. S. App.* 67, 79 *Fed. Rep.* 296, 24 *C. C. A.* 597.

In the business of banking, rediscounting commercial paper is only a method of borrowing money.

Fleckner v. Bank of United States, 8 *Wheat.* 338, 5 *L. ed.* 631; *National Bank v. Johnson*, 104 *U. S.* 277, 26 *L. ed.* 745; *Merchants' Nat. Bank v. Sevier*, 14 *Fed. Rep.* 662; *People v. Utica Ins. Co.* 15 *Johns.* 358, 8 *Am. Dec.* 243; *City Bank v. Bruce*, 17 *N. Y.* 507; *Smith v. Exchange Bank*, 26 *Ohio*

St. 141; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *Freeman v. Brittin*, 17 N. J. L. 191; *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank v. Sherburne*, 14 Ill. App. 566; *State ex rel. Atty. Gen. v. Boatman's Sav. Inst.* 48 Mo. 189; *Farmers & M. Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683; *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183; *McLean v. Lafayette Bank*, 3 McLean, 587, Fed. Cas. No. 8,888; *Rodecker v. Littauer*, 19 U. S. App. 455, 59 Fed. Rep. 857, 8 C. C. A. 320; *Chemical Nat. Bank v. Armstrong*, 76 Fed. Rep. 339; *Byrne v. Kennifeck*, Batty, 273; *Fereday v. Wightwick*, Tamlyn, 250; *Mussey v. Eagle Bank*, 9 Met. 306; *Aetna Nat. Bank v. Charter Oak L. Ins. Co.* 50 Conn. 167; *Lamb v. Cecil*, 28 W. Va. 653; *Ridgway v. National Bank*, 12 Ky. L. Rep. 216.

It is not presumed that Denney had the power to bind the defendant bank merely because he assumed the right, as its cashier, to do so.

Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; *American Exch. Nat. Bank v. Oregon Pottery Co.* 55 Fed. Rep. 265; *Thomas v. City Nat. Bank*, 40 Neb. 501, 24 L. R. A. 263, 58 N. W. 943; 4 Thomp. Corp. §§ 4880, 4882; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535, 34 S. W. 89; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. ed. 100; *United States v. City Bank*, 21 How. 356, 16 L. ed. 130; *The Floyd Acceptances*, 7 Wall. 666, 19 L. ed. 169; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.

The protection which commercial usage throws around negotiable paper cannot be used to establish the authority of an agent to issue or indorse it.

The Floyd Acceptances, 7 Wall. 666, 19 L. ed. 169; 1 Dan. Neg. Inst. §§ 273, 279; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535, 34 S. W. 89; *Chemical Nat. Bank v. Wagner*, 93 Ky. 525, 20 S. W. 535; *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. ed. 490; *McCullough v. Moss*, 5 Denio, 567; *Davis v. Rockingham Invest. Co.* 89 Va. 290, 15 S. E. 547.

Even if it had been shown that Denney was employed by the directors to run the bank, that would have constituted him the general agent only as to ordinary transactions incident to its business, and would not have authorized him to borrow money, or to indorse notes for that purpose.

Fifth Ward Sav. Bank v. First Nat. Bank, 47 N. J. L. 357, 1 Atl. 478; *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* 7 Wend. 31; *McCullough v. Moss*, 5 Denio, 567; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.
47 L. R. A.

Messrs. Dodge & Johnson, for appellee: Notice may be given to the person in charge of the indorser's office.

Mercantile Bank v. McCarthy, 7 Mo. App. 318; *Lord v. Appleton*, 15 Me. 270; *Edson v. Jacobs*, 14 La. 494; *Jones v. Mansker*, 15 La. 51; *Stainback v. Bank of Virginia*, 11 Gratt. 260; *Dickerson v. Turner*, 12 Ind. 225; *Aurianne v. Eschbacher*, 28 La. Ann. 48.

When the Press Printing Company note became due it was in the hands of the First National Bank for payment. That bank had received it some time before maturity, and it was the bank's duty, under the law and the custom among banks, as indorser, to pay the note and protect its good name, or, if necessary so to do, to protect the owner. It was his duty to give notice of protest, or have some duly qualified officer serve notice of protest, as required by the rules of the law merchant, or by the statute, if any existed.

Morse, Banks & Banking, p. 352.

If an agent neglects to give proper notice of dishonor, and the indorser is discharged thereby, he will be liable for the face of the note.

Borup v. Nininger, 5 Minn. 523; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489.

If a bank receives a note from another bank for collection, indorsed by the cashier of the latter bank, it is its duty as a collecting agent to present the note for payment, and, if it is not paid, to give notice of its dishonor to the bank from which it was received.

Phipps v. Millbury Bank, 8 Met. 79.

The undertaking of a bank to collect a note is held to include the duty of giving notice by notary or otherwise.

Tiernan v. Commercial Bank, 7 How. (Miss.) 656, 40 Am. Dec. 83; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592.

Any notary who has the note in his hands to protest is authorized to give the notice as the holder's agent, and his authority to give the notice will be presumed by his possession of the bill, and by his signing the notice as notary.

Greene v. Farley, 20 Ala. 322; *Renick v. Robbins*, 28 Mo. 339; *Bank of Utica v. Smith*, 18 Johns. 230; *Burbank v. Beach*, 15 Barb. 326; *Bradley v. Davis*, 26 Me. 45.

Demand and notice may be waived by an act of the indorser or drawer, calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done.

Parsons, Notes & Bills, p. 582; *Spencer v. Harvey*, 17 Wend. 489; *Bruce v. Lytle*, 13 Barb. 163; *Taylor v. French*, 4 E. D. Smith, 458; *Phipson v. Kneller*, 1 Starkie, 116; *Minturn v. Fisher*, 7 Cal. 573; *Havens v. Talbott*, 11 Ind. 323.

Any act which puts the holder off his guard, and so induces him to neglect proper demand or notice, is a waiver.

2 Dan. Neg. Inst. 143; *Boyd v. Bank of Toledo*, 32 Ohio St. 526, 30 Am. Rep. 624.

Demand and notice may be dispensed with

by the indorser by some act of his own in that regard.

Ashley v. Gunton, 15 Ark. 422.

Bunn, Ch. J., delivered the opinion of the court:

This is a suit by the appellee against the appellant, as the indorser on two promissory notes; the one drawn by the McCarthy & Joyce Company, payable to the appellant, at its office in Little Rock, on the 10th February, 1893, dated July 19, 1892, for the sum of \$5,000, with 8 per centum per annum interest from date until paid, and indorsed by James McCarthy and George Mandelbaum, secretary and treasurer. The First National Bank of Little Rock—the drawee—in due course of trade assigned and transferred said note, for value, by indorsement, to the appellee national bank, of Manistee, Michigan, and the latter thereby became the owner thereof. This note was presented for payment at the First National Bank of Little Rock in due time after maturity, payment refused, and the same was duly protested before suit. This suit is also on a second note, made to the order of George R. Brown on October 10, 1892, for \$4,000, with 10 per cent interest from maturity until paid, due and payable at the First National Bank of Little Rock, Arkansas, ninety days after date, by the Press Printing Company, George R. Brown, president, the same falling due January 11, 1893. This second note was duly indorsed by George R. Brown, the payee, to the First National Bank, waiving demand and protest, and by it indorsed and transferred for value to appellee bank, before maturity. In due time it was sent by appellee to appellant bank for collection, it being made payable at its office or place of business. The appellant thus became the agent of the appellee to collect the note, although it was liable thereon, as the immediate indorser, to appellee. The First National Bank of Little Rock, the appellant here and defendant in the court below, thereby was made to occupy, or rather chose to occupy, two antagonistic positions, the one as indorser, and conditionally responsible for the payment of the note, and the other as the agent of the appellee, to collect the same, and, peradventure, from itself. Appellant, after a delay of twelve or fifteen days, returned the note to the appellee, with notification of its nonpayment. Upon this state of case the defendant asked the court to give the following instruction (No. 11), to wit: "If the plaintiff is excusable for not making demand and giving notice of dishonor to the defendant bank at the maturity of the Press Printing Company note it was its duty to do so as soon as the cause of the delay ceased to operate, and if it neglected to do so, the defendant bank is discharged." This instruction the court refused to give, but in its general charge, on its own motion, gave the following on the subject, to wit: "(6) The indorser of commercial paper is not, like the maker, absolutely bound to pay the paper upon which his name appears. The indorser's liability is conditioned to pay if 47 L. R. A.

the maker, on due presentment at maturity, fails to pay, and upon due notice of such default by the maker being given the indorser [as set forth in other instructions]. (7) So, in this case, the defendant bank would be liable only on such presentment and notice, unless you may find as to one of the notes [the Press Printing Company note] that at the time of maturity, and when payment should have been made, it was in the hands of the defendant bank, as the agent of plaintiff, for collection, and the defendant bank failed to make such presentment and demand, and returned it to the plaintiff bank without having taken such steps. The defendant bank, in such case, would not be discharged of liability by reason of a failure to present for payment growing out of its own failure to discharge its duty to the plaintiff bank, and notice to it would be waived." In refusing to give the instruction asked by defendant, and in giving the instruction quoted, the defendant argues that the court erred, and makes this error a ground for its motion for new trial.

The defendant contends that "it is not the usage to send a note to the obligor for collection from himself," citing *American Bank Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451, and *Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601. In the former it is held: "If a bank receiving paper for collection payable at a distant place sends it by mail to the payor for collection, it is guilty of negligence, and this, too, though the payor is the only bank in the place, and though it is customary thus to send paper for collection, since the custom is unreasonable, and though the bank payor failed within the time the forwarding bank had, under the law, to forward the paper, as the forwarding bank did in fact forward it in a shorter time." This particular question is not a question in the case at bar, as was the question in the Missouri case, between the principal and its collecting agent, for neglect of duty as such on the collector's part, but the question here is one between the owner of the note and immediate indorser. The agency of the latter is only incidentally involved. This indorser claims to be discharged because of the nonprotest of the note, claiming that it was not responsible for the failure to make demand and protest. It was not sued for failing to make demand and protest as against the other indorser, but sued as an indorser; and its only defense is that no demand and protest for the failure of itself to pay is shown. The object of demand is payment; the object of protest is to notify all interested that payment has been refused. It would seem to be a useless procedure to notify one who has made, or ought to have made, the demand, and been refused, that such was the fact. It is true that it is said by many authorities—and that is doubtless the law—that it is negligence *per se* on the part of the holder of a note to send it to one of the obligors for collection; but it is only negligence in the holder in so far as he has appointed an im-

proper agent to collect the note, for the delinquent agent ought not to be heard to plead his own failure to do his assumed duty as agent; and, besides, the question of negligence does not arise when the person who is such agent and also an obligor is sought to be bound in the latter capacity only. It is not a question of negligence, but of notice, which is always necessary in order to bind an indorser, unless there has been a waiver, express or implied. The instruction of the court put this question to the jury properly, and there was no error in that regard.

The case of *Drovers' Nat. Bank v. Anglo-American Pkg. & Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601, was where the packing and provision company gave the bank a certified check of Kieldsen on Rice & Messman, bankers, of Cadellac, Michigan, for collection. The collecting banks failed to collect, and the Bank of Cadellac failed. The suit was brought by the packing and provision company against its agent, the Drovers' Bank, to hold it responsible for negligence in not making demand, etc., and their failing to collect before the payee bank failed. The collecting bank was held liable, because it had sent the check directly to the bank primarily liable for collection, and not to a proper agent to see to the collection. That was a suit for negligence in the agent. The suit at bar is against the Little Rock bank as one of the obligors on the note. It pleads, not diligence, but a want of notice of protest and nonpayment, for its defense.

The next question is whether or not the Little Rock bank is bound for the acts of its cashier, Denney, in negotiating these notes. The facts are that this bank received these two notes; whether by purchasing the same, or for its own accommodation, it is really impossible to say, nor does it matter, in one view of the case. The cashier, Denney, had had business conferences with the representatives of the appellee bank, which seems to have money to loan, in the usual course of banking business, and the Little Rock bank required money, as its officials represented, to enable it to meet its demands in removing the cotton crop. Whether this was the real reason or not, it does not matter, so far as parties who did not know or have reason to know the contrary are concerned. The appellee bank paid the Little Rock bank the money on the two notes in question, and by direction of the latter deposited the amount with the New York bank to its credit. In due time the appellee demanded the payment of the two notes, and payment was refused. It then sued the appellant bank as one of the indorsers on each of the two notes, and the real beneficiary of their sale to the appellee; and the defense is that Denney, the cashier, had no authority to bind his bank in such a

47 L. R. A.

dealing. On this point the court below gave its instruction No. 2,* and also for plaintiff No. 4,† in which we see no error. See also recent case of *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628. That the president or other official of the Little Rock bank should have successfully schemed to divert the Little Rock bank's funds to its credit in the New York bank to his own use by making use of his official authority cannot be introduced to defeat the claim of the Manistee bank in this action. It had parted with its money in due course of trade, and paid it out on the direction of the appellant bank; and certainly a misuse or misapplication of it afterwards by the fraud and chicanery of the appellant bank ought not to prejudice the appellee bank, if it is innocent; and there is nothing shown to the contrary.

It is contended by the defendant that demand and notice upon Armstrong, the Federal examiner in possession of the insolvent bank, was irregular, and not sufficient to bind the bank. Armstrong was not, it is true, an officer or agent of the corporation, but was, by operation of law, in charge of its books, papers, and other papers to the exclusion of all others. There was, therefore, no other person upon whom to make the demand at the place appointed in the note. See Randolph, Com. Paper, § 1083, by analogy. Besides, the taking position by the examiner was notice to all the world that no payment would be made, unless afterwards in the course of administration. This disposes of the essential questions.

The judgment is affirmed.

“(2) As to the authority of Cashier Denney to bind the defendant bank by indorsement of the note, I say to you that to the outside world and to parties dealing in good faith the cashier of a national bank is the duly-authorized agent of the bank to make such an indorsement for the bank, and the plaintiff bank had a right to deal with him as such; and the defendant bank would not be relieved of liability by reason of an improper or fraudulent indorsement made by the cashier, Denney, unless the plaintiff bank had notice of such bad conduct or dishonest dealing of the cashier with his own bank.”

“(4) It matters not what the reasons may have been,—the reasons or inducements actuating W. C. Denney, cashier of the First National Bank, defendant herein, in negotiating or discounting the notes in controversy. If you find from the evidence that said Denney was cashier of the First National Bank, and was dealing with the public as its duly-authorized officer, and that plaintiff had no knowledge that W. C. Denney, cashier, was engaged in defrauding the First National Bank, and that it, in good faith, dealt with him as an authorized officer of that bank, then the court instructs you that Denney's acts were such as are within the scope of his authority as such cashier, and the defendant bank would be bound by his acts.”

CALIFORNIA SUPREME COURT.

O. B. STANTON, *Appt.*,

v.

John SINGLETON *et al.*, *Respts.*

(.....Cal.....)

1. A contract to expend \$10,000 in "opening and developing" mining property which consisted of a large number of mining claims, both quartz and placer, and in erecting a ten-stamp quartz mill, without any provision as to the place for it or the time in which the money should be expended, except that active operations should be commenced within thirty days, cannot be specifically enforced for want of certainty and exactness in its provisions.
2. A court will not undertake to frame a decree of specific performance of a contract, where it involves a continuous and long series of acts of supervision requiring special knowledge and skill, and repeated examinations and new directions, such as would be required in enforcing a contract for opening and developing mining property which consists of a large number of mining claims of different kinds, and for erecting a quartz mill modern in every particular, with stamps of a certain weight, or its "equivalent," without specifying where the mill is to be built or when the contract is to be performed.
3. The ownership of an undivided one-third part of mining property by a person who has not executed a contract made by his cotenants for the opening and developing of the property, and who is not a party to the action, will preclude a decree for the enforcement of the contract in favor of the party who was to be let into possession, and perform it.

(November 10, 1899.)

A PPEAL by plaintiff from a judgment of the Superior Court for Kern County in favor of defendants in an action to compel specific performance of a contract for the development of mining claims. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Ahrens for appellant.

Messrs. J. A. Haralson and Reddy, Campbell, & Metson for respondents.

McFarland, J., delivered the opinion of the court:

The court below sustained a demurrer to the complaint, and gave judgment for defendants, and plaintiff appeals from the judgment.

The action is brought to compel the specific performance by the two defendants named of a certain alleged contract, a copy

NOTE.—As to definiteness of contract, see cases in note to Woodruff v. Woodruff (N. J.) 1 L. R. A. on page 381; also Schwanebeck v. Smith (Md.) 24 L. R. A. 168.

As to indefiniteness of quantity in contract for purchase, see also Wells v. Alexandre (N. Y.) 15 L. R. A. 218, and note.

For refusal of specific performance on account of the difficulty of compelling it to be fully performed, see Welty v. Jacobs (Ill.) 40 L. R. A. 98; and Standard Fashion Co. v. Siegel-Cooper Co. (N. Y.) 48 L. R. A. 854.

47 L. R. A.

of which is annexed to the complaint, marked "Exhibit A," and made a part thereof. The contract is as follows:

Agreement made and entered into this 22d day of June, 1895, between John Singleton, F. M. Mooers, and C. A. Burcham, of Kern county, state of California, parties of the first part, and O. B. Stanton, of Bakersfield, state of California, party of the second part. Whereas, the parties of the first part are owners by location of a certain mineral tract located in the Summit mining district, Kern county, California, and designated and described as follows: [Here follows a description of the property, which consists of thirteen different quartz and placer claims.] And being desirous of obtaining capital to work the same, hereby agree with party of second part that for and in consideration of one dollar in hand to them paid; the receipt of which is hereby acknowledged, agree to give party of second part thirty days' option of a one-half interest of the above-enumerated claims, now owned by them, in consideration of the party of the second part agreeing to spend—First, ten thousand dollars (\$10,000.00) in opening and developing said property; second, in erecting a ten-stamp quartz mill, modern in every particular, the stamps to weigh not less than seven hundred pounds, or the equivalent, as may be found the most desirous to work the ores. The parties of the first part hereby agree that, this contract having been entered into in good faith, any locations that they may make or cause to be made in the said district shall be made for the joint benefit of both parties. The party of the second part shall have the privilege to incorporate as many companies as he may deem fit: provided, always, that any money, stock, or other consideration that he may obtain as profit shall be divided equally between the parties hereto. The parties of the first part hereby agree that the party of the second part shall have the privilege any time within six months from the date of this instrument to purchase the aforesaid property for the sum of five hundred thousand dollars (\$500,000.00). The essence of this contract being time, it is mutually agreed that, should the party of the second part not commence active operations within thirty days, this contract shall be null and void. The party of the second part hereby agrees that all stock delivered to parties of the first part shall be free and non-assessable, and, further, if he should fail to fully carry out this contract, that all moneys paid or expended by him shall be forfeited, and the full properties returned to the parties of the first part.

[Signed] John Singleton,

Party of the First Part.

Frederick M. Mooers,

Party of the First Part.

O. B. Stanton,

Party of the Second Part.

It will be observed that this contract, although purporting to be signed by the two respondents and C. A. Burcham, was not signed by the latter; and at the hearing in department (54 Pac. 587), while other points were briefly noticed by counsel for respondents, the stress of their argument was on the point that the contract was void because not signed by Burcham, and in the opinion of the court then rendered that point was alone considered. But at the hearing in banc, while that point was also urged, it was elaborately argued by counsel for respondents that, even if it be held that the contract was sufficiently executed without the signature of Burcham, still it was in its nature a contract which a court of equity will not decree to be specifically performed; and we think that this contention must be sustained. The action is based upon the contract, which was made a part of the complaint; and, of course, the meaning which appears on its face cannot be changed by any mere matter of averment in the pleading. There is one provision in the contract to the effect that the party of the second part shall have the privilege within six months "to purchase the aforesaid property for \$500,000, but whether the "aforesaid property" means the whole of the mining property described or only an undivided half thereof, we do not understand that this clause of the contract is particularly involved in this action. The contract gives to the appellant "thirty days' option of a one-half interest of the above-enumerated claims" upon the consideration—First, that he shall spend \$10,000 in opening and developing the property; and, second, shall erect a 10-stamp quartz mill, "modern in every particular, the stamps to weigh not less than 700 pounds, or the equivalent, as may be found the most desirous to work the ores." If this means anything it means that he should have thirty days in which to determine whether he would spend the \$10,000 and erect a mill, and thereby become entitled to an undivided one half of the property. It is averred in the complaint that appellant notified the respondents within the thirty days that he elected to perform his part of the contract, "and to thereby acquire the undivided one-half interest;" that he then and there proceeded to expend, and did expend, \$2,000 in pursuance of the contract; and that afterwards, on or about the 9th day of July, A. D. 1895, the defendants informed him that they would not be bound by the contract, and repudiated it, and have ever since refused, and do now refuse, to be bound by the terms thereof, or to permit plaintiff to continue the performance of labor on the property, or to expend the remainder of the \$10,000, or to erect a mill, and refuse to allow the appellant to enter upon the claims, or to do work thereon, and have refused to execute to him a deed to the one-half interest. The prayer of the complaint is that the respondents be let into possession of the premises for the purpose of performing the work under the contract, and for the purpose of erecting the mill, and of otherwise

performing and carrying out the covenants of the contract, and that defendants be restrained from interfering with the work of plaintiff, "and that upon the completion of said labor and the expenditure of said money and the erection of said ten-stamp quartz mill the plaintiff be decreed to be the owner of one-half interest in and to the premises set forth in said complaint," and that defendants execute a conveyance to him of an undivided one-half interest, etc. Nothing is said about the tender under the \$500,000 clause, nor is any relief asked under it; so that the only asserted right to a decree of specific performance is that based on the \$10,000 and quartz mill clause. Of course, there is, on the face of the instrument, no mutuality of contract, for appellant does not promise in it to do anything. It is contended, however, that afterwards his notice to respondents of his election to proceed under the contract made it mutual, under the principle announced in *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, and 52 Pac. 44, and some other cases cited; but, with our views of the case, it is not necessary to discuss the applicability of that principle here. Neither is it necessary to consider the point (which is certainly not without merit) that the contract itself is void for all purposes on account of its ambiguity and uncertainty. In our opinion, the contract is one which does not allow a mutuality of the remedy of a decree of specific performance, and is not, in its nature, a contract which a court of equity would undertake to enforce specifically at the suit of respondents; and it is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other. *Cooper v. Pena*, 21 Cal. 404, and cases there cited: *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1231; *Anson v. Townsend*, 73 Cal. 418, 15 Pac. 49; *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961; *Banbury v. Arnold*, 91 Cal. 608, 27 Pac. 934; *Pom. Contr.* 2d ed. § 162. In *Cooper v. Pena*, 21 Cal. 404, the court states the principle in this language: "The remedy must be mutual as well as the obligation, and, where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." Therefore, waiving all other questions, if the obligations of appellant as a party to the contract (assuming that he incurred any) are not such as would be specifically enforced by a court of equity at the suit of respondents, then, under the principle and authorities above stated and referred to, this action cannot be maintained. And it is quite clear that his obligations were of that character.

Appellant contends that *Cooper v. Penn*, 21 Cal. 404, which is a leading case on the general subject, and has been frequently cited, should not be taken as authority here, because the obligation of plaintiff there was for expressly designated personal services. But *Cooper v. Pena* is cited mainly to the point that there must be "a mutuality of remedy;" and, if there be not such mutuality,

—no matter from what cause,—the principle declared in that case applies. Moreover, it is difficult to see any difference in kind between the obligation of the appellant here and that which was held not specifically enforceable in *Cooper v. Pena*; for “opening and developing” a mine, and “erecting” such a quartz mill as is described in the contract, certainly involved to some degree personal skilled services, knowledge, judgment, and skill, and a repose of confidence. But, apart from the foregoing consideration, the remedy of specific performance would not lie against appellant in the case at bar for want of certainty and exactness in the contract. A contract expressed in very general terms might not be void for uncertainty, and might be the basis of an action for damages for its breach, while it would be entirely too loose and inexact to warrant a decree for specific performance. In Pom. Contr. 2d ed. § 159, it is said: “A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere nonperformance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced.” Now, in the case at bar the property to which the contract relates consists of a large number of mining claims of different kinds,—quartz and placer; and a provision for “opening and developing said property” is certainly too general and indefinite to be specifically enforced by an equity decree. Moreover, the provision for “erecting a ten-stamp quartz mill,” etc., does not provide where it is to be erected,—not even that it shall be on “said property;” but, assuming its meaning to be that the mill shall be on some part of one of the large number of mining claims described in the contract, still, with that meaning, it is widely uncertain and indefinite as to the place where it was to be erected; and the place of the location of the mill would probably be a matter of very great importance. Again, there is no provision as to the limit within which the \$10,000 should be expended in developing the mine, or within which the mill should be erected. The only provision touching that subject is that the appellant should “commence active operations”—whatever that may mean—within thirty days. In all these respects the contract is too loose and vague to justify a decree of specific performance.

Moreover, a court will not undertake to frame a decree of specific performance where it involves a continuous and long series of acts of supervision requiring special knowledge and skill and repeated examinations and new directions. In Pom. Contr. 2d ed. 47 L. R. A.

§ 312, the author states the law on this point—and he cites a multitude of authorities to sustain the text—as follows: “Finally, contracts which, by their terms, stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight,—such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings,—are not, as a general rule, specifically enforced.” The rule is aptly stated, and authorities cited, in *Clarno v. Grayson*, 30 Or. 144, 46 Pac. 426, which, in its leading features, is much like the case at bar. In that case the plaintiff claimed under an option to purchase a mine, with the right to work it until a certain time, and then buy it at a certain price. He was ousted by the other party before the expiration of the time. He brought an action to be restored by a decree of specific performance to possession, and to be allowed to continue the work; claiming, also, that certain intermediate proceeds of the mine should be accounted for, and applied on the purchase price, which raises questions not pertinent here. With respect to the point now under consideration, the court said: “One element of the prayer of plaintiff is that he be put in possession, and maintained there, and that a future time be fixed in which plaintiff shall satisfy any balance found due on the accounting after possession given; and this proposition was urged both in the briefs and at the argument. We think it untenable for two reasons: First, the act required of the court comprehends an order continuous in its nature, requiring protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in the oversight, to determine whether the mine is being operated under the conditions of the contract, and will not be specifically enforced. Pom. Contr. 2d ed. § 312; *Rutland Marble Co. v. Ripley*, 10 Wall. 358, 19 L. ed. 981; *Beck v. Allison*, 56 N. Y. 367, 15 Am. Rep. 430; *Martin v. Halley*, 61 Mo. 196.” In *Martin v. Halley* the court refused to specifically enforce a contract to convey because the consideration of the contract was the plaintiff’s undertaking to erect a certain building on the land, which could not have been specifically enforced against the plaintiff; the court saying: “A court of equity will not enforce building contracts.” In *Lattin v. Hazard*, 91 Cal. 87, 27 Pac. 515, this court held that the remedy of specific performance did not lie in favor of plaintiff, because it could not have been invoked in favor of defendant on account of the nature of the latter’s obligations. The court said: “The agreement that McLoughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part of the obligation, which has not been performed, and of which specific performance cannot be enforced by a decree.” It is evident that the contract here involved is, on the part of appellant, within the principle above stated.

A decree that appellant "be let into possession of said premises for the purpose of performing the labor provided for in the contract, and for the erection of said ten-stamp quartz mill, and to otherwise perform," etc., would be only the beginning of the court's work. It would have to be followed by numerous and repeated supervisions and investigations and additional decrees and orders, all requiring judgment and skill in a special business. It would have to be determined afterwards what would constitute "opening and developing" the property; on what part of the numerous mines the developing should be attempted; whether the work in developing was done properly, and in good faith; and whether it was done in such manner as would reasonably tend to so prospect the ground as to show whether or not it contained valuable ore, and to put it in such condition as to be worked to advantage if such ore should be discovered. The same supervision would be necessary over the building of the mill,—where it should be located; whether, if erected, it would be "modern in every particular;" and whether, if the stamps should be less than 700 pounds, it would still be "the equivalent, as may be found the most desirous to work the ore." And then within what time must the developing be done and the mill be built? All this—to say nothing of the tangled provisions about stocks of corporations "nonassessable"—clearly brings the case within that class with respect to which courts will not undertake to frame decrees for specific performance. Moreover, Burcham is a tenant in common of the whole property, holding an undivided one third of every part and parcel of it, seised *per my et per tout*; and, as he did not execute the contract, and is not a party to the action, how can it be decreed that appellant be let into possession and allowed to use the property in the manner asked by him, when the court has no control over Burcham or his interest? This was one of the points considered in *Cooper v. Pena*, for the court there says: "It is proper to remark that there is no assurance that the offer could be carried out, for there is a third person to be consulted, who might refuse to act in the matter, or might not agree to a satisfactory partition." Appellant has cited a few cases tending somewhat to the point that appellant's obligation could have been specifically performed, but they are mostly railroad cases, where, in order to protect various interests of great magnitude, courts have undertaken to temporarily operate railroads through receivers, and in a few instances have ordered railroads to be completed. They are exceptional cases, and do not disturb the general rule as hereinbefore stated. Our conclusion is that the court below properly sustained the demurrer, and gave judgment for defendants, and that appellant, if he have any cause of action growing out of the contract, must be left to the remedy of a suit at law for damages.

The judgment is affirmed.

Beatty, Ch. J., concurring:

I concur in the judgment of affirmance, but upon grounds to a great extent distinct from those stated in the opinion of Justice McFarland. It is conceded that a contract will not be specifically enforced unless the remedy is mutual. It is also conceded that the contract here in question does not, by its terms, bind the plaintiff to do anything, and that to impart to it the element of mutuality the plaintiff must have made a binding offer to perform on his part, and this offer must have been free from any conditions which the defendants on their part were not bound to perform. Civil Code, § 1494. It does not appear that any such offer to perform has ever been made by the plaintiff at any time, and certainly he does not make it by his complaint. He alleges, it is true, "that immediately after the execution of said contract plaintiff notified defendants that he elected to perform his part of said contract, and to thereby acquire the undivided one-half interest in and to said mining claims as in said contract mentioned, and then and there proceeded to, and did thereafter, expend the sum of about \$2,000 hereinbefore mentioned, in pursuance of said contract." But this allegation is to be construed in connection with other parts of the complaint, which show that, according to plaintiff's construction of the contract, he was to become the owner of a half interest in the mines as soon as he had expended \$10,000 in their development and erected a ten-stamp mill. All, therefore, that he ever offered to do at any time, so far as can be gathered from the complaint, was to expend \$10,000 and build a mill upon condition that he should thereupon become the owner and have a conveyance of a one-half interest in the property. And that, indeed, is the condition upon which he offers to perform in the complaint filed herein, the prayer of which reads as follows: "That plaintiff be let into possession of the said premises for the purpose of performing the labor provided for in said contract, and for the erection of said ten-stamp quartz mill, and to otherwise perform and carry out the covenants of said contract, and that said defendants, their servants, agents, and employees, be restrained by this court from interfering with the work of plaintiff upon said mining claims, and that upon the completion of said labor and the expenditure of said money and the erection of said ten-stamp quartz mill that plaintiff be decree to be the owner of one-half interest in and to the premises set forth in the complaint, and that the defendants cause to be executed and delivered to plaintiff herein a good and sufficient deed conveying to said plaintiff an undivided one-half interest in and to said premises." But the contract, which is annexed to the complaint as an exhibit, does not bear the construction which the plaintiff has placed upon it. The terms of this instrument are so obscure and ambiguous that no one can assert with much confidence that he has discovered the real and exact intention of the parties; but I think Justice Harrison, in his opinion delivered in

department (54 Pac. 587), correctly held that the plaintiff, by expending \$10,000 and building a mill, would only have secured an option to purchase a half interest for \$500,000. Plaintiff, therefore, has never offered to perform the contract according to its true construction, and subject to its stipulated conditions, but only according to his erroneous construction, and subject to conditions which he had no right to impose; and, such being the case, it cannot be said that the remedy of specific performance ever became mutual.

Another ground of my concurrence is that the defendants Singleton and Mooers never agreed to do what the court is asked to compel them to do, and what the plaintiff makes another condition of his offer to perform. They never agreed to convey to plaintiff a half interest in the mines out of their two thirds. They merely executed for themselves a contract which, if it had been completed, would have bound them, in conjunction with their cotenant, Burcham, to convey a half interest in the whole; in other words, each of the defendants was to part with one sixth, and not with the one fourth, which the plaintiff demands. The failure of Burcham to execute the contract left it incomplete, and the defect is not cured by the fact that defendants represented that they had authority to act for him. Whatever authority to act for Burcham they may have had or claimed, it is very certain that they neither acted nor pretended to act for him in the only way they could have done so effectively; i. e., by executing the contract in his name, and as his attorneys in fact. If plaintiff was relying upon their asserted authority to act for Burcham, why did he not require them to execute the contract in Burcham's behalf? If he had done so, Burcham would have been bound, if they had authority, and if they did not have authority, they themselves would have been bound to perform what they had promised in his name. But in the incomplete condition in which the contract was delivered (assuming that the complaint shows it was delivered), neither defendants nor Burcham were bound to convey the one-sixth interest which, upon a fair construction of the written terms, was to be contributed from Burcham's third. Plaintiff nevertheless offers to perform only upon condition that he shall become the owner of that sixth interest, and that it be transferred to him by parties who never contracted to transfer it.

Andrew JOHNSON, *Respt.*,
v.

GOODYEAR MINING COMPANY *et al.*,
Appts.

(.....Cal.....)

1. A lien for wages on all the property of a corporation in preference to all other liens, except duly recorded mortgages and deeds of trust, which is imposed by Laws

NOTE.—As to statutes regulating the time of payment of wages, see note to *Re House Bill No. 1230* (Mass.) 28 L. R. A. 344.
47 L. R. A.

1897, p. 231, in case of the failure of a corporation to pay its employees monthly, without even requiring any description of the property or notice in any manner in order to make the lien valid, and an attorney's fee imposed by the statute in case of an action to enforce the employee's right, while such provisions do not apply to any other class of laborers,—constitute an unconstitutional discrimination against corporations and their employees.

2. To justify the treatment of corporations as a class for the purpose of legislation the classification must be founded upon differences either defined by the Constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation.
3. Restrictions of the contracts or business of foreign corporations cannot be upheld to the extent of altering or amending or repealing their charters under the laws of other states.

(November 20, 1899.)

APPEAL by defendants from a judgment of the Superior Court for Sierra County in favor of plaintiff in an action brought to recover the value of labor performed for defendant corporation. *Affirmed in part.*

The facts are stated in the Commissioner's opinion.

Mr. Frank R. Wehe, for appellants:

There is no allegation in the complaint that respondent was the owner or holder of any of the assigned claims at the time of the commencement of this action.

Such an allegation is necessary.

Holly v. Heiskell, 112 Cal. 174, 44 Pac. 466.

The act of 1891 and its successor, the act of 1897, are repugnant to the Constitution of this state and of the United States, and are therefore void.

Ex parte Smith, 38 Cal. 710; *Dougherty v. Austin*, 94 Cal. 633, 16 L. R. A. 161, 23 Pac. 834, 29 Pac. 1092; *Pasadena v. Stimson*, 91 Cal. 251, 27 Pac. 604; *People ex rel. Daniels v. Henshaw*, 76 Cal. 443, 18 Pac. 413.

The acts do not affect all of the corporations of the state—only those doing business in this state.

Keener v. Eagle Lake Land & Irrig. Co. 110 Cal. 627, 43 Pac. 14.

The classification must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation.

Darcy v. San José, 104 Cal. 645, 38 Pac. 500; *People v. Central P. R. Co.* 105 Cal. 584, 38 Pac. 905.

The members of a corporation are the real parties in interest.

San Mateo County v. Southern P. R. Co. 13 Fed. Rep. 785, 8 Sawy. 282; *Atkins v. Gamble*, 42 Cal. 99, 10 Am. Rep. 282; *People ex rel. Burke v. Badlam*, 57 Cal. 601; *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 116; *Redington v. Cornwell*, 90 Cal. 56, 27 Pac. 40; *Kennedy v. California Sav. Bank*, 97 Cal. 96, 31 Pac. 846; *Bank of United*

States v. Deveaux, 5 Cranch, 87, 3 L. ed. 44; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *United States v. Amedy*, 11 Wheat. 412, 6 L. ed. 507; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 513; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288.

The acts are repugnant to § 13, art. 1, of the Constitution of this state, in that they deprive persons of property without due process of law.

San Antonio & A. P. R. Co. v. Wilson (Tex. App.) 19 S. W. 910; *Philadelphia v. Scott*, 81 Pa. 80, 22 Am. Rep. 738.

They deny corporations doing business in this state the equal protection of the law.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. Frank D. Seward for respondent.

Cooper, C., filed the following opinion:

This action was brought to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff, and defendants appeal. The case comes here on the judgment roll. The findings show that the defendant corporation, while engaged in business in Sierra county, California, became indebted to plaintiff and some twenty others, who, before the commencement of this action, assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid; that \$400 is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law the court found that plaintiff was entitled to judgment against defendant corporation for the sum of \$5,039.57 and for \$400 attorneys' fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorneys' fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorney's fees, and to have the amount declared a lien upon the property of the defendant corporation, under an act approved March 29, 1897 (Stat. 1897, p. 231). As the constitutionality of the act is the main question in controversy here, it will be necessary to give the sections of the act herein discussed in full. The sections material are as follows:

"Sec. 1. Every corporation doing business in this state shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee 47 L. R. A.

during the preceding month; provided, however, that if at the time of payment any employee shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

"Sec. 2. A violation of any of the provisions of section one of this act shall entitle each of the said employees to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defense to such actions.

"Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defense for a failure to pay monthly any employee engaged in transacting or carrying on its business the wages earned by such employee during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a set-off or counterclaim against the same, or the absence of such employee from his usual employment at the time of the payment of the wages so earned by him."

"Sec. 5. No corporation shall require, and no employee of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

"Sec. 6. All wages earned by any employee engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

"Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the same to be imposed by any court in this state having jurisdiction of offenses in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had."

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the Constitution of the state: (1) Subdivision 13, § 1, art. 1: "No person shall . . . be deprived of life, liberty, or property without due process of law." (2) Subdivision 21, Id.: "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (3) Subdivision 11, Id.: "All laws of a general nature shall

have a uniform operation." (4) Section 25, art. 4, providing that the legislature shall not pass local or special laws in the following cases: "Third. Regulating the practice of courts of justice." "Twenty-Fourth. Authorizing the creation, extension, or impairing of liens." "Thirty-Third. In all other cases where a general law can be made applicable." (5) Fourteenth Amendment to the Constitution of the United States: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." In the decision of this case the constitutionality of the sections of the statute herein set forth is necessarily involved, and it is with a deep sense of the importance of the subject that we enter upon its discussion. We must determine whether the lawmaking power of the state has in this instance gone beyond the limits of the Constitution adopted by the people. This is always a question of great delicacy, and one which this court approaches with reluctance, but one in which the duty of the court is plain, and which must be met squarely when presented. The same Constitution that lays down the fundamental law of our state, and prohibits legislatures from going outside the powers and limitations therein contained, created the courts, and provided that they should stand as the guardians of the people, and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights.

It will be observed that the act in question applies only to two classes of persons: First, corporations doing business in this state, and not to corporations of any other class; second, to laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or copartnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the 14th Amendment to the Constitution of the United States, applies to a corporation. *Douglas v. Pacific Mail S. S. Co.* 4 Cal. 306; *Pasadena v. Stimson*, 91 Cal. 248, 27 Pac. 604; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255. The rule is admirably stated in the *Railroad Tax Cases*, 13 Fed. Rep. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some

legitimate business. In this state they are formed under general laws; and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' [Section 286.] Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the Supreme Court of the United States and of the several states that whenever a provision of the Constitution or of a law guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents." The case was afterwards taken to the Supreme Court of the United States (116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the provisions of the statute in question it will therefore be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to be measured by the same laws as the rights of a person. The law should be made for all alike,—for the rich as well as the poor, for the corporation as well as the laborer. In *Cooley on Constitutional Limitations* (6th ed. p. 483) it is said: "But everyone has a right to demand that he be governed by general rules; and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of

the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporations would be governed by one law, the mass of the community and those who made the law by another, whereas a like general law affecting the whole community equally could not have been passed. Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property, or notice in any manner, in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or co-partnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor felling the forest, tilling the soil, or digging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law liens are given to all mechanics, artisans, laborers, or materialmen, and against all persons and corporations. Under the present statute a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution; but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of this statute at once sweeps it away. The materialman or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may have secured a judgment thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making

his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation; and yet under this statute the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorney's fees, which become a part of the judgment. No other classes of laborers or persons are given the right to recover attorney's fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defense to the action except some two or three. Matters which might be pleaded as a defense by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defenses which other litigants on like terms are allowed, it could, by a Draconian edict, deprive it of all of them, and say at once that the corporation should make no defense whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than \$50 for each violation of the statute. A corporation employing 1,000 men, and sued by each, could not defend the suits without being limited in its defense to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the 1,000 men by which they agreed to work for it three months for \$100 each, they could bring suit, and recover, before the end of the three months, and each recover an attorney's fee, making 1,000 attorney's fees, and the corporation would be subject to

1,000 fines of \$100 each, making the modest sum of \$100,000 in fines; or perhaps the magistrate might, in his discretion, make the fine \$50 in each case, and thus reduce it to \$50,000. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it.

It is probably unnecessary in this opinion to discuss separately the constitutional objections herein briefly pointed out. In *Ex parte Kuback*, 85 Cal. 275, 9 L. R. A. 482, 24 Pac. 757, it appeared that the petitioner had been arrested for the violation of an ordinance of the city of Los Angeles making it a misdemeanor for any contractor to make any agreement to pay any laborer for any labor in excess of eight hours in any one day. This court, in discharging the petitioner, said: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business, and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful, or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation; but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day." Statutes similar to the one under discussion have been frequently passed by the legislatures of sister states, and as frequently declared unconstitutional by the courts. The legislature of Pennsylvania, in June, 1881, passed what was known as the "Store-Order Act," and under its provisions all laborers employed by firms, corporations, or persons engaged in the business of manufacturing must be paid in cash, and can make no agreement by which their labor shall be paid for in any goods or store orders. The supreme court of the state in *Godcharles v. Wigeman*, 113 Pa. 437, 6 Atl. 354, held the act unconstitutional, and in the opinion said: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best,—whether money or goods,—just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional priv-

47 L. R. A.

ileges, and consequently vicious and void." In 1887 the legislature of the state of West Virginia passed an act declaring that all persons engaged in mining coal or other minerals, or in manufacturing them, should not issue for the payment of labor certain orders therein described. The supreme court of the state in *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285, declared the law unconstitutional, and in the opinion said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper without injury to his neighbor is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. . . . But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employee, even in this class of occupations; much less in cases that are not impressed with a public trust or duty." This case was immediately followed by *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288, in which, on the same reasoning, a statute of the state making it unlawful for any person, firm, or corporation engaged in mining or manufacturing to sell goods to any employee at a greater per cent profit than like goods are sold to others, was held unconstitutional. In the opinion it is said: "That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens." The general assembly of Massachusetts passed an act providing that no employer should impose a fine upon or withhold the wages of an employee engaged in weaving for imperfections that may arise during the process of weaving. This act was pronounced unconstitutional in an able opinion of the supreme court of the state. *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126. The Revised Statutes of Missouri in 1889 made it unlawful for any corporation, firm, or person engaged in mining to issue in payment of wages any order or check payable otherwise than in money, unless the same was negotiable or redeemable at its face value in cash or goods at the option of the holder. The supreme court of the state in *State v. Loomis*, 115 Mo.

307, 21 L. R. A. 789, 22 S. W. 350, held the statute unconstitutional. The legislature of the state of Illinois in 1883 passed a statute requiring that owners and operators of coal mines in the state should weigh the coal at the mines, and that all contracts with laborers by which the weighing of coal at the mines shall be dispensed with shall be void. The statute was held unconstitutional in *Millett v. People*, 117 Ill. 295, 57 Am. Rep. 869, 7 N. E. 631. The same rule has been followed by the same court in regard to similar statutes as to "truck stores." *Fraser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395. As to an act for the weekly payment of wages by corporations, see *Braceville Coal Co. v. People*, 147 Ill. 68, 22 L. R. A. 340, 35 N. E. 62. The legislature of Texas provided by statute that a railroad company refusing to pay an employee within fifteen days after demand shall be liable to such employee in a sum equal to 20 per cent on the amount due. The statute was held unconstitutional. *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910. In the opinion it is said: "If the legislature desires to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of the employer and employee, for the law knows no favorites." The supreme court of Nebraska in *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, held unconstitutional a statute of 1867 giving to owners of live stock double the value of such property injured or destroyed on a railroad track. In Michigan a statute was passed in 1885, authorizing the taxing of an attorney's fee of \$25 in actions against a railroad company for damages for cattle killed, and the supreme court of the state held it unconstitutional. *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289. And the supreme court of Arkansas held a similar statute of that state unconstitutional (*St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883); and the same ruling was made on a similar statute by the supreme court of the state of Washington (*Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149), and by the supreme court of Ohio (*Hooking Valley Coal Co. v. Rosser*, 53 Ohio St. 12-24, 29 L. R. A. 386, 41 N. E. 263). Cases almost without number could be cited to the same general effect. Among others, see *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641-652; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177.

This court in banc held that a statute of the state prohibiting bakers from following their vocation between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday was a special law, and void. *Ex parte Westerfield*, 55 Cal. 551, 36 Am. Rep. 47. And the same was held as to a similar statute in relation to barbers. *Ex parte Jentzsch*, 112 Cal. 469, 32 L. R. A. 664, 44 Pac. 803. 47 L. R. A.

The question is very ably considered and would seem to be finally put to rest, by the Supreme Court of the United States in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. The statute of the state of Texas allowing owners of stock killed by a railway corporation \$10 attorney's fees as additional costs was held unconstitutional. In the opinion it is said: "The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. . . . They do not stand equal before the law. They do not receive its equal protection." The reasoning of the highest court in the land in the case cited applies to this case. There is no reason why a different rule as to defenses that may be pleaded and proved and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants. In *Cullen v. Glendora Water Co.* 113 Cal. 503, 39 Pac. 769, and 45 Pac. 822, 1047, it was held that a part of the 4th section of the act generally known as the "Wright Act," which provided that in a proceeding to confirm the organization and bonds of an irrigation district "a motion for a new trial must be made upon the minutes of the court," was a special law regulating the practice of courts of justice, and unconstitutional. In *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, it was held that § 870 of the municipal corporation act of 1883, requiring cities of the fifth and sixth classes to make an effort to agree before instituting condemnation proceedings, was unconstitutional. And so in the late case of *Tulare v. Heven* (filed September 29, 1899) (Cal.) 58 Pac. 530, this court held that that portion of the general act of the state in regard to the municipal corporations, by which it is provided that in municipal corporations of the fifth class courts shall take judicial notice of all ordinances of the municipality, was unconstitutional.

It is claimed that corporations are a class, and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the Constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. *Darcy v. San José*, 104 Cal. 645, 38 Pac. 500; *State ex rel. Richards v. Hammer*, 42 N. J. L. 439; Cooley, Const. Lim. 6th ed. p. 484. Arbitrary selection can never be justified by calling it classification. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 159, 41 L. ed. 669, 17 Sup. Ct. Rep. 255. In this case there can be no reason why a corporation doing business in this state should have its property subjected to

a lien unless the property of other persons in the state under like circumstances is subjected to the same kind of a lien; or why such corporations should be prohibited from making defenses which all other persons in the state may make; or why such corporations should pay attorneys' fees or fines in an ordinary action at law, while all other persons under like circumstances are exempt from such attorneys' fees and fines; or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded, while all other persons in the state may do so; or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employees, while all other persons in the state who are over twenty-one years of age, and not incompetent, may do so; or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid.

It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters, or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation, and while it exists, deprive it of the rights guaranteed to it by the Federal Constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Railroad Tax Cases*, 13 Fed. Rep. 754, 755; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140-147, 5 N. W. 275.

But the act in question applies, not only to the corporations existing under the laws of this state, but to all other corporations doing business in this state, and in no wise indebted to the state for their charters. Surely, the legislature of this state could not alter, amend, or repeal the charter of a corporation existing under the laws of another state. Counsel for respondent states that similar statutes have been upheld in *Shaffer v. Union Min. Co.* 55 Md. 74; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000, and *Hancock v. Yaden*, 121 Ind. 36, 6 L. R. A. 578, 23 N. E. 253. The statute upheld in *Shaffer v. Union Min. Co.* was one which provided that every corporation engaged in manufacturing, or in operating a railroad, in a certain county, and employing ten hands or more, should pay its employees the full amount of their wages in legal tender money of the United States, and that every contract for the payment of such wages in any other manner should be null and void. The ground upon which the act was upheld was that the legislature had the right to alter or amend the corporate charter. It is evident, in view of the authorities hereinbefore cited, that the ruling upon such ground was clearly incor-

rect. The decision cannot be regarded as of much value as a contribution to jurisprudence, and an examination of the authorities therein cited does not support it. The case of *State v. Peel Splint Coal Co.* upheld the validity of two statutes of West Virginia, one prohibiting the payment of employees in paper redeemable otherwise than in lawful money, and the other prescribing a certain method for weighing coal at the mouth of a mine. The court consisted of four judges, and two of the four can affirm a judgment. The judgment was affirmed by two judges and two dissented. The opinion of the two affirming the judgment, while lengthy, is not convincing. The decision appears to have been based upon practically the same reasoning as the Maryland case,—that, the corporation being a creature of the legislature, and having a license under the state, the legislature could practically deprive it of any rights. In view of the fact that the opinion is in direct conflict with the two previous decisions of the same state, and is the opinion of two judges as against two others of the same court, it cannot have weight here. It seems to us that anyone reading the able dissenting opinions of Judge English and Judge Brannon would be satisfied that the decision is wrong. Judge Brannon, in his dissenting opinion, says: "If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts in private business, government becomes, not simply paternal, but oppressive and tyrannical. The 'scrip act' would prevent the farmer, brick maker, or coal operator from giving to his hands for wages an order to anyone for sugar, coffee, flour, or meat,—a great reversal in the right of contracts as used time out of mind." *Hancock v. Yaden* turned on the validity of a statute of Indiana which forbade the execution of contracts waiving the payment of wages in money. The court sustained the law, and the decision is the most direct authority in favor of plaintiff's contention of any he has cited. There is no authority cited in the opinion upon which it can legally stand. The court sustained the law upon the ground "that it protected and maintained the medium of payment established by the sovereign power of the nation." Even if this be so, it is self-evident that the legislature, in passing the act, did not have in mind the protection of the coinage. The policy of the law in protecting the coin of the country would justify stringent laws against counterfeiting or debasing it, but certainly could not justify a law that precludes persons from agreeing to receive payment of their debts in anything but money. Since the submission of this case, our attention has also been called by counsel for plaintiff to a decision of the circuit court of the United States for ninth circuit, northern California, in the case of *Skinner v. Garnett Gold-Min. Co.* (filed Sept. 6, 1899) 96 Fed. Rep. 735, in which this very statute was upheld. While we have the greatest respect for the able judge who wrote the opinion,

yet it is not binding on us as a precedent, and the reasoning therein does not convince us of its correctness, nor, in our opinion, do the authorities therein cited support it. The learned judge refers to the case of *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679. In that case the circuit court of the United States held unconstitutional an act of the legislature of the state of Tennessee creating a railroad commission, and making certain discrimination against railroads. In the opinion it is said: "Their general object [referring to the provisions of the Fourteenth Amendment] is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to everyone an equal right to invoke the remedies prescribed by law for the redress of wrongs done either to his person, reputation, or property." In the opinion of the learned judge it is further stated that the act of March 31, 1891 (Stat. 1891, p. 195), similar to the statute in question, relating to the payment of wages of laborers by corporations, has been construed in *Keener v. Eagle Lake Land & Irrig. Co.* 110 Cal. 627, 43 Pac. 14, and *Ackley v. Black Hawk Gravel Min. Co.* 112 Cal. 42, 44 Pac. 330, and that the act in question is directed to the same end as the statute of 1891. The act was under consideration, but not passed upon as to its constitutionality, in either case. In each case it was held that the laborers were entitled to an ordinary judgment such as is granted to other litigants, and in each of the cases the judgment of the lower court as to counsel fees and as to the judgment being declared a lien was reversed. In the case in 110 Cal. and 43 Pac. it is said in con-

clusion of the opinion: "That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed." And in the case in 112 Cal. and 44 Pac. the same ruling was made and the same language used in reversing the portion of the judgment as to counsel fees and declaring the judgment a lien. The act of 1891 has, however, by this court in banc, been held unconstitutional, as special legislation in favor of a class, and making an arbitrary classification. *Slocum v. Bear Valley Irrig. Co.* 122 Cal. 555, 55 Pac. 403.

The court properly overruled the defendants' demurrer to the complaint. The allegation as to the assignment of the several causes of action, prior to the time of the commencement of the action, to plaintiff, was sufficient when attacked by general demurrer. That portion of the judgment in favor of plaintiff and against the defendant corporation for \$5,039.57, with costs, should be affirmed. The portion awarding the plaintiff \$400 attorney's fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation, and to have a commissioner appointed to sell the property, should be reversed.

We concur: **Haynes, C.; Chipman, C.**

Per Curiam:

For the reasons given in the foregoing opinion, that portion of the judgment in favor of plaintiff and against the defendant corporation for \$5,039.57, with costs, is affirmed. The portion awarding the plaintiff \$400 attorney's fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation, and to have a commissioner appointed to sell the property, is reversed.

Rehearing denied.

MICHIGAN SUPREME COURT.

Joseph L. HUDSON, Receiver of Third National Bank of Detroit,

v.

Eugene E. WILBER, Saginaw Circuit Judge.

(114 Mich. 116.)

Garnishment proceedings will not lie against an executor to reach a debt of the

NORM.—Garnishment of executor or administrator.

I. Scope of the subject.

II. Application of statutes to executors and administrators.

- a. General statement as to.
- b. Application to claims against estates generally.
- c. Rule after estate is ready for distribution.
- d. General statutes as to attachment and garnishment.

decendent before a decree for the distribution of the assets in his hands, in the absence of statutory permission, although it has been placed in judgment in a suit revived against the executor.

(Grant, J., and Long, Ch. J., dissent.)

(September 14, 1897.)

e. Statutes specifically applicable to executors and administrators.

f. Statutes as to attachment execution.

g. Statutes as to foreign attachment.

h. Statutes as to attachment of absent, concealed, and absconding debtors.

i. Statute as to attachment of property not capable of manual delivery.

III. Interest and possession necessary to sustain.

IV. Garnishment of husband's interest in wife's legacy or distributive share.

APPPLICATION for a writ of mandamus to compel defendant to entertain garnishment proceedings by petitioner to compel the executors of Aaron C. Fisher to respond to petitioner for the amount of a judgment due by Fisher to John E. Nolan, petitioner's debtor. *Denied.*

The facts are stated in the opinion.

Mr. De Forest Paine for relator.

Mr. William G. Gage, for respondent: To entitle the plaintiff to the benefit he claims under these proceedings, he must show that they are clearly within the provisions of the statute.

Iron Cliffs Co. v. Lahais, 52 Mich. 395, 18 N. W. 121; *Folkerts v. Standish*, 55 Mich. 463, 21 N. W. 891; *Farwell v. Chambers*, 62 Mich. 316, 28 N. W. 859; *Crisp v. Fort Wayne & E. R. Co.* 98 Mich. 650, 22 L. R. A. 732, 57 N. W. 1050.

V. Rule when the representative is the debtor.

VI. Effect of trust conferred upon representative.

VII. Set-off.

VIII. The judgment.

IX. Exclusiveness of the remedy.

X. Summary.

I. Scope of the subject.

Garnishment is a proceeding in the nature of an attachment or execution by means of which credits, property, or effects of a debtor in the hands of a third person may be subjected to the payment of the claims of the creditors of such debtor. This method of reaching the property and credits of debtors in the hands of third persons, however, is not universal. In some of the states, as, for example, in New York, garnishment is unknown, and the same object is accomplished by other means, as by attachment of property and debts in the hands of third persons under the name of attachment of property not capable of manual delivery, attachment execution, and foreign attachment. In view of the fact, therefore, that the difference between these processes and garnishment, as applied to the subject in hand, is slight and technical, and relates to application and method rather than to results, cases with relation to attachment of credits or effects in the hands of executors and administrators and with relation to attachment executions and foreign attachment against executors and administrators have been included in this note. It is to be noted, also, that in Connecticut the process of garnishment is called factorizing, and in most, if not all, the other New England states it is called trustee process, but these will be found to be precisely the same thing under a different name.

II. Application of statutes to executors and administrators.

a. General statement as to.

The rule formerly was that executors and administrators were not subject to garnishment in the absence of an express statutory provision therefor. But there seems to have been a general tendency, at least in legislation, and perhaps also in judicial decision, to change or modify the rule with the probable view of making all one's property, effects, and credits liable for the payment of his debts. In accord with this tendency, some progress has been made toward a construction of general statutes with relation to attachment and garnishment 47 L. R. A.

The affidavit for writ of garnishment must show whether the garnishee defendant has property in his hands or under his control.

The nature of the contract cannot be shown in the affidavit for garnishment in the alternative.

Weisteister v. Manville, 44 Mich. 408, 6 N. W. 859; *Conway v. Ionia Circuit Judge*, 46 Mich. 28, 8 N. W. 588; *People use of Tracey v. Blanchard*, 61 Mich. 478, 22 N. W. 669.

The affidavit in this case does not show whether the garnishee defendants had property, money, goods, chattels, credits, and effects in their hands or under their control and custody, or whether they are indebted to the said John E. Nolan. This is a fatal defect.

Shinn, Pl. & Pr. § 322.

The affidavit must show whether there is

which will include executors and administrators, and in quite a number of the states statutes have been enacted directly subjecting executors and administrators to garnishment or trustee process or to attachment execution. They have in some instances been held liable under statutes providing for foreign attachment, either by construction of general statutes, or directly under statutes made specifically applicable to them, and in New York an effort has been made to hold them under the statute providing for the attachment of absent and absconding debtors, and legacies in their hands have been held to be property incapable of manual delivery, and attachable as such under a statute providing therefor.

b. Application to claims against estates generally.

The rule has been stated broadly and generally to be that in the absence of statutory provision on the subject expressly subjecting an executor or administrator to garnishment, he could not be summoned as a garnishee or trustee with reference to the funds in his hands. *Thorn v. Woodruff*, 5 Ark. 55; *Sime's Estate*, Myrick Prob. Ct. Rep. (Cal.) 100; *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Brooks v. Cook*, 8 Mass. 246; *Holbrook v. Waters*, 19 Pick. 354; *Wheeler v. Bowen*, 20 Pick. 563; *Curling v. Hyde*, 10 Mo. 374; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *Ryan v. Marcy*, 1 Kulp, 360; *Parks v. Cushman*, 9 Vt. 320; *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81; *Pringle v. Black*, 2 Dall. 97, 1 L. ed. 305.

So, a justice of the peace was held to have had no authority previous to the enactment of Ind. Rev. Stat. 1843 to issue a summons against an executor in a garnishment proceeding, and proceedings of a justice requiring an executor to answer in garnishment in his representative capacity were *coram non judice*, and the satisfaction of the judgment rendered thereon by the executor was regarded as voluntary on his part, and no protection to him. *Harmon v. Birchard*, 8 Blackf. 418.

And the same rule was adopted specifically with reference to summoning an executor or administrator as garnishee or trustee with reference to a claim against the decedent or the estate, in *Gill v. Middleton*, 60 Ark. 213, 29 S. W. 465; *Marvel v. Houston*, 2 Harr. (Del.) 349; *Kimball v. Woodman*, 19 Me. 200; *Williamson v. Beck*, 8 Phila. 269.

And within this rule a judgment obtained against an administrator as such in garnish-

an indebtedness, or whether the garnishee defendant has property in his hands.

Weimeister v. Manville, 44 Mich. 410, 6 N. W. 850; *Botsford v. Simmons*, 32 Mich. 352. Uncertainty in the affidavit vitiates it.

Drake, Attachm. § 104.

Garnishment will not issue against an executor.

White v. Ledyard, 48 Mich. 264, 12 N. W. 216; *Blake v. Hubbard*, 45 Mich. 1, 7 N. W. 204; *Fish v. Morse*, 8 Mich. 34.

And the admissions of an executor, if made, would not bind the estate.

White v. Ledyard, 48 Mich. 266, 12 N. W. 216; *Blake v. Hubbard*, 45 Mich. 1, 7 N. W. 204.

Nor can a receiver be reached by garnishment.

People ex rel. Tremper v. Brooks, 40 Mich. 333, 29 Am. Rep. 534; *Waples*, Attachment

& Garnishment, § 223; *Wilder v. Bailey*, 3 Mass. 289.

The garnishee defendant cannot admit away or prejudice the rights of the principal defendant.

Hebel v. Amazon Ins. Co. 33 Mich. 403; *Tabor v. Van Vranken*, 39 Mich. 793.

The defendant in a suit before a justice for a debt cannot, pending suit, be garnished before another justice by a creditor of the plaintiff.

Custer v. White, 49 Mich. 262, 13 N. W. 583; *Wallace v. M'Connell*, 13 Pet. 136, 10 L. ed. 95; *Drake*, Attachm. § 619.

Receivers and registers in chancery cannot be interfered with by garnishee process, so as to subject moneys under their official control to the ordinary operation of that action.

Voorhees v. Sessions, 34 Mich. 99; *People*

ment proceedings before a justice of the peace is void, and will not be allowed and classified by the probate court against the estate of which the garnishee is the administrator. *Gill v. Middleton*, 60 Ark. 213, 29 S. W. 465.

And an attachment will not lie against property of a succession for a debt of a deceased person in Louisiana; the creditor is bound to provoke an administration of the estate in pursuance of law, and collect his debt by that means. *Cheatham v. Carrington*, 14 La. Ann. 707.

So, a person summoned as a garnishee cannot be asked whether he owed as the executor of his father or of his grandfather. *Gee v. Warwick*, 3 N. C. (2 Hayw.) 354.

And a widow acting as administratrix of her deceased husband's estate cannot be compelled to appear and answer as garnishee, as to whether or not the estate owed a specified debt, as, not having contracted the debt herself, she cannot be presumed to have sufficient knowledge of the transaction to answer. *Welch v. Gurley*, 3 N. C. (2 Hayw.) 334.

And an executor who is garnished with reference to a claim against the estate, who stands by without opposition and permits the creditor to illegally seize and appropriate all the assets to the exclusion of other creditors having equal rights, will be deemed to have made voluntary payment, and where the estate is insolvent, and not sufficient to pay all claims, he is not protected by the judgment entered against him for the debt, and may be held liable for the amount paid. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81.

Personal representatives of a deceased debtor are not as such debtors of the creditors of their testator or intestate so as to be liable to garnishment by such creditors, their liability being in detinet only, and not in debit. *Parker v. Donnally*, 4 W. Va. 648.

So, a proceeding in garnishment against a debtor who dies before the return day of the process and before answering as to his indebtedness abates, and cannot be revived against his representatives, and his administrators cannot be required to answer therein. *Tate v. Morehead*, 65 N. C. 681; *White v. Ledyard*, 48 Mich. 264, 12 N. W. 216; *Brecht v. Corby*, 7 Mo. App. 800.

And the fact that the appearance of the executor or administrator was entered, and the cause revived by stipulation, is immaterial to affect his liability. *Brecht v. Corby*, 7 Mo. App. 800.

And where a person is summoned as trustee 47 L. R. A.

of another, but afterwards dies and another is appointed executor under his will, and the estate is found to be insufficient to pay all the debts, Mass. Pub. Stat. chap. 83, § 58, providing that if, in case of the decease of one charged as trustee, the executor or administrator does not voluntarily pay the amount in his hands, the plaintiff may proceed against him by a writ of scire facias as if the judgment in the first suit had been against him as trustee, gives to the attaching creditor only the rights which the defendant had, and does not enlarge the liability of the alleged trustee; and therefore his only remedy would be to prove his debt before the commissioners and take his dividend. *Guptill v. Ayer*, 149 Mass. 49, 20 N. E. 449.

So, the general rule that executors and administrators could not be summoned as garnishees or trustees was adopted specifically with reference to claims against devisees, legatees, and persons entitled to a distributive share of the estates in their hands, in *Debleux v. Hotard*, 31 La. Ann. 194; *Beckwith v. Baxter*, 8 N. H. 67; *Ross v. McKinny*, 2 Rawle, 227; *Young v. Young*, 2 Hill, L. 425; *Wood v. Smith*, Noy, 115.

The principle that the estate of a testator ought to come into the hands of the executor that he may administer it according to law and pay the debts if the assets suffice, and that he ought not to be stopped and subjected to new responsibilities by proceedings in attachment, applies with equal force to an attempt to make an executor garnishee for the purpose of paying out of the assets in his hands a debt due to a creditor of a legatee. *Graham v. Fitch*, 13 App. D. C. 569.

And a common-law court has no jurisdiction to compel executors to pay a legacy by process of garnishment against them, brought for the purpose of reaching it to satisfy a debt of the legatee. *Whitehead v. Coleman*, 31 Gratt. 784.

A pecuniary legacy is not a debt. It is a sum of money payable by the executor or administrator out of the estate of the decedent, if sufficient assets remain in his hands after discharging the debts of the deceased and other responsibilities; and he cannot be summoned as a garnishee with reference thereto. *Shewell v. Keen*, 2 Whart. 332, 30 Am. Dec. 266; *Barnett v. Weaver*, 2 Whart. 418.

So, in Ohio it has been held that an administrator before an order of distribution cannot be garnished in an action against a distributee, as, until such an order is passed, there is no indebtedness between the administrator and the

ex rel. Tremper v. Brooks, 40 Mich. 333, 29 Am. Rep. 534.

Hooker, J., delivered the opinion of the court:

Nolan brought an action against Aaron C. Fisher in his lifetime, which culminated in a judgment against his executors, the same being affirmed by this court in 111 Mich. 56, 69 N. W. 96. Thereupon the relator garnished the executors, but the circuit court dismissed the proceedings, after disclosure, upon the ground that garnishment would not lie against executors.

It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law does not permit one court to assume control over the representative of another court, or the property confided to his charge. By this it is not

distributees. *Bently v. Strathers*, 5 Ohio L. J. 288.

And promissory notes payable to a debtor as trustee, in his hands as executor and trustee of the estate, are not subject to attachment on a personal claim against him, where distribution has not yet been ordered, though the executor is one of several devisees of the estate, and it appears that on division of the whole his share will be greater than the amount of the notes garnished. *Glidden & J. Varnish Co. v. Joy*, 8 Ohio C. C. 157.

So, in *McElwee v. Story*, 1 Rich. L. 9, it was held that a promise in writing by an administrator to pay out of the funds of his estate a debt due by one of the distributees who was absent from the state if the creditor would abstain from attaching the share of the distributee in his hands, is without consideration, and that no action could be maintained upon it.

The reason for the common rule above given, set forth and acted upon in *Sime's Estate*, *Myrick Prob. Ct. Rep. (Cal.) 100*; *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Kimball v. Woodman*, 19 Me. 200; *Brooks v. Cook*, 8 Mass. 246; *Curling v. Hyde*, 10 Mo. 374; *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498; *Parks v. Cushman*, 9 Vt. 320; and *Brewer v. Hutton*, 45 W. Va. 100, 30 S. E. 81,—was to the effect that executors and administrators are not subject to garnishment or trustee process because they derive their authority from the law, and it is their duty to exercise it according to the rules of the law, and they must account to the probate court for all the funds coming to their hands; and that it would be against public policy to permit another court to interfere with the administration.

And a cognate rule to the effect that executors and administrators cannot be garnished, as to permit it would disturb the proper administration of the estate, is given in *Brewer v. Hutton*, 45 W. Va. 106, 80 S. E. 81; *Thorn v. Woodruff*, 5 Ark. 55; *Williamson v. Beck*, 8 Phila. 269.

And it has been said that in England a legacy cannot be attached in the hands of an executor, because it is uncertain whether, after debts are paid, the executor will have assets to discharge it, and because a legacy is not demandable or suable at common law, and because it may work a wrong to the creditors who are third persons and can have no day in court in the suit to interplead. *Ross v. McKinny*, 2 Rawle, 227.

And in *Wood v. Smith*, Noy, 115, it was held that a creditor cannot, by the custom of London, attach a legacy that is to be paid to a debtor, because to pay it is a spiritual duty.

meant that personal remedies against the individual may not be sought, but any proceeding in the nature of an action *in rem*, whereby it is sought to reach the property which another court has taken possession of, is forbidden. Thus replevin from an officer holding under order of the court of chancery is punishable as a contempt. Even suits against a receiver in his representative capacity are forbidden, though the court appointing the receiver may, on cause shown, permit them. The probate court has not even this power respecting its officers, who can only be sued in the manner pointed out by statute, and a garnishee proceeding is not included among statutory proceedings against executors and administrators in Michigan, though it is in some states. That administrators and executors are exempt from this process is the general rule. In

don, attach a legacy that is to be paid to a debtor, because to pay it is a spiritual duty.

See also, on this subject, cases laying down the above rule, but limiting it to estates not yet settled and ready for distribution, *infra*, II. c.; and see *infra*, II. d, by which it will be seen that in some instances general statutes as to attachment and garnishment have been held to apply to executors and administrators.

c. Rule after estate is ready for distribution.

While, prior to a decree of distribution, money in the hands of an executor or administrator could not be reached by attachment against the creditors, heirs, or devisees of the estate, the rule does not hold good after the decree of distribution has been made, as by such decree each share is finally and definitely ascertained, and a cause of action exists, therefore, against the representative in his individual capacity in favor of the distributees. *Re Nerac*, 85 Cal. 392, 95 Am. Dec. 111; *Fitchett v. Dolbee*, 3 Harr. (Del.) 267; *Bartell v. Bauman*, 12 Ill. App. 450; *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659; *Hoyt v. Christie*, 51 Vt. 48.

An adjudication upon the settlement of an administrator, directing him to pay over a sum of money, does not differ in principle from any other judgment, and after such an adjudication is had, the fund may be garnished in his hands in a suit against the person in whose favor such adjudication was made. *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240.

And where the distributive share of an heir has been ascertained and ordered to be paid by the court, the right to it becomes fixed, and the executor ceases to hold it in his representative capacity, but holds it in his personal capacity, and it is no longer regarded as in the custody of the law, and may therefore be garnished in the hands of such executor. *Harrington v. La Rocque*, 13 Or. 344, 10 Pac. 498.

So, judgment creditors of a widow who had renounced her husband's will and elected to take under the statute may maintain garnishment proceedings against the administrator with the will annexed to reach her share of the moneys in his hands, where he had made his final report showing a balance in his hands for distribution. *Bartell v. Bauman*, 12 Ill. App. 450.

And after decree of distribution an administrator of the estate of a deceased person is subject to garnishment with respect to moneys in his hands bequeathed to the judgment creditor who is serving sentence in state's prison for a term of years for felony. *Re Nerac*, 85 Cal. 392, 95 Am. Dec. 111.

Rood, Garnishment, § 27, it is said: "When property or money is *in custodia legis*, the officer holding it is the mere hand of the court. His possession is the possession of the court. To interfere with his possession is to invade the jurisdiction of the court itself. And an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. *Re Cunningham*, 9 Cent. L. J. 208. These principles have been applied in numerous cases to various classes of legal custodians, and in accordance with them it has been held that clerks of courts, trial justices, registers in chancery, masters in chancery, receivers, trustees appointed by a court of chancery, assignees in bankruptcy, trustees for creditors

under a general assignment pursuant to insolvent laws, other trustees appointed to dispose of property and apply the avails according to the orders of the court, sheriffs, constables, and other ministerial officers, and their bailiffs and assistants, justices of the peace, executors, administrators, and guardians, cannot be charged as garnishees by reason of any property or money which they hold, or any debts which they owe, merely as such officers." In his next section the author says that, "in a few of the states, while these principles are recognized as sound, they have been considered inapplicable to certain of the cases above mentioned, either generally or in view of the particular provisions of the statute governing the conduct of the particular officer. Among these may be mentioned sheriffs and constables,

So, there are a number of cases laying down the general rule, but applying it in express terms to estates in the hands of executors and administrators not yet settled and ready for distribution, thus implying that garnishment or trustee process would lie after the estate was settled and ready for distribution, or at least after distribution had been ordered.

Thus, an executor or administrator is not liable to garnishee or trustee process before a final order for the distribution of the estate is made, unless he is rendered so liable by some statutory provision. *Case Threshing Mach. Co. v. Miracle*, 54 Wis. 295, 11 N. W. 580; *Crownover v. Bamberg*, 2 Ill. App. 162; *Norton v. Clark*, 18 Nev. 247, 2 Pac. 529. And see *HUDSON V. WILKER*.

And an allowed and approved claim against the estate cannot be levied upon and sold under an execution against the claimant. *Norton v. Clark*, 18 Nev. 247, 2 Pac. 529.

And when a judgment debtor, entitled to a portion of funds in the hands of an administrator with other heirs before distribution is ordered, gives a third person an order on the administrator to pay whatever remain in his hands as executor to such third person, which order is recognized by the administrator, there is an entire appropriation of the funds beyond the reach and control of the judgment debtor, and the administrator therefore is not liable to garnishment on his account. *Crownover v. Bamberg*, 2 Ill. App. 162.

So, the executor of an estate cannot be compelled under garnishment process by a judgment creditor of an heir to surrender the undivided portion of the heir in a succession whose debts and legacies are unpaid. *Deblieux v. Hotard*, 31 La. Ann. 194.

And a decree refusing to order an executor, on motion of a judgment creditor of an heir, to turn over to the sheriff the undivided portion of the heir in a succession whose debts and legacies had not been paid is an interlocutory decree from which the creditor cannot appeal. *Ibid*.

Nor can the undivided interest of one of several heirs or distributees of an estate in the hands of an administrator *de bonis non* be reached by the process of garnishment. *Mock v. King*, 15 Ala. 66.

And the creditors of a residuary legatee or devisee, or one entitled to an estate as tenant by curtesy, are not authorized to levy upon specific property belonging to the estate while it is still in the possession and under the control of the executor, and the estate is not yet fully administered, or while it is in the hands of another as his agent. *Thornhill v. Christmas*, 11 Rob. (La.) 201.
47 L. R. A.

And a judgment for a specific sum cannot be rendered against an executor in a garnishment proceeding upon answers showing that he holds property to pay the legatees and creditors primarily, and not therefore for the present benefit of the judgment debtor, who is an heir of the succession, where the truth, correctness, and completeness of the answers are not disputed. *Roth v. Hotard*, 32 La. Ann. 280.

And an answer of a garnishee that he holds property, not for the present benefit of the defendant, but to pay the creditors of the succession from which the defendant inherited, is not an admission that he has funds which belong by right to the defendant which will bind the garnishee to pay the money. *Larche v. Kent*, 10 La. Ann. 146.

At any rate, judgment of condemnation will not be rendered against an administrator as garnishee for property in his hands in which the debtor will be interested as distributee after the settlement of the administrator's account, where the estate was not so far settled as to enable the administrator to ascertain what sum would remain for distribution after payment of debts and costs of administration. *Elliott v. Newby*, 9 N. C. (2 Hawks) 22.

And a legacy is not subject to seizure and sale for the debts of the legatee until the executor has assented to it, or at least until all claims upon it of higher rank than the claim of the legatee have ceased to exist. *Suggs v. Sapp*, 20 Ga. 100.

It cannot be attached by a creditor in the hands of an executor for a debt of the legatee, unless there has been such an account stated between the parties as would enable the legatee to maintain an action at law. *M'Dowall v. Hollister*, 8 C. L. Rep. 933, 3 Week. Rep. 522, 25 L. T. 185.

And the estate of a testator in the hands of the executor, who is also a residuary legatee and devisee, cannot be attached in the hands of the executor, where it clearly appears that it was necessary for the executor to receive it to enable him either to pay the debts of the testator or the legacies given to the other legatees. *Pleasants v. Cowden*, 7 Watts & S. 380.

So, before the passage of Pennsylvania act of July 27, 1842, designed to enable creditors to attach legacies, executors and administrators were not liable as garnishees for a distributive share payable to a judgment debtor upon the death of his mother previous to the time of her death. *Hartie v. Long*, 5 Pa. 491.

Garnishment of legacies against an executor to reach a legacy bequeathed to a debtor will not lie during the progress of the regular and usual course of administration, and before the condition of the estate is ascertained, as to

clerks in chancery courts, justices of the peace, administrators, and executors." Among the cases cited by the author is *Hardisty v. Campbell*, 29 Md. 533, where the decision rests upon the Code. In the Alabama cases the question is not raised, and, though the jurisdiction over an administrator seems conceded, it rests upon a statute, which is not quoted. Against the few states, the author cites to the contrary cases involving administrators, from Massachusetts, Maine, Arkansas, West Virginia, Rhode Island, Delaware, Vermont, Indiana, and Missouri, to say nothing of a cloud of analogous cases relating to other officers. Mr. Shinn, in his treatise on Attachment and Garnishment (§ 510), says: "In the absence of special statute it was an undisputed rule of law that an executor or administrator could not, in his official capacity, be held liable as a garnishee

at suit of a creditor of the decedent, or of one who was a legatee or distributee or other creditor of the estate. He is not then considered to be a 'debtor.' Neither is he an agent, factor, attorney, or trustee of such creditor, because he derives his authority from the law, and is obliged to execute it according to law. And it was said that to subject executors and administrators to the process of garnishment might destroy the whole operation and intention of our law of administrators." He admits, however, that in many states this rule has been changed by statute, and a long list of cases is given. It goes without saying that decisions based upon a statutory right of garnishment are not to be considered as authority for changing the general rule, unless by analogy a similar construction should be indulged. The author says of the administrator's lia-

permit it would be productive of great confusion and expense. *Post v. Love*, 19 Fla. 634.

And a judgment cannot be rendered against an administrator on his answer as a garnishee unless there is a distinct admission of a legal debt either due or to become due, where he was summoned within six months after the grant of letters of administration. *Presnall v. Mabry*, 3 Port. (Ala.) 105.

And where by law an administrator is allowed twelve months within which to ascertain the debts of the estate before paying them, or before paying any distributive share, he is not subject to garnishment with reference to a distributive share of a debtor until the twelve months have expired after his appointment. *Selman v. Milliken*, 28 Ga. 366.

The reason for the rule that a legacy or distributive share is not subject to garnishment in the hands of an executor or administrator until settlement of the administration account is that if the law allowed this undefined and unknown interest to be attached, it would necessarily withdraw to a certain extent the accounts of administrators from the orphan's court, and subject administrators to two jurisdictions. *Bank of Chester v. Ralston*, 7 Pa. 482.

d. General statutes as to attachment and garnishment.

Of course all the cases set forth in *supra*, II. b, holding the rule that in the absence of an express statutory provision making them so executors and administrators are not subject to garnishment, in effect negative the applicability of general statutes as to attachment and garnishment to executors and administrators. The same rule has been adopted directly with reference to particular statutes, but there are other statutes which have been held broad enough to include them, the question whether or not executors and administrators are within general statutes as to attachment and garnishment depending upon the language of the statute in question.

Thus, a person like an executor deriving his authority from the law and bound to perform it according to the rules prescribed by law cannot be considered as a trustee, agent, attorney, or factor who can be made a garnishee, as it would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate where they ought to be settled, before the courts of common law, which would have no power to adjust and settle accounts. *Winchell v. Allen*, 1 Conn. 385.

And where the estate of a deceased person is indebted to another person, that debt cannot be 47 L. R. A.

attached in the hands of the administrator under R. I. Pub. Laws March 31, 1870, chap. 858, § 1, providing that the personal estate of any person lodged or lying in the hands of his attorney, agent, factor, trustee, or debtor shall be liable to be attached, as the administrator is not an attorney, agent, factor, trustee, or debtor of the person to whom the estate of the deceased owed the debt within the meaning of that act. *Conway v. Armington*, 11 R. I. 116; *Bryant v. Fussell*, 11 R. I. 286.

But a legacy due from an executor or administrator may be attached by trustee process under Me. Rev. Stat. chap. 86, § 36, the words "effects and credits" therein used being sufficient to authorize the attachment. *Cummings v. Garvin*, 65 Me. 301.

And a legacy due from an executor or administrator may be attached by trustee process under that act, under the old form of writ-averring that the supposed trustee has in his hands goods, effects, and credits of the principal defendant, but making no mention of the legacy as such. *Ibid.*

And where an estate has been represented as insolvent, and the judge of probate has by decree ordered the administrator to pay a certain sum to a creditor whose claim had been allowed by the commissioners, the administrator may, under the New Hampshire statute subjecting whoever shall have in his possession any money, goods, chattels, rights, or credits of any debtor to trustee process, be adjudged to be chargeable as trustee of the creditor. *Adams v. Barrett*, 2 N. H. 374.

But an executor before the probate of a will cannot be summoned and afterwards charged as the trustee of one to whom a pecuniary legacy is given by his testator, though he has sufficient assets to pay all debts and legacies under a statute making goods, effects, and credits intrusted and deposited in the hands of a stranger attachable, as pecuniary legacies in the hands of an executor are not goods, effects, or credits. *Barnes v. Treat*, 7 Mass. 273.

So, a bequest to a debtor may be subjected by garnishee process in the hands of an executor or administrator to the payment of any judgment which may have been recovered against the legatee under Ohio Rev. Stat. § 5330, authorizing garnishment against any person, partnership, or corporation who has property of the defendant in his possession, where, though there may be a doubt as to the amount to be paid to the legatee, it is reasonably certain that the condition of the estate in the hands of the representative is such that the entire bequest will be paid. *Sampson v. Sampson*, 17 Ohio C. C. 455.

In the above case *Bentley v. Strathern*, 5

bility, where he may be garnished, that, "in states permitting an executor or administrator to be made a garnishee he may be held as such whenever the person to whom he is to pay the legacy or distributive share may maintain an action at law against such executor or administrator. After a court has decreed a distribution of the proceeds in the hands of the administrator, such administrator may be held as garnishee. Some statutes permit an executor or administrator to be made a garnishee during the pendency of the settlement of the estate, but no judgment can be rendered against him until a settlement is made, unless he assents to the legacy or admits assets to pay the amount claimed out of the distributive share. Until the distributive shares are ascertained they cannot be secured by garnishment. In other words, when it is uncertain whether

the administrator will have a surplus in his hands or not he cannot be held as garnishee." 2 Shinn, *Attachm.* § 511, and cases cited. In 8 Am. & Eng. Enc. Law, p. 1139, a paragraph denying the liability concludes as follows, after citing *Brooks v. Cook*, 8 Mass. 246: "The court held, that as the administrator derived his authority from the law, . . . he was not liable to process of this kind, and such has been the almost uniform current of authority, including cases as to executors as well." The language of Mr. Rood, who is quoted in support of the doctrine that "the great preponderance of modern authorities . . . holds that, when the purposes of the court have been fully accomplished in respect to the particular funds, by a final decree or order for payment of the same to the defendant by such officer, or his becoming directly and absolutely ac-

Ohio L. J. 288, *supra*, II. b, was questioned, the court saying that it seemed a little difficult to understand why a distinction is made between a case in which an order of distribution has been made and one in which it has not been made, as the order of distribution in that state is simply an order that the administrator pay the balance in his hands to the parties entitled by law to it, without determining who the parties are to whom payment is to be made.

Under the Vermont statute, however, trustee process may issue against executors or administrators in all cases where the right of the principal debtor is such that the creditor is entitled to attach in any form. *Short v. Moore*, 10 Vt. 446.

And a representative may be summoned in his individual, and not in his representative, capacity, where the estate was fully settled, and the legatee or distributee could have maintained an action for his portion against the representative in his individual capacity. *Hoyt v. Christie*, 51 Vt. 48.

And in *Tillinghast v. Johnson*, 5 Ala. 514, it was said that the question whether process of garnishment under the attachment law of that state can be sued out against executors or administrators to condemn a debt due from the deceased to the defendant in attachment, although not directly adjudicated by that court, appears to have been affirmed and sanctioned in *Terry v. Lindsay*, 3 Stew. & P. (Ala.) 317.

So, in Delaware the interest or share of an heir at law in a recognizance in the orphans' court, entered into by a purchaser of a portion of the intestate real estate, is subject to attachment in the hands of the person giving such recognizance. *Crawford v. Elliott*, 1 Houst. (Del.) 465.

But the interest of an heir at law in intestate lands cannot be attached in the hands of one who has given a recognizance in the orphans' court on the purchase of intestate lands, conditioned to pay to the parties entitled their respective shares so as to prevent an assignment, where the attachment is laid upon the land, and not upon the recognizance. *State use of Temple v. Huxley*, 4 Harr. (Del.) 344.

And the mere fact that a garnishee is an administrator is not sufficient reason under the Maryland statutes for quashing the attachment. *Hardesty v. Campbell*, 29 Md. 538.

But an executor or administrator of a judgment debtor of the defendant in an attachment which seeks to reach and have condemned goods, chattels, and credits for the satisfaction of the debt, is not liable, under Md. act 1715, chap. 40, § 7, providing that the plaintiff in a judgment may, instead of other execution, take 47 L. R. A.

out attachment against the goods, chattels, and credits of the defendant in the judgment in the plaintiff's own hands or in the hands of any other person or persons whatsoever, to garnishment while the estate is in the course of administration, and before the assets are ascertained and ready for distribution to creditors. *Graham v. Fitch*, 13 App. D. C. 569.

And under Tenn. act 1829, chap. 57, declaring that an executor or administrator shall not be liable to answer any suit or summons which shall be commenced within six months after his qualification as such, a summons against an administrator served within six months after his qualification to appear as garnishee at the suit of a creditor of one to whom the estate was indebted, to answer as to his indebtedness, and a judgment obtained therein upon his answer, admitting the debt and assets to that amount, are a nullity, and where he submits and pays the judgment rendered against him, he is guilty of a devastavit to the amount of the judgment, and the judgment and payment are no bar to a subsequent suit by the creditor of the estate to recover the amount of the claim, and the administrator will not be permitted in such case to deny assets *pro tanto*. *Gorman v. Swagerty*, 4 Sneed, 560.

e. Statutes specifically applicable to executors and administrators.

A number of the states have enacted statutes specifically providing that executors or administrators shall be subject to garnishment or trustee process. Under these statutes, the right to garnish them is, of course, complete and unquestionable, and the principal questions arising under them are as to the application of the statute to the particular facts of the case in hand, and as to whether or not executors and administrators would be liable to garnishment before the estate is settled and distribution ordered, though other questions have arisen incidentally.

Thus, the object of Mass. Rev. Stat. chap. 109, § 62, providing that any debt or legacy due from an administrator or executor may be attached by trustee process, is to carry out more perfectly the means of enforcing the principle that all the property of a debtor shall be made subject to legal process for the payment of his debts. *Wheeler v. Bowen*, 20 Pick. 563.

And a legacy by a father to a son, remaining in the hands of the executor, is attachable in his hands for a debt due from the son under that act. *Stills v. Harmon*, 7 Cush. 406.

And shares of stock specifically bequeathed to a legatee in the hands of executors of the

countable to the defendant therefor without such order, such property or credit may be reached by garnishing such officer" (Rood, Garnishment, §§ 32, 33), if approved, should not be applied to this case, for the probate court is not shown to have made a decree or order for payment, nor have the executors become directly and absolutely accountable to the principal defendant. Such liability becomes fixed when distribution is ordered under §§ 5925 to 5931 of Howell's Annotated Statutes. It does not rest in the authority of other tribunals to determine the status of a fund in the custody of the probate court. It is said that in *Cohnen v. Sweeney*, 105 Mich. 643, 63 N. W. 641, this court held that a receiver might be garnished with permission of the court that appointed him. The exercise of discretion by a court of chancery having jurisdiction of the fund is

a very different thing from the power of other courts to determine what shall be done with it. That case does not rule this. I am unable to see the propriety of holding that the liability or nonliability of an executor becomes a question of fact, dependent upon the quantity of assets and ability of the executor to pay, to be tried by jury or otherwise in as many courts as there are garnishing creditors, to the embarrassment of the settlement of estates, and the overthrow of one of the best-settled rules of general application known to the law.

The writ is denied, with costs.

Montgomery and Moore, JJ., concurred with **Hooker, J.**

Grant, J., dissenting:

The relator brought suit against John E.

testator, which were not required for the payment of the debts of the estate, and stood upon the books of the bank in the name of the testator, the certificates in her name being in the hands of executors, are attachable in an ordinary trustee process against the legatee, and the executors can be charged under such process as his trustees. *Vantine v. Morse*, 104 Mass. 275.

So, an executor is chargeable in trustee process served upon him within a year after his appointment under that act, though after the service of process upon him and before the legacy became due and payable by the terms of the will he had paid it in full to the legatee. *Hoar v. Marshall*, 2 Gray, 253; *Vantine v. Morse*, 104 Mass. 275.

The interest of an heir at law in a distributive share in an intestate estate in the hands of an administrator is subject to attachment by trustee process, before a decree of distribution under that act, though it may be uncertain whether there will be any assets for distribution, and the suit may be continued until sufficient opportunity has been given for the settlement of the administrator's accounts and a decree of distribution. *Wheeler v. Bowen*, 20 Pick. 563; *Holbrook v. Waters*, 19 Pick. 354; *Hoar v. Marshall*, 2 Gray, 253.

A debtor's distributive share of an estate in the hands of an administrator may be attached by trustee process under the Massachusetts statute as soon as the administrator has given bond and received letters of administration, for the reason that the interest of the distributee vests at the death of the testator. *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. 915.

And the facts that the guardian of a deceased minor still held his personal estate, and that the guardian's final account had not been allowed, do not prevent a distributive share of the estate of the minor from being attached by trustee process in the hands of an administrator as soon as the administrator has given bond and received letters of administration. *Ibid.*

In the above case, *Nickerson v. Chase*, 122 Mass. 296, *infra*, V., was distinguished upon the ground that in that case the attachment failed because it did not reach the specific chattel bequeathed, while in the present case the right does not depend upon reaching specific chattels, but attaches to the right of the principal debtor against the administrator.

So, in *Smith v. Chandler*, 1 Gray, 526, a legacy due to a judgment creditor under a will was attached in the hands of the executors, and the attachment was in effect sustained, though it was not objected to, and the case turned upon other questions.

47 L. R. A.

But executors are not liable to be attached as trustees of a husband with reference to a legacy given him by his wife in her will out of her separate property for his maintenance under a power of appointment, until after probate of the will, and the taking upon themselves by the executors of the administration thereof. *Picquet v. Swan*, 4 Mason, 448, Fed. Cas. No. 11,183.

And the remedy which the Massachusetts statute furnishes to a creditor by way of trustee process is subject to the express statutory limitation provided by Mass. Pub. Stat. chap. 183, § 17, that the answers and statements sworn to by the trustee shall be considered as true in deciding how far he is chargeable, and the creditor who has instituted a proceeding by trustee process cannot maintain a bill for discovery in aid of his attachment to obtain evidence to contradict the answers of the trustee, though the trustee is an administrator, and his answers are made with reference to matters concerning which he has no personal knowledge. *Emery v. Bidwell*, 140 Mass. 271, 3 N. E. 24.

So, the fact that a legatee under a will is supposed by his friends to have died before the testator does not relieve the executors thereof from liability in trustee process for the amount bequeathed to such legatee, although they have exhausted the testator's personal property by paying other legacies and debts, where there is no proof of the death of such legatee, and he has been heard from within seven years. *Cady v. Comey*, 10 Met. 459.

But execution will be stayed to give them opportunity to apply for a license to sell real estate sufficient to raise money to pay the legacy, and the plaintiff in the trustee process will be required to give bond to the executors to refund for the sum recovered by him thereby needed to satisfy demands that may be afterwards recovered against the estate of the testator, and also to indemnify the executors. *Ibid.*

So, under Me. Rev. Stat. 1841, chap. 119, §§ 48, 63, providing that any debt or legacy due from an executor or administrator, and any goods, effects, or credits in his hands as such, may be attached by the process of foreign attachment, but no person shall be adjudged a trustee by reason of any money or anything due from him to the principal defendant, unless it is at the time of the service of the writ upon him due absolutely and without depending upon any contingency, an executor is liable to be called upon to account on trustee process for the estate, both real and personal, intended for the judgment debtor, though on the settlement there may be proved to be nothing due him. *Cutter v. Perkins*, 47 Me. 557.

And where a testator provided by his will

Nolan and garnished Charles B. Gray and Edward Y. Swift, executors of the last will and testament of Aaron C. Fisher, deceased. Nolan brought suit against Fisher, and upon his death that suit was revived against the executors. Nolan recovered a judgment, which was affirmed by this court. 111 Mich. 56, 69 N. W. 96. The executors filed a disclosure, in which they admitted the judgment against them, and that the money was in their hands ready to be paid to such persons as were legally entitled to receive it. The court quashed the proceedings on the ground that a suit of garnishment would not lie against an executor or administrator. The court granted the order, evidently relying upon *White v. Ledyard*, 48 Mich. 264, 12 N. W. 216. That case differs in its facts from this, in that the garnishee defendant died without making disclosure, and the

cause was revived against his administrator, while in this the original suit is directly against the executors. The reason for that decision is found in this statement: "When the cause was revived against the administrator, he, as such, had neither the requisite knowledge nor authority to make a disclosure binding upon the estate." Clearly this statement does not apply to the present case, where the liability of the garnishee executors to Nolan is fixed by the judgment of the court. That case came within the rule adopted by many courts,—that administrators and executors should not be harassed and delayed in the settlement of their estates by proceedings of this character. It does not hold that under no circumstances can the administrator be garnished, and the case there cited of *Blake v. Hubbard*, 45 Mich. 1, 7 N. W. 204, does not

that all his real and personal property should be sold by his executor, and after the payment of debts, legacies, and expenses the residue to go to two designated persons, and the executor was summoned as trustee of one of them before he could ascertain whether on the settlement of the estate there would remain any balance to be paid to him under the residuary clause, the case may be continued until the estate is so far settled as to ascertain the amount of the residuary fund, and the executor may be required to make further disclosure showing the facts when ascertained, and he will be chargeable as trustee for whatever sum may be found to be in his hands belonging to such legatee. *Ibid.*

The contingency referred to in that statute is one which may prevent the principal from having any claim upon the trustee or right to call on him to account, and not one which might go only to show on an accounting that there was nothing due. *Ibid.*

And the liability of an executor or administrator as trustee for a legatee is not necessarily to be determined upon his disclosure made at the first term, where there are matters to be settled afterwards in order to ascertain the fact and amount of the trustee's indebtedness to the principal defendant. *Ibid.*

But an administrator whose intestate gave a negotiable promissory note to his creditor is not chargeable under the Maine statute for that cause as the trustee of the creditor, though the note may have been presented by the promisee for allowance against the estate. *Commercial Bank v. Neally*, 39 Me. 402.

So, a legacy to a judgment or attachment debtor may be reached by garnishment process against the executor, issued and served before the final order of distribution, under Iowa Code, § 2976, providing that an executor for money due from the decedent to the defendant may be garnished, as garnishment statutes are remedial in their nature, and should be broadly construed for the advancement of the remedy. *Boyer v. Hawkins*, 86 Iowa, 40, 52 N. W. 659.

And the rule that goods and assets unadministered in the hands of an administrator are *in custodia legis*, and not subject to attachment, is altered by Miss. Rev. Code, 379, art. 24, providing that executors and administrators may be garnished for a debt due by their testator or intestate to the defendant. *Thrasher v. Buckingham*, 40 Miss. 67; *Holman v. Fisher*, 49 Miss. 472.

And as a garnishment proceeding is in the nature of a suit, and also of a final process, such a proceeding against an executor or administrator, brought by a creditor of the estate, is

not prohibited by Miss. Code 1857, p. 379, prohibiting suits against insolvent estates, though the estate is insolvent. *Ibid.*

So, an executor or administrator is liable to be summoned as garnishee under Mo. Rev. Stat. § 6220, after the making of an order of distribution or for the payment of a legacy. *Godman v. Gordon*, 61 Mo. App. 685.

And as a garnishment is one of the modes pointed out by statute by which defendant's credit may be sequestered to apply to the satisfaction of the plaintiff's judgment, and is not a suit, Mo. Rev. Stat. § 6124, providing that no justice of the peace shall have jurisdiction to hear or try any action against an executor or administrator, does not deprive a justice of jurisdiction in a garnishment proceeding against an executor or administrator. *Ibid.*

So, under Ala. Code, § 1917, providing that no suit must be commenced against an executor or administrator as such until six months after the grant of letters testamentary or of administration, as modified by §§ 2520, 2522, thereof, providing that executors and administrators may be garnished for debts due the legatees or distributees, but no judgment can be rendered against them until a settlement of the estate, unless they assent to the legacy or admit assets to pay the amount claimed out of the distributive share of the debtor, and no judgment can be rendered on the answer of an executor or administrator until the lapse of eighteen months after the grant of letters, the process of garnishment may issue against an executor or administrator before the lapse of six months after the grant of letters of administration, but no judgment can be rendered against him as such until the estate is finally settled. *Moore v. Stainton*, 22 Ala. 831.

And an attachment will lie under Clay's (Ala.) Dig. 58, § 14, providing that in case of the death of any debtor residing out of the limits of the state having lands or other property therein, a creditor resident within the state shall in like manner be entitled to recover by attachment against the executors or administrators, in favor of the resident creditor against a foreign executor or administrator of a deceased nonresident debtor, but to authorize an attachment against the foreign executor or administrator it must appear that the deceased debtor was a nonresident at the time of his death, and when the attachment was sued out against the nonresident debtor himself while living, the suit cannot be revived against his foreign executor or administrator. *Branch Bank v. McDonald*, 22 Ala. 474.

And an affidavit for garnishment under Ala. Code, § 2520, allowing a judgment creditor of

support the proposition. We have held that a receiver may be garnished with the permission of the court. *Cohnen v. Sweeney*, 105 Mich. 643, 63 N. W. 641. Under the disclosure in this case there is no embarrassment of the executor or delay in settling the estate. The right of Mr. Nolan is fixed by the judgment, and the executors have the money with which to pay it. Courts are not uniform in their holdings upon this question. There are those which hold that when the rights of all parties have become fixed, and all that remains is the payment of the money, which is in the hands of the admin-

istrators or executors, the fund is subject to garnishment. Rood, in his admirable work on Garnishment, says that "the great preponderance of modern authorities, proceeding upon the principle that when the reason for the rule ceases the rule should not apply, holds that, when the purposes of the court have been fully accomplished in respect to the particular funds, by a final decree or order for payment of the same to the defendant by such officer, or his becoming directly and absolutely accountable to the defendant therefor without such order, such property or credit may be reached by gar-

a distributee to sue out process of garnishment against the administrator of the estate, should be made by the real owner of the judgment, and not by the plaintiff of record. *Jackson v. Shipman*, 28 Ala. 488.

So, process of garnishment may be served upon an executor or administrator under Ga. Code, § 3498, providing that garnishment will issue for any debt or demand owing by an estate to any other person if the creditor will swear, in addition to the oath required in ordinary cases, that his debtor resides without the state or is insolvent; and in such cases the executor or administrator shall not be compelled to answer the garnishment until the estate in his hands is sufficiently administered to enable him to safely answer the same, though the twelve months prescribed for the protection of executors and administrators from suit have not expired; but he need not answer until he is enabled from the administration of the estate safely to do so, the effect of the garnishment being to retain in his hands the property finally to be ascertained and disposed of by the court upon consideration of all the priorities and equities of existing claimants. *Sapp v. McArdle*, 41 Ga. 628.

And where garnishments are issued in suits against a legatee and served upon an executor, and the executor pays over to the attorney of the legatee his share of the estate less an amount sufficient to cover the garnishment, taking from such attorney a receipt specifying the purpose of the payment, and stating that the amount that the executor was required to pay on such garnishment should be deducted from the sum retained and the balance paid over to the legatee, the receipt is not evidence of an appropriation of the sum retained, or of any part thereof, for the benefit of the garnishment creditors. *Raele v. Moore*, 58 Ga. 94.

So, a foreign attachment under Conn. Gen. Stat. § 1231, providing that where any debt, legacy, or distributive share is or may become due from the estate of any deceased person to a defendant in a civil action in which a judgment for money damages may be rendered the officer may be directed to leave a true attested copy of the writ and complaint with the executor or administrator, and that the amount which might become due from such executor or administrator should thereby be secured in the hands of such garnishee, to pay such judgment as the plaintiff might recover, is not invalidated and rendered nugatory by the fact that the will had not been approved by the probate court at the time the officer left a copy of the complaint with the executor therein, though a judgment could not be rendered against the defendant until the time had come when, if the attachment had not been made, it became the duty of the executor to turn over to the judgment debtor the legacy or distributive share to which he was entitled. *Johnes v. Jackson*, 67 Conn. 81, 84 Atl. 709.

But an allowance made under a statute authorizing it, out of the estate of the deceased person for the support of his widow or family during the settlement of the estate, is not a debt from the estate to her which her creditor can intercept by attachment or garnishment on its passage from the estate to her in the hands of the administrator, under a statute providing that when any debt, legacy, or distributive share is or may become due to anyone from the estate of a deceased person his creditor may attach it in the hands of the executor or administrator. *Barnum v. Boughton*, 55 Conn. 117, 10 Atl. 514.

1. Statutes as to attachment execution.

Attachment execution seems to be merely the name adopted by the Pennsylvania legislature and most of her courts for garnishment differing from it in no substantial particular, and the cases with reference to attachment executions are treated separately, only because of their number and importance.

The several acts of assembly in Pennsylvania relating to execution attachments upon legacies or distributive shares are *in pari materia*, and, taken together, they give the creditor the right to succeed to the defendant's interest in a legacy or distributive share arising out of a decedent's estate by process of attachment execution without regard to the relations of the garnishee. *Gochenaur v. Hostetter*, 18 Pa. 414.

And a legacy or distributive share of a debtor in the proceeds of real estate may be levied upon and attached under attachment execution under Pa. act July 27, 1843, § 1, and April 13, 1843, § 10, in whose hands or possession whatsoever the same may be. *Ibid*.

And under Pa. act April 13, 1843, § 10, providing that where a legacy is given or lands devised to any person or persons by will it shall be subject and liable to attachment in the hands or possession of the executor, or in whose hands or possession soever the sum may be, a legacy may be attached and levied upon by an attachment execution laid in the hands of the executor, or a purchaser at a sale of the testator's real estate under the will as garnishee. *Baldy v. Brady*, 15 Pa. 103.

So, under that act and the act of April 10, 1849, lands devised to any person or persons, and any interest which any person or persons may have in real or personal estate of any decedent by will or otherwise, may be attached and levied upon in the hands of the representative of the decedent in satisfaction of any judgment against the person entitled thereto, in the same manner as debts are by law made subject to execution, and the fact that the interest in land has been turned into money does not affect the right. *Straley's Appeal*, 43 Pa. 89.

And a foreign attachment will lie against a legacy or distributive share under the Pennsylvania statute before any settlement of the estate of the decedent, and it is in the power of

nishing such officer." Rood, Garnishment, §§ 32, 33, and authorities there cited. It must be understood that we are not holding that executors and administrators are generally liable to this process, but only in those cases where their liability to the principal defendant has been fixed, and nothing remains but to pay over the money. Whether an order has been made by the probate court directing the executors to pay the debts as provided in 2 How. Anno. Stat. §§ 5925 *et seq.*, does not appear. No such order is necessary to authorize them to pay.

the court to mold the judgment against the executor or administrator into such form that no injustice shall be done to anyone. *Sinnickson v. Painter*, 32 Pa. 384.

And evidence tending to show that a prior assignment of a legacy or distributive share attached is fraudulent against creditors is admissible upon the trial of a proceeding by foreign attachment against a legatee or distributee in which the executor was summoned as garnishee. *Ibid.*

So, in *Baker's Appeal*, 108 Pa. 510, 56 Am. Rep. 231, an attachment execution on judgments against a legatee issued against the executors was sustained, but the question in the case was not as to the right to proceed against the executors as garnishees, but as to the right of the garnishees to set up title to the property in themselves by virtue of a previous assignment.

The earlier Pennsylvania cases, decided under the early statutes, cling to the idea that before an estate is ready for distribution the executor or administrator should not be permitted to be interfered with by garnishment.

Thus, a supposed or potential distributive share in the estate of a deceased person arising out of personal estate is not subject to attachment in execution immediately after the death of the ancestor, and the executor or administrator cannot be summoned as garnishee with reference thereto. The creditor is obliged to wait until settlement of the administration account by the administrator so as to make it manifest whether a distributive share exist or not. *McCreary v. Topper*, 10 Pa. 419; *Bank of Chester v. Ralston*, 7 Pa. 482.

In *Bank of Chester v. Ralston*, 7 Pa. 482, *supra*, *Ross v. Cowden*, 7 Watts & S. 376, *infra*, was distinguished on the ground that the debt in that case was considered by the court to be a liquidated debt due to the executor in a sum certain, and therefore liable to be attached on a judgment against him.

It is held, however, by the later Pennsylvania cases to be the rule under later statutes that a foreign attachment will lie against a legacy or distributive share before any settlement of the estate of a decedent, and that it is within the power of the court to mold the judgment against the executor or administrator as garnishee into such form that no injustice shall be done to anyone, and that this rule is applicable to attachment executions under Pa. acts April 13, 1843, and April 10, 1849. *Lorenz v. King*, 88 Pa. 93.

And that an attachment execution issued upon a debt due to the defendant from an insolvent estate laid in the hands of the executor of the estate is not premature under Pa. acts April 13, 1843, and July 27, 1843, though laid before the filing and confirmation of the auditor's report and before the amount to which the debtor would be entitled was ascertained. *Chambers v. Baugh*, 26 Pa. 105.

And judgment will be entered against garnishees when their answers to interrogatories admit an indebtedness to the defendant upon an 47 L. R. A.

No such claim is made. The estate is settled, except the payment of the debts and the distribution of the estate in accordance with the will. Nothing but payment remains to be done. The executors cannot be embarrassed, as they admit they are ready to pay. If executors can ever be garnished, I see no reason why they cannot in this case. We think the court was in error in quashing the proceedings, and therefore the writ should issue, but without costs.

Long, Ch. J., concurred with Grant, J.

annuity for a certain sum, although the garnishees were the executors and trustees under a will which created the annuity, and they had not as yet settled the estate which was solvent, and no arrangement had been made for the payment of the annuity, and no funds had been set apart for that purpose. *Rhodes v. Kemple*, 12 Pa. Co. Ct. 470.

And an attachment execution upon the distributive share of a son in the proceeds of real estate directed by the testator to be sold by his executors, laid in the hands of an agent appointed by one of the executors, residing in the county where the land was situated, to sell the real estate, as garnishee, takes precedence over a subsequent attachment execution issued on a judgment in another county against the son, and laid in the hands of the other executor as garnishee. *Gochensaur v. Hostetter*, 18 Pa. 414.

In the above case, *Hartle v. Long*, 5 Pa. 491, *supra*, III., *Hess v. Shorb*, 7 Pa. 231, *infra*, VIII., and *Bank of Chester v. Ralston*, 7 Pa. 482, and *McCreary v. Topper*, 10 Pa. 419, *supra*, were distinguished upon the ground that the statutes under which they were decided had been changed, the court saying that there seems to have been a persevering conflict between the legislature and the court as to a creditor's right to attach his debtor's interest in a decedent's estate, and that it was time such contests should cease, and the acts of assembly be permitted to have free course.

But while an attachment execution will lie against a party as garnishee in his own right and as executor of another to attach his interest in a legacy or distributive share before settlement of the decedent's estate under Pa. statute, where the amount of such interest can only be ascertained upon the settlement of the decedent's estate, the jurisdiction of the orphans' court is exclusive, and the common pleas cannot determine the amount of the interest. *Maurer v. Kerper*, 102 Pa. 444.

And in *Allison v. Willson*, 13 Serg. & R. 330, it was held that on the sale of land made by an administrator *de bonis non* after the death of a widow, under provisions in her husband's will for such sale and the division of the money equally amongst the testator's four children, the administrator, and not a creditor who had obtained judgment against a son before the sale, is entitled to receive the money; but this was an amicable suit brought to determine the rights of the parties, and not a garnishment.

So, an attachment of all the interest of and all the legacies given to a son under a will directing that the testator's widow shall have his mansion farm for life, and if any of his children should wish to hold the old mansion property after two of them arrive at full age they may do so by agreement, or, if they cannot agree, they may get three disinterested persons to divide it for them, and directing a sale to the best advantage possible if it should not be taken by any of the children, in which proceedings are summoned as garnishees the wife and a son who were the executors under the

will, is binding under the Pennsylvania statute upon the son's share of the proceeds of the mansion farm sold under order of the orphan's court by the executors. *Neely v. Grantham*, 58 Pa. 433.

But legacies and devises or interests in realty and personality are not confounded by Pa. act April 13, 1843, § 10, Pamph. Laws, 235, subjecting all legacies given, and all lands devised, to any person, and any interest which any person may have in real or personal estate of any decedent, by will or otherwise, in the hands or possession of the executor or administrator, except legacies and distributive shares due married women, to attachment and levy in satisfaction of any judgment, in the same manner as debts are made subject to execution by law, and Pa. act 1849, § 11, Pamph. Laws, 620, authorizing the issue of process in the nature of an attachment at any time after the interest of the defendant in real or personal estate shall have accrued by reason of the death of a decedent; and therefore, an interest in decedent's real estate is not bound by a writ of attachment which on its face embraces no more than the defendant's interest or his distributive share in the personal estate in the representative's hands, where the return of service shows no attachment of lands or interests therein, and it is admitted that the representative of the decedent was not in possession of the land. *Roth's Appeal*, 94 Pa. 186.

In the above case, *Straley's Appeal*, 43 Pa. 89, and *Neely v. Grantham*, 58 Pa. 433, *supra*, were disapproved, and the court said that the latter case could not be regarded as ruling that the defendant's interest in real estate of the decedent is bound by an attachment of his interest in the personal estate only.

A decree of the orphan's court, however, directing distribution of a fund in the hands of executors or administrators, makes the executors or administrators personally liable therefor as well as liable in their official capacity; and after such decree the guardians of the poor of a city may issue a warrant of seisure under act March 31, 1812, 5 S. M. Laws, 392, against the person entitled to a distributive share to apply it to the support of his wife under that act, and attach all moneys, rights, and credits of the defendant in the hands of the executors or administrators. *Philadelphia v. Brennan*, 5 Pa. Dist. R. 116.

And a debt of a testator for which the executor, who was also a residuary legatee, had taken a note in his own name, may be taken on attachment execution against the executor for the payment of his own debt, where it appears that a number of years had passed since the death of the testator, and there was a sufficient estate to pay all debts and legacies. *Ross v. Cowden*, 7 Watts & S. 376.

An attachment execution from a justice of the peace, based on a judgment obtained before him, will lie against an administratrix in her representative capacity as garnishee to the decedent, and the justice's power of inquiry is not exhausted by the filing of the garnishee's answer, the right to test the truth of the answer before the justice being given by Pa. act 1845, § 1, 1 Purd. Dig. p. 999, pl. 125, which extends their jurisdiction to the issuing, trial, etc., of all processes required by the sections of the act of 1836 relating to attachments. *Strouse v. Lawrence*, 18 Pa. Co. Ct. 131.

A pecuniary legacy due to a legatee may be attached in the hands of the executor of the will in the manner provided for the service of a writ of summons in a personal action. *Purves v. Lex*, 19 W. N. C. 392.

g. Statutes as to foreign attachment.

The question as to whether or not executors 47 L. R. A.

and administrators are liable under statutes providing for foreign attachment, like that under the general attachment and garnishment statutes, depends upon the language of the statute in question.

Thus, Ind. Rev. Stat. 1848, p. 772, providing that the lands, tenements, hereditaments, goods, chattels, rights, credits, moneys, and effects of any and all persons not residents of the state are and shall be liable for the payment of debts and other demands by suit, to be instituted by process of foreign attachment, seems to embrace every species of property known to the law, and under it an unascertained distributive share of a decedent's estate in the executor's hands is liable to the process of garnishment under a judgment against the persons entitled to it on final settlement, though the order of the court therein would not take effect until the estate was fully and finally settled. *Stratton v. Ham*, 8 Ind. 84, 65 Am. Dec. 754.

And executors and administrators are subject to garnishment at the suit of any attachment creditor of the person who has money or choses in action in their hands under Ind. Rev. Stat. 188, § 942, though the distributees' shares of the decedent's estate are unascertained. *Simonds v. Harris*, 92 Ind. 505.

And an order for the payment of a distributive share of an estate in a garnishment proceeding against the administrator for a debt of the distributee binds a subsequent administrator so that he cannot in the settlement of his trust take credit for payment thereof to the distributee or legatee. *Ibid*.

And where lands are given by a will to the testator's wife for life, and their sale is directed at her death, the proceeds to be equally divided among five children, and the share of one of the children is attached by the creditor of such child, and the executor is garnished and a judgment obtained and the attached lands ordered sold, and the executor is ordered to pay on final settlement out of the debtor's distributive share a sum sufficient to satisfy the judgment, and the creditor buys the attached lands at sheriff's sale, and the executor dies, and an administrator *de bonis non* sells the land upon the death of the widow, the share of the debtor in the proceeds should be paid to his creditor who had become the owner of his interest by the sheriff's sale. *Ibid*.

So, under a provision of the New Hampshire statute relating to the process of foreign attachment, an executor or administrator is chargeable as trustee of an heir or legatee for any sum of money found to be in his hands on the settlement of the estate belonging to such heir or legatee. *Palmer v. Noyes*, 45 N. H. 174.

And an executor or administrator may be charged as trustee under process of foreign attachment, though no previous demand or presentation of his claim was made by the principal debtor. *Quigg v. Kittredge*, 18 N. H. 137.

And one who pays a judgment obtained against him, which judgment is afterwards reversed, has a right of action to recover back the money paid which he might enforce by presenting it to the executor of his debtor, and the executor therefore may be charged as trustee. *Ibid*.

But where process is served upon an executor as trustee under the New Hampshire statutes relating to foreign attachment before the settlement of the estate or before it is rendered certain that there will be anything in the hands of the trustee belonging to the defendant, the action will ordinarily be continued until the settlement of the estate, or until the liability of the trustee can be definitely settled and determined, when he will be required to disclose

and be charged or discharged according to the facts as they exist at the time of this judgment. *Palmer v. Noyes*, 45 N. H. 174.

So, in *Masters v. Lewis*, 1 Ld. Raym. 57, holding that the ordinary is not a debtor before goods come into his hands, and that garnishment can only be had where the garnishee is liable to an action by the defendant, it was said that where there is an executor or administrator a foreign attachment may well be allowed, because he may be sued or may sue.

In *Sandridge v. Graves*, 1 Patton & H. (Va.) 101, however, it was held that service of process of foreign attachment on an executor creates a lien on a legacy to an absent debtor in favor of the attaching creditor; and that a creditor at whose suit process of foreign attachment against an absent debtor is served on one of two executors, is entitled to priority of satisfaction out of the legacy to the absent debtor over an assignee of the legacy under an assignment dated the day after the service of the attachment on the executor; but that an assignment of a legacy takes effect from its date, and the assignee will be entitled to priority of satisfaction as against creditors who attach the legacy in the hands of the executor subsequent to the date of the assignment, though it does not appear that the assignment had been delivered to the assignee prior to the service of the process.

And an attachment will not lie under the Louisiana act against a nonresident executor. The person indebted must be a nonresident under that act; and as the executor was not personally indebted his absence furnishes no ground for the proceeding. *Debuys v. Yerby*, 1 Mart. N. S. 380.

And a writ of foreign attachment will not lie under the South Carolina act against an executor who is out of the state, as an executor or administrator represents the deceased person's estate, but he is not responsible for the acts of the deceased, the terms of the act confining the operation of an attachment to absent debtors, who were originally responsible in their own right. *Weyman v. Murdock*, Harp. L. 125.

And previous to the statute specifically applying to executors and administrators, a writ of foreign attachment could not issue in Pennsylvania against a legacy in the hands of an executor. *Shewell v. Keene*, 2 Whart. 832, 30 Am. Dec. 266; *Barnett v. Weaver*, 2 Whart. 418; *McCoombe v. Dunch*, 2 Dall. 73, 1 L. ed. 294.

And they could not be summoned as garnishees with reference to a demand formerly due from the decedent in his lifetime. *McCoombe v. Dunch*, 2 Dall. 73, 1 L. ed. 294.

And an administrator is not chargeable as trustee in a process of foreign attachment brought to recover a debt due from a creditor of the intestate, though the effects in his hands are the proceeds of a sale of real estate made by consent of the heirs and without license from the probate judge. *Waite v. Osborne*, 11 Me. 185.

For cases under statutes specifically providing for foreign attachment against executors and administrators, see *supra*, II. c.

As to effect of foreign attachment on assets coming to the hands of an executor or administrator after service, see *infra*, III.

b. Statutes as to attachment of absent, concealed, and absconding debtors.

Statutes with reference to the attachment of absent, concealed, and absconding debtors are usually held to be inapplicable to executors and administrators.

Thus, proceedings by attachment are inapplicable *47 L. R. A.*

cable for the purpose of compelling the settlement of the estate of a deceased person, or of enforcing payment by an executor or administrator of an individual demand contracted by the deceased without charging the executors with any breach of duty except a neglect to pay the debt. *Metcalf v. Clark*, 41 Barb. 45.

The New York statute with relation to attachment against absent and absconding debtors limits the remedy to a debtor who is indebted individually, and does not warrant proceedings against his personal representative. *Re Hurd*, 9 Wend. 465; *Jackson ex dem. Murray v. Walsworth*, 1 Johns. Cas. 372.

And while the provisions in the New York act with relation to attachment against absent and absconding debtors, declaring that the appointment of trustees shall be conclusive proof in all courts that the debtor was at the time absent within the meaning of the act, and that the appointment and proceedings previous thereto were regular, precludes all inquiry into the regularity of the proceedings, and estops the party from denying that he was an absent debtor, they do not prevent an executor or administrator from contesting the jurisdiction of the officer, upon the ground that the statute did not authorize the proceeding against a person acting in a representative capacity, so as to prevent him from raising such objection after such appointment of trustees is made. *Re Hurd*, 9 Wend. 465.

But while an executor or administrator cannot ordinarily be proceeded against as an absent debtor, where he enters on leasehold property held by the testator or intestate in his lifetime, or receives the rents and profits thereof, he is chargeable directly on the covenant of the lessee as an assignee, and, being personally liable, may be proceeded against by attachment under the act relative to absconding, concealed, and nonresident debtors. *Re Galloway*, 21 Wend. 32, 34 Am. Dec. 200.

And while an attachment cannot issue against an executor or administrator in his representative capacity for a demand against his decedent, it may issue, in a proper case, against persons holding the position of executor or administrator, for a debt contracted and owing by themselves, where they were doing business as a firm and traded under their firm name with the word "executors" added at the time of contracting the debt. *Wickham v. Stern*, 18 N. Y. Civ. Proc. Rep. 63, 9 N. Y. Supp. 803.

And in *Jackson ex dem. Murray v. Walsworth*, 1 Johns. Cas. 372, in which an attachment was issued under the statute with relation to absent and absconding debtors, and an appointment of trustees pursuant to the act was made, designating the debtors as certain persons trading together under a firm name, calling some of them trustees for others, and some executors, in describing the individuals composing the company, these additions were considered merely as words of description, so as to support the validity of the appointment and the proceeding, and it was held that they should be so considered, more especially after a lapse of time, and the acquiescence of the parties interested.

So, under the New Jersey statute authorizing the sheriff to attach the goods and chattels, rights and credits, moneys and effects, etc., of an absconding or absent debtor, a legacy may be attached in the hands of an executor or administrator when it was suable at common law and charged on land. *Taylor v. Woodward*, 9 N. J. L. 115, 17 Am. Dec. 462.

But a personal legacy cannot be reached in the hands of executors by attachment for a debt of the legatee under N. J. Rev. Laws, 50, § 3, until a refunding bond with two sufficient sureties is tendered to the executor and filed if re-

fused; but no such preliminary is required or necessary in the case of a legacy charged upon land. *Ibid.*

I. Statute as to attachment of property not capable of manual delivery.

In New York there is no statutory provision for garnishment. But by N. Y. Code Civ. Proc. § 649, subd. 3, an attachment upon debts or other property incapable of manual delivery was provided for to be carried into effect by a delivery by the sheriff of a certified copy of the warrant of attachment to the debtor or individual holding such property in his possession. This provision would seem to be calculated to accomplish at least something of what is accomplished by the process of garnishment in other states.

Under it a claim held by an attachment debtor against an executor for a legacy, being one which can be enforced by action under N. Y. Code, § 1819, or by proceeding before the surrogate under § 2717 thereof, is therefore personal property incapable of manual delivery, which can be attached by leaving with the executor a certified copy of the warrant, with a notice showing that the legacy is the property attached; and such a case is not within the provisions of N. Y. Code Civ. Proc. § 655, as amended in 1889, authorizing the sheriff, in aid of certain nonresident attachments, to maintain an action against the attachment debtor and any other person or persons to compel the discovery of anything in action or other property belonging to the attachment debtor, and of any money, thing in action, or other property due him or held in trust for him. *Backus v. Kimball*, 62 Hun, 122, 16 N. Y. Supp. 619.

But an executrix under a will which has not been established, with reference to which there is a contest, at a time when a special administrator is acting, is not an individual holding property within the meaning of N. Y. Code Civ. Proc. § 235, N. Y. Code Civ. Proc. § 649, requiring that the execution of an attachment upon any debts or other property incapable of manual delivery to the sheriff shall be made by delivering a certified copy of the warrant of attachment to the debtor or individual holding such property, as the executrix then has no power to represent the estate, and in case of such a service an application by the attachment creditor to the surrogate for direction to pay a judgment recovered by him against the decedent prior to his death will be denied, and the fact that the appointment of a special administrator had been concealed by his attorney will not preclude him from raising the objection. *Re Flandrow*, 92 N. Y. 256.

III. Interest and possession necessary to sustain.

The interest of a debtor in property, effects, or credits in the hands of an executor which will sustain a garnishment or trustee process must be tangible and susceptible of measurement.

Thus, an interest in property, real or personal, under a will which is so remote, contingent, or of such uncertain value that it cannot be fairly appraised and sold on execution, is not open to attachment in the hands of an executor or trustee under the will, either at common law or by statute. *Smith v. Gilbert*, 71 Conn. 149, 41 Atl. 284.

And Conn. Gen. Stat. § 1231, providing for securing a legacy or distributive share due or that may become due to a debtor from an executor by laying an attachment in the hands of an executor, and Gen. Stat. § 1258, providing that

when judgment is rendered for the plaintiff in an action by foreign attachment, any legacy or distributive share at the time of the attachment due or to become due to the defendant from any garnishee as an executor shall be liable for the payment of the judgment, do not authorize the attachment of an interest in property, real or personal, which is so remote, contingent, and of such uncertain value that it cannot be fairly appraised and sold on execution. *Ibid.*

And the interest of a child of a testator under his will giving his whole property to his wife, who was made executrix, to be used by her for the support and education of their children, and authorizing her to advance, at her discretion, a portion of the estate among the children, and to assist any of them who through loss or misfortune might be in want, is too uncertain, contingent, and indefinite to be subject to attachment in the hands of the executor by a creditor of the child. *Sturm v. White*, 8 Baxt. 197.

Nor is an administrator with the will annexed chargeable as trustee of a legatee under process of foreign attachment for a bequest of the testator's interest in a schooner, where it was only a small fractional undivided interest in it, and it does not appear that the vessel had ever been in the possession or under the control of the alleged trustee, or that the testator's interest in it had ever been sold or reduced to money. *Nickerson v. Chase*, 122 Mass. 292.

So, trustee process against an administrator for the debt of a surety on sundry notes of the intestate is unavailing where, when service of the writ was made, the surety had paid nothing, and there was no indebtedness of the estate. *Commercial Bank v. Neally*, 30 Me. 402.

And where the widow of a deceased husband, who at the time of his death owned with his wife as community property a stock of goods, continues, without administration, a mercantile business under the old name with the consent of the husband's heirs, receiving the profits, and some of the heirs assist in the business, holding themselves out to the world as having an interest in it, and the stock is from time to time replenished, and afterwards an administrator of the estate is appointed, and one who had furnished goods after the husband's death sues the widow and heirs as partners and garnishes the administrator, the court should ascertain, if possible, what part of the effects held by the administrator were the property of the deceased at the date of his death, and what had been since acquired by the defendants, as he would be chargeable as garnishee as to the effects since acquired only, and would not be chargeable with the effects of the defendants at the date of his death, as they are to be administered by him under the order of the court. *Cleveland v. Harding*, 67 Tex. 396, 3 S. W. 537.

See also *Hess v. Shorb*, 7 Pa. 231, *infra*, VI.

So, the property, effects, or credits must have come to the hands of the executor or administrator in the same capacity in which he was garnished.

Thus, an attachment execution served upon a person as executor of one decedent to satisfy a debt due from a legatee, will not bind property of the legatee coming to the hands of the representative as executor of another decedent. *Smith's Appeal*, 108 Pa. 508.

And a debtor of a person who died bequeathing his personal property to another, and appointing him his sole executor, which trust he accepted and caused the will to be proved, after which he died, is not a debtor of the executor of such legatee, because of his indebtedness to the estate of the first decedent, within the meaning of the law with relation to foreign attachment, so that a trustee process can issue

against the executor of the legatee as such. *Stanton v. Holmes*, 4 Day, 87.

And where a will leaves a legacy to the testator's son, and another to his granddaughter, and before the payment of the legacies the granddaughter dies, leaving her father her sole heir at law, the legacy of the granddaughter in the hands of the executor is not subject to attachment for the debt of her father, under *Mass. Rev. Stat. chap. 109, § 62*, providing that any legacy due from an executor, and any other goods, effects, and credits in the hands of an executor, may be attached in his hands by the process of foreign attachment, as administration on her estate should have been taken out, and the legacy would have been an asset in the hands of her administrator, and furnishes no ground for charging the original executor. *Stills v. Harmon*, 7 Cush. 406.

Nor can one to whom a testator devised and bequeathed all his property on the condition that he should pay off his debts and the legacies given by the will, appointing him executor of the will, be summoned as trustee of one of the legatees named in the will who was indebted on promissory notes which were over due in an amount larger than the legacy, where he accepted the devise and bequest made to him, but declined the trust of executor, and another was appointed administrator with the will annexed. *Green v. Nelson*, 12 Met. 587.

And a father who, as administrator of his deceased son's estate, recovers a judgment against a railroad company for causing the son's death, has no property interest therein as administrator which is garnishable, as, under *Iowa Code, § 3731*, it immediately descends to the father and mother of the deceased, and is not subject to the payment of his debts, and the administrator cannot be garnished on account thereof for his distributive share to satisfy a judgment against himself individually, as the effect of such a proceeding would only be to give the plaintiff another judgment for his claim. *Casady v. Grimmerman*, 108 Iowa, —, 77 N. W. 1067.

As to the possession by the executor or administrator necessary to sustain the garnishment or trustee process, there is some contrariety of opinion. But it would appear to be settled that actual possession of the estate by a qualified representative would be necessary.

Thus, a garnishee order *not*, obtained against the administrators of a testator to reach a sum ordered to be paid to a separate account in an administration suit, will not be enforced where the estate is being administered by the court, and has been turned over to the court. *Stevens v. Phelps*, 44 L. J. Ch. N. S. 689, L. R. 10 Ch. 417, 23 Week. Rep. 716.

And an intestate's goods or effects are not in the hands of his administrator as such so as to render the administrator liable as the trustee of one entitled to a distributive share in the estate under *Mass. Rev. Stat. chap. 109, § 62*, providing that any debt or legacy due from an executor or administrator, and any other goods, effects, or credits in the hands of an executor or administrator as such, may be attached in his hands by the process of foreign attachment, before the administrator has given bond for the discharge of his trust, where the statute provides that the administrator has no legal authority as such to take possession of decedent's effects until he has given bond. *Davis v. Davis*, 2 Cush. 111.

Mississippi Rev. Code, 379, art. 24, however, providing that executors and administrators may be garnished for a debt due by their testator or intestate to the defendant, is applicable whether the assets are in the hands of the executor or administrator himself, and he is proceeded against by garnishment, or whether they are in the hands of one who is a debtor to him as such, as the statute establishes the rule that the administrator may be garnished because the assets of the estate may be subjected to the payment of its debts in that way, and they are equally assets whether in the hands of the representative in the shape of money or money in the hands of others which they are bound to pay him. *Thrasher v. Buckingham*, 40 Miss. 67.

But it would appear to be immaterial, as a general rule, whether or not the particular fund sought to be reached had come to the hands of the executor or administrator at the time of the service of the process.

Thus, the fact that the funds for which an administrator is charged on trustee process came to his hands after the service of the process upon him in the original action cannot avail him as a defense against such trustee process. *Jewett v. Morrison* (Mass.) 55 N. E. 890.

When a suit is begun by trustee process in Massachusetts, and an administrator is summoned as trustee, the lien takes effect from the service of the process, and reaches the whole interest of the debtor in the personal estate that may eventually come into his hands. *Jewett v. Morrison* (Mass.) 55 N. E. 890; *Boston Bank v. Minot*, 3 Met. 507; *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. 915.

And therefore, where an administrator of an insolvent estate, after service of process upon him at the suit of a creditor of one whom the intestate owed, sells the real estate for the payment of debts under a license granted for that purpose, and receives the proceeds of the sale, and collects debts due to the intestate, and a distribution among the intestate creditors is ordered, the administrator will be held as trustee of the attaching creditor to the full amount of the dividend decreed to the creditor. *Boston Bank v. Minot*, 3 Met. 507.

And the fact that a fund from which the debts and legacies under a will are to be paid was to be derived in part from the sale of real estate, does not affect the liability of the executor or administrator to trustee process for a debt of the legatee under *Me. Rev. Stat. 1841, chap. 119, §§ 43, 63*, authorizing foreign attachment against executors and administrators, but providing that no person shall be adjudged a trustee unless the money due from him is at the time of the service of the writ due absolutely, and without depending upon any contingency. *Cutter v. Perkins*, 47 Me. 557.

So, a residuary fund in the hands of an executor to which a legatee was entitled on settlement of the administration under a will directing the sale of the real and personal property of the testator, is in his hands, within the meaning of *Me. Rev. Stat. 1841, chap. 119, §§ 43, 63*, so as to warrant trustee process against him, though at the time of the service of the process the sales had not been made, and the avails had not been received. *Ibid.*

Under the Vermont statute all property in the hands of an executor or administrator at the time of the service of process, which he comes into possession of before the disclosure, is subject to trustee process. *Parks v. Cushman*, 9 Vt. 320.

An administrator will not be held, however, on trustee process for a debt of a person entitled to a distributive share, where the process was served after the probate court had granted a license to sell the whole real estate or such part as might appear to be most for the interest of all concerned, but before the sale, as, if the administrator should decide to sell only enough to pay the debts, the remainder would descend to the heirs, and not be affected by the

process, while, if the heirs should advance money to pay the debts, no sale would be likely to be made, and therefore there would be no certainty that anything would ever come to the defendant from the sale. *Beverstock v. Brown*, 157 Mass. 565, 32 N. E. 901.

And the liability of an alleged trustee must be determined by the state of things existing at the time the writ is served upon him, under Mass. Pub. Stat. chap. 183, § 22, Gen. Stat. chap. 142, § 22, providing that debts, legacies, goods, effects, or credits due from or in the hands of an executor or administrator as such may be attached in his hands by trustee process; and where, at the time of the service of a writ upon an executor, there was insufficient personal property of the estate to pay the debts, and afterwards the executor obtained leave of the probate court to sell real estate for the payment of the debts, and he made such sale and paid the debts, and had a surplus remaining, and paid over to the defendant in the trustee process, who was a devisee and heir at law, his share of the surplus, he is not chargeable as trustee for the sum so paid over, as, until the debts were paid, the devisee had no claim against the executor. *Capen v. Duggan*, 136 Mass. 501.

In the above case, *Holbrook v. Waters*, 19 Pick. 354, and *Wheeler v. Bowen*, 20 Pick. 563, *supra*, II. c. were distinguished upon the ground that in those cases the only uncertainty was as to the amount; and *Boston Bank v. Minot*, 3 Met. 507, *supra*, was distinguished and explained, the court saying that the debt which is attached in the case at bar was at the time the writ was served a fixed liability of the estate and of the executor, who was bound to pay it out of the assets from whatever source they might come.

In *Cash Threshing Mach. Co. v. Miracle*, 54 Wis. 295, 11 N. W. 580, however, it was held that where an executor at the time he is served with process as garnishee is not liable thereto because no final order for the distribution of the estate had been made, he is not rendered liable by the circumstance that the garnishee action remained in court until after the order of distribution.

And in *Fowler v. McClelland*, 5 Ark. 188, it was held that an administrator against whom an allowance has been made by the probate court in favor of a creditor of the estate, and who has been ordered to pay him a *pro rata* dividend, is not liable to garnishment at the suit of a creditor of that creditor in respect to such allowance, either individually or as an administrator.

But see, *supra*, *Boston Bank v. Minot*, 3 Met. 507.

IV. Garnishment of husband's interest in wife's legacy or distributive share.

Under the common-law rule now generally superseded by statute, vesting all property owned or accruing to a wife during coverture in her husband, the general rule was that a legacy or distributive share to which the wife became entitled during the marriage was subject to garnishment or attachment in the hands of the executor or administrator for the debts of the husband.

Thus, the interest of a husband in a distributive share of an intestate estate to which his wife is entitled, though not reduced to possession, may be attached by trustee process for his debt, where the law is that the interest of the husband, to the extent he possesses it, may be seized by his creditor, as the trustee process operates as a statutory assignment of the interest of the husband. *Wheeler v. Bowen*, 20 Pick. 563; *Parks v. Cushman*, 9 Vt. 320.

47 L. R. A.

And this is the rule though no possession had in fact been taken by him, where, under the law, properties of the wife became upon marriage the absolute property of the husband. *Parks v. Cushman*, 9 Vt. 320.

And the interest of a husband in a legacy accruing to his wife during the coverture is subject to be attached in the hands of the executor by trustee process at the suit of a creditor of the husband, under Mass. Rev. Stat. chap. 109, § 62, providing that any debt or legacy due from an executor or administrator, and any other goods, effects, and credits in the hands of an executor and administrator as such, may be attached in his hands by the process of foreign attachment, the fact that the legacy was given to the wife not diminishing the liability of the trustees, as all property which accrued to a wife forthwith vests in the husband, either absolutely or conditionally. *Holbrook v. Waters*, 19 Pick. 354.

So, under that rule the rights and interest of an absent debtor in and to the share of his wife in the personal estate of her father in the hands of the executor are liable to be proceeded against and charged by the creditors of such debtor by way of foreign attachment. *Vance v. McLaughlin*, 8 Gratt. 289.

And a wife's interest in a recognizance in the orphan's court, given to pay to the heirs at law of a decedent, of whom the wife was one, their several shares of the valuation of the decedent's real estate, may be attached for the debt of her husband. *Babb v. Elliott*, 4 Harr. (Del.) 406.

But the interest of a wife in her ancestor's estate cannot be held by trustee process for the debts of her husband, where the extent of her rights have not been ascertained, and there has been no decree of distribution. *Short v. Moore*, 10 Vt. 446.

And an administrator having in his hands a distributive share of an estate which accrued to a married woman who is summoned as trustee in an action against her husband will be discharged if the husband died while the action was pending, as nothing short of a judgment will amount to such a reduction to possession as to bar the wife's right to survivorship. *Strong v. Smith*, 1 Met. 476.

And the commencement of proceedings by foreign attachment by a creditor to reach the rights and interests of the absent debtor in and to the share of his wife in the personal estate of her father in the hands of an executor is not in legal contemplation equivalent to the reduction to possession by the latter of the thing sought to be charged: it only creates a lien in favor of the creditor, which is liable to be defeated by the husband's dying pending the proceeding leaving his wife surviving him, so that the attachment against the executor would thereby be defeated. *Vance v. McLaughlin*, 8 Gratt. 289.

And it was held in Pennsylvania that a husband has but a naked power over a bequest to his wife, and one which he is not obliged to exercise in favor of his creditors, and that such a bequest is not subject to attachment for the husband's debt, or to garnishment therefor in the hands of the executor. *Dennison v. Nigh*, 2 Watts, 30.

See also *Benton v. Dutcher*, 3 Day, 440, *infra*, VI.

V. Rule where the representative is the debtor.

The fact that the executor or administrator is himself the principal debtor does not, as a general rule, at least outside of Iowa, affect his liability to garnishment with respect to a legacy or distributive share to which he is entitled.

Thus, a plaintiff in garnishment may attach funds due from an estate to the representative

of such estate who is the debtor of such plaintiff, though the representative and the garnishee are the same person, as in contemplation of law the individual and the executor are two different persons. *Dudley v. Falkner*, 49 Ala. 148; *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905.

And a judgment rendered in favor of a creditor of a distributee in a garnishment proceeding against the administrator of the estate of a deceased person, who is the debtor and is interested as a distributee, is conclusive upon the administrator where it appears that he filed an answer denying any indebtedness, and, on a traverse thereto, the issue was found against him, and it is prima facie valid and binding upon the sureties on the administrator's bond; and the burden rests on the administrator, in an action thereon brought by the plaintiff in such judgment, to prove the contrary. *Brown v. Wiley*, 107 Ga. 85, 32 S. E. 905.

And an attachment execution issued to attach a legacy due to the defendant will not be dissolved merely because the defendant himself is the executor of the will under which he is entitled to the legacy, and is as such executor summoned to answer as garnishee. *Union Nat. Bank v. Fagan*, 84 W. N. C. 20; *Pleasants v. Cowden*, 7 Watts & S. 380.

But the party should plead to it, and then raise the question whether the debt was one of the estate, or belonged to the executor himself. *Pleasants v. Cowden*, 7 Watts & S. 380.

And a debt of a testator for which the executor, who was also a residuary legatee, had taken a note in his own name may be attached by process of execution against the executor for the payment of his own debt, where it appears that a number of years had passed since the death of the testator, and that there was an abundance of estate besides to pay all debts and legacies. *Ross v. Cowden*, 7 Watts & S. 376.

And a debt due to a party as the executor and residuary legatee and devisee in his father's will may be attached under Pa. act of assembly of June 16, 1836, and applied toward the payment of a judgment obtained against him for a debt due from him in his own right, where it appears that there were assets, both real and personal, belonging to the estate, abundantly sufficient to satisfy all the debts thereof, and all prior legacies given by the will, so that the debt attached, if recovered by the defendant himself, would belong to him absolutely, and he would have a perfect right to apply it to the payment of his own debts, or to dispose of it as he pleased. *Pleasants v. Cowden*, 7 Watts & S. 379.

In the above case, *Shewell v. King*, 2 Whart. 332, 30 Am. Dec. 206, *supra*, II. e, was distinguished upon the ground that there the legatee was not entitled to receive the legacy without first giving the executor a refunding bond.

But a debt due to an administrator, who is himself sole distributee, is not subject to attachment for his private debt, or to garnishment in his hands as administrator until settlement of his administration account. *Bank of Chester v. Ralston*, 7 Pa. 482. But see *Pennsylvania cases*, *supra*, II. c, indicating a different rule under subsequent statutes.

And under Iowa Code, § 2976, providing that an executor may be garnished for money due from the decedent to the defendant, the owner of a judgment against his debtor in her individual capacity cannot maintain a proceeding for garnishment against her as administratrix of her deceased husband on the claim that she, as administratrix, owed a debt to herself as an individual, the property sought to be reached being money which the defendant as administra-

trix owed to herself, as both the statutes and common law upon the subject contemplate that there are three persons in every garnishment proceeding. *Shepherd v. Dridenstine*, 80 Iowa, 225, 45 N. W. 746.

In the above case, the court refused to follow *Dudley v. Falkner*, 49 Ala. 148, *supra*, on the ground that in Iowa the judgment in an ordinary garnishment proceeding is regarded as a personal one.

So, the general rule has been held to be that commissions of an executor or an administrator are deemed to be appropriated as they are earned, and they are not subject to attachment or garnishment at the suit of his judgment creditor in his own hands or in those of his co-executors. *Adams's Appeal*, 47 Pa. 94.

But in *Dudley v. Falkner*, 49 Ala. 148, it was held that an executor may be summoned as garnishee under execution on a judgment against him in his individual capacity to reach an indebtedness due him from the estate for services as executor.

So, an administrator to whom a distributee of the intestate owes a personal debt cannot sue his debtor personally, and summon himself as executor of the estate of the intestate as trustee, and cannot be charged as such trustee in such a proceeding. *Hoag v. Hoag*, 55 N. H. 172.

See also *Glidden & J. Varnish Co. v. Joy*, 8 Ohio, C. C. 157, *supra*, II. b; *Green v. Nelson*, 12 Met. 567, *supra*, III.; *Casady v. Grimmelman*, 108 Iowa, —, 77 N. W. 1067, *supra*, III.; *Zimmerman v. Briner*, 50 Pa. 535, *infra*, VI.

VI. Effect of trust conferred upon representative.

An executor or administrator with the will annexed, upon whom the will confers an active trust, is not subject to garnishment or trustee process or attachment with reference to a debt owing by a devisee or legatee, and the question whether or not a trust is an active one which will prevent a garnishment or attachment seems to depend upon whether or not the representative is required to hold and manage the estate, or exercise a discretion with reference to its disposition, or perform some other act with reference to it other than merely to turn it over to the persons entitled to it.

Thus, a statute providing that debts, legacies, goods, effects, or credits due from or in the hands of an executor or administrator as such may be attached in his hands for a debt of an heir at law or legatee is not applicable where, in addition to the ordinary powers and duties of an executor, a trust is created by the will, or arises by implication of law out of the terms in which the personal estate is disposed of, by which the title to the property is vested in executors as trustees to hold, manage, and invest the same for the use and benefit of a *cestui que trust* for life. *Carson v. Carson*, 6 Allen, 397.

And a fund in the hands of an executor, consisting of the proceeds of property sold under a devise directing such sale and that the proceeds should be held for the benefit of the wife and children of the testator, one third of the interest of the real estate to be paid to the wife during her natural life yearly by the executor, is held by him strictly as a trustee, and he cannot be summoned to answer as a garnishee of his *cestui que trust*. *Plunkett v. Le Huray*, 4 Harr. (Del.) 436.

So, a will giving to the husband of the testatrix the proceeds of her farm which was to be sold, to be prudently used if needed by him for his support during the remainder of his life, or if not used, or if any should be left after the

expenses of his sickness and funeral are paid, the balance to go to their children, must be regarded as creating a trust, and the proceeds of the farm cannot be taken by foreign attachment in the hands of the executor to pay a general indebtedness of the husband. *Chase v. Currier*, 63 N. H. 90.

And the interest of a beneficiary under a will empowering the executor to hold, use, and employ and expend a designated sum of money as he shall deem proper for the benefit of such beneficiary, and empowering him to invest it as he shall deem proper, and providing that any part left after his decease shall pass to another, cannot be attached in the hands of the executor and trustee by trustee process in an action against the beneficiary. *Banfield v. Wiggins*, 58 N. H. 155.

And the executor and trustee under a will is not liable under trustee process as trustee of one of the beneficiaries under the will and of the husband of the other, where the will gave the testator's property to him in trust to annually expend the income thereof, and so much of the principal as should in his judgment be necessary, at his discretion, for the proper support of the testator's two daughters, where the trustee had invested the funds in a mortgage on real estate, on which interest was payable annually, though he had received interest which was not called for by the persons entitled thereto, and which had remained and accumulated in his hands. *Hinckley v. Williams*, 1 Cush. 490, 48 Am. Dec. 642.

Nor is an executor under a will chargeable in his individual capacity as trustee on account of money received for a legatee in the performance of his duty as executor, where the will gave a sum of money to the legatee to be paid by the executor within six months, and gave certain real estate absolutely and the use and income of the residue and remainder of the estate, both real and personal, to such legatee for life, and the executor retained the property of which the legatee was to have the income, and there had been no accounting in the probate court and no order of distribution, and where, though giving the legatee the management of the personalty, the trustee had not promised to pay the beneficiary the amount in his hands. *Husted v. Stone*, 69 Vt. 140, 37 Atl. 253.

In the above case, *Hoyt v. Christie*, 51 Vt. 48, *supra*, II. b, was distinguished upon the ground that in that case the estate had been fully settled and the share of the defendant therein fully determined, and the money which constituted the defendant's share had ceased to be the money of the estate and had become the money of the defendant.

So, where a testator by his will either in express terms or by legal implication gave the income of his personal estate to one for life, and on his or her decease to another, or left it on the termination of the life interest undisposed of, so that it would then go to his heirs at law, and did not in terms place it in trust with any trustee other than the executor, it is the province and duty of the executor to hold it and pay over the income from time to time to the legatee for life, and at the death of such legatee to pay over the principal to the person who may by the will be entitled to it, or, if not disposed of by will, to distribute it among the heirs at law; and in such cases executors are not chargeable under trustee process at the suit of a creditor of one of the heirs at law, as they do not hold the property merely in their capacity as executors. *Carson v. Carson*, 6 Allen. 397.

And the interest of one of seven children of a testator under his will giving his whole property to his wife, who was the executrix thereof, 47 L. R. A.

to be used by her for the support and education of their children, and allowing her to advance, at her discretion, a portion of the estate among the children, and to assist any one of them who through losses or misfortune might be in want, is too uncertain, contingent, and indefinite to be subject to attachment in the hands of the executor by a creditor of the child. *Sturm v. White*, 8 Baxt. 197.

And the reversionary interest in bank stock of one of the children of a testator who bequeathed to his wife the use of thirty shares in the Oxford Bank, said shares at her decease to be equally divided between his heirs, is contingent and not liable to be attached as his property in the hands of the executor, as, until the death of the mother, it cannot be ascertained who will be the heirs of the testator at the time the remainder will become due and payable. *Rich v. Waters*, 22 Pick. 563.

So, the process of foreign attachment contemplates an uninterrupted and continuous possession by the garnishee from the date of the attachment to that of the demand on execution, and where, under a will, a paramount right of possession exists in favor of the holder of a life estate, and it is uncertain whether after her death the enjoyment of the property will pass to the attachment defendant, and the executor has no power to hold enough of the personal property and money of the estate to pay the legacy until the happening of contingent events, the interest in remainder cannot be secured to a creditor by that process. *Smith v. Gilbert*, 71 Conn. 140, 41 Atl. 284.

And a will authorizing and directing the executors to sell the real estate of the testator and to pay over rents arising therefrom from the time of his death until the time of the sale, to designated persons as bequests, creates an active trust, and a sum of money in the hands of the executors from that source payable to one of the legatees, cannot be reached to satisfy a judgment creditor of such legatee. *Force v. Brown*, 32 N. J. Eq. 118.

Nor is the body of a fund created by a will giving moneys to a trustee in trust to pay the interest at his discretion to a beneficiary, and in case of his death without issue to pay the principal to the children of another, subject to attachment by a creditor of the beneficiary, and it cannot be garnished in the hands of an executor. *Still v. Spear*, 45 Pa. 168.

And the interest of a child under the will of his father directing the land to be sold by his executor after the death of his widow, and the proceeds distributed among his three children, cannot be attached in the hands of the executor as garnishee during the lifetime of the mother for a debt of the child, as at that time all the garnishee has in his hands is a naked and contingent power to sell the testator's land. *Hess v. Shorb*, 7 Pa. 231.

So, an annuity given by a will is not bound by an attachment execution issued upon a judgment against the annuitant and served upon the executor by whom the annuity is to be paid as garnishee, where it is not yet due. *Cany v. Day*, 2 Miles (Pa.) 412.

And where money is in the hands of an executor payable to a legatee in ten equal annual payments only so much of it can be held upon trustee process against the executor as is due and payable at the time the plaintiff takes his judgment. *Palmer v. Noyes*, 45 N. H. 174.

Nor can the executor of a deceased person be summoned as trustee in foreign attachment with reference to a legacy to the wife of the judgment debtor payable in three and six years from the testator's death at the suit of a creditor of the husband. *Benton v. Dutcher*, 3 Day, 440.

And an executor and trustee under a will providing a fund of \$25 per month for the support of a son, and placing it in the hands of the trustee for the son, is not subject to process with reference to the fund for the payment of a debt for which the *cestui que trust* or beneficiary was surety, under the Kentucky statute of 1796, making estates of every kind holden in trust subject to the like debts and charges of the person for whose use or benefit they are holden, as if he owned a like interest in the thing holden as he owns in the uses or trusts thereof. *Pope v. Elliott*, 8 B. Mon. 56.

And Ky. act 1796, 1 Stat. at L. 91, providing for reaching debts due by a resident to a non-resident or absent debtor, or effects of the latter in possession of the former in the state, and act 1837, 3 Stat. at L. 12, extending the remedy so as to embrace lands as well as debts and effects, do not authorize proceedings against anything in the hands of a resident creditor of the absent debtor but lands, debts, or effects, and do not embrace a monthly support in the hands of an executor and trustee provided in a will for the absent debtor. *Ibid*.

But a legacy to one or two executors of a will, payable out of real estate of the testator to be sold by them after the death of the testator's widow, may be attached by a creditor of one of the executors in their hands, and recovered. *Zimmerman v. Briner*, 50 Pa. 535.

And while the will of a testatrix giving to her brother a designated sum, the said sum to be received, held, and applied by her executors, and directing the lawful interest or proceeds of the same to be annually paid over to the legatee, places the principal of the legacy beyond the reach and control of the legatee or his creditors, it leaves the interests and proceeds which are to be paid annually entirely within his power, so that the executrix might be garnished with reference thereto for his debt. *Mathews v. Park*, 1 Pittsb. 22.

And a will giving the residue of the testator's estate to executors to receive and collect rents, issues, profits, and dividends thereon from time to time, and to pay, apply, and dispose of the rents, issues, interests, and dividends to his son, does not protect the income from attachment execution, or the administrators from garnishment with reference thereto. *Harrison v. McCana*, 11 W. N. C. 239.

So, in *Park v. Matthews*, 36 Pa. 28, it was held that \$5,000 bequeathed by a testatrix to her brother to be received and held by trustees, the interest or proceeds to be annually paid over to the legatee for his use and benefit, is attachable in the hands of the executors, because it is his in law and equity, and if the trustees were to withhold it he could sue them thereon.

And in *Hardenburgh v. Blair*, 30 N. J. Eq. 645, it was held that a legacy in the hands of an executor, held upon no other trust than to pay it over to the legatee, may be reached by a judgment creditor of the legatee, but where it is given to executors with directions to invest it and pay the interest and income to the legatee during life at such times and in such manner and amounts as the executor shall deem prudent, the fund is held in trust, and neither the principal funds nor accumulations of interest can be reached by a judgment creditor; but this was an action in equity and not in garnishment.

So, an attachment and garnishment will not bind funds in the hands of an executor or administrator for the payment of a debt of a legatee, where the legacy was given upon the express condition that the funds should not be liable to be attached or seized for the debts or moneys which the legatee might owe at the time 47 L. R. A.

of the testator's decease, but that the whole amount should be paid directly to her by the executor. *Beck's Estate*, 133 Pa. 51, 19 Atl. 302.

And where a testator by his will creates a trust for the benefit of his son, and provides that the income of his estate in the hands of his executor and testamentary trustee is not to be subject to attachment or sequestration for any debts or liabilities of his son, the fund cannot be attached in the hands of the executor and trustee under a decree of alimony obtained against the son by his wife, who had obtained a divorce from him. *Thackara v. Mintzer*, 100 Pa. 154.

And funds in the hands of an executor and surviving trustee in a will devising the testator's residuary estate in trust to lease and demise, and directing the investment of the personal estate and the collection of the rents, income, and profits, and providing that the income of the estate was not to be subject to execution attachment or sequestration for any debts or liabilities of his son, the *cestui que trust*, cannot be reached and seized under a warrant directed to the guardians of the poor for the support of the wife of the son whom he had deserted. *Guardians of the Poor v. Mintzer*, 16 Phila. 449.

But a deviser's intention to withdraw his gift from the devisee's creditors, which will defeat a garnishment of the devise in the hands of executors and trustees, will not be presumed from the surrounding circumstances of which the creditor has no record notice, where such intention is not expressed in, or necessarily implied from, the terms of the instrument creating the trust. *Pickens v. Dorris*, 20 Mo. App. 1.

In *Smith v. Moore*, 37 Ala. 327, however, it was held that a sum of money bequeathed to an executor or trustee in trust for a debtor, not subject to any debts he may have contracted before, and for his comfort and support may, under Ala. Code, § 2956, be subjected to equitable attachment for the payment of his existing debts.

It is not intended in the above subdivision to go into the question of trusts or the garnishability of trustees in general. The discussion is intended to be confined to the garnishment or executors or administrators with the will annexed, upon whom a trust has been conferred by the will.

VII. Set-off.

Set-off is allowed in case of garnishment or attachment of legacies or distributive shares in the hands of executors and administrators with the same liberality as in ordinary cases, the rule apparently being that the executor or administrator can interpose any set-off, or make any defense, against the substituted creditor that he might have interposed or made against the legatee or distributee.

Thus, an attachment creditor of a legatee under a will can have no greater rights against the executor summoned as a garnishee than the legatee himself would have if there were no attachment, and the garnishee is left with all the right of set-off, defalcation, or defense incident to the relations of the parties existing at the time of the service. *Fogg v. Carroll*, 18 Pa. Co. Ct. 434.

The attachment of a legacy in the hands of an executor or administrator as garnishee merely transfers to the plaintiff in the attachment the responsibility which before was due to the legatee, and if, therefore, the executor had a right of set-off against the legatee, he retains it against his substituted creditor, and if for any reason the legatee could not enforce pay-

ment of the legacy without first or simultaneously performing some other duty to the estate, his attaching creditor can reach the legacy only on the same conditions. *Strong v. Bass*, 35 Pa. 333.

And the executor of a will is not bound to pay a legacy to a legatee while an indebtedness of the legatee to the estate in a greater amount than the legacy remains unpaid, and there is therefore nothing in the hands of the executor upon which an attachment execution issued by a creditor of the legatee can operate. *Fogg v. Carroll*, 18 Pa. Co. Ct. 484.

And an administrator with the will annexed is entitled to retain a legacy in part satisfaction, where the legatee owed the testator a larger amount, and is not, therefore, chargeable as trustee of the legatee so far as that legacy is concerned. *Nickerson v. Chase*, 122 Mass. 296.

So, the right of an executor to set off against an attachment creditor of a legatee an indebtedness in a greater amount than the legacy due by the legatee to the estate exists, not because of the defalcation act, but because the legatee has no right to enforce his claim against the estate without first or simultaneously performing the duty of payment which he owes to it. *Fogg v. Carroll*, 18 Pa. Co. Ct. 484.

And the right of an executor to set off an indebtedness of a legatee against the legacy due him on an execution attachment against such legatee brought by a creditor is not affected by the fact that the debt sought to be set off against the legacy was not the personal debt of the legatee, but that of his wife, where the original debt was a joint one, and the legatee was bound to pay it, though the debts were not strictly mutual. *Ibid.*

So, an administrator of the estate of a deceased person is not liable as trustee of a person entitled to a distributive share of the estate, where payment had been made and the distributee had become indebted personally to the administrator in an amount exceeding the entire sum that he was entitled to receive from the estate; and the fact that before such indebtedness was contracted the distributee had transferred to and administrator his share in the estate in fraud of his creditors is of no effect, where the creditors took no steps to avoid it. *Henshaw v. Whitney*, 11 Gray, 223.

And where a foreign attachment is issued against a debtor, or the executor of a decedent is summoned as garnishee to recover a legacy bequeathed by the decedent to the debtor, it is a good defense that the decedent was surety for the debtor, and that the executor had been sued and was likely to be compelled to pay the debt; but this contingent liability does not form an absolute defense. All that the surety has a right to require is reasonable indemnity, and this may be given by a conditional verdict for the plaintiff that execution shall not issue until it can be seen that he will not be made twice liable. *Ross v. McKinny*, 2 Rawle, 227.

But a trustee in a foreign attachment cannot set off against a debt due from himself to the defendant a debt due from the defendant to the trustee as administrator of an estate, and this is so though the principal defendant is insolvent, and this is the only opportunity to collect the debt due the trustee's intestate. *Woodward v. Tupper*, 58 N. H. 577.

But see, *supra*, *Henshaw v. Whitney*, 11 Gray, 223.

And an administrator who has in his hands a distributive share of his intestate's estate which belongs to an insolvent debtor cannot withhold it from the debtor's assignee on trustee process against him for the purpose of paying himself by way of set-off a debt due to him 47 L. R. A.

from such debtor in his own personal right. *Davis v. Newton*, 6 Met. 537.

Nor can a garnishee who answers that he is indebted to the principal debtor be discharged on the ground that he has a claim as administrator of another person against the principal debtor for a larger amount, as such claim would be in the nature of a set-off, and could not be allowed as such, because the two were not due in the same right. *Thomas's Representatives v. Hopper*, 5 Ala. 442.

So, an executor who is served with trustee process for the debt of a legatee is not entitled to deduct the amount of a note indorsed by him for such legatee, where he had not paid or assumed payment of the note, and his liability was only the usual liability of an indorser. *Husted v. Stone*, 69 Vt. 149, 87 Atl. 253.

Nor is an executor summoned as trustee of a legatee named in the will of his testator entitled to be discharged thereon because he holds a promissory note greater in amount than the legacy, which is payable to himself and signed by the principal defendant as principal, and by the testator as surety, where the note was barred by the statute of limitation as against the promisors before the testator's death, and the testator had never paid anything as surety for the legatee thereon. *Wadleigh v. Jordan*, 74 Me. 483.

And a judgment against an executor of an estate who was garnished, and answered that the testator was indebted to the principal debtor in a designated sum, rendered for such sum, is proper where it appears that the principal debtor had contracted to buy lots of the testator and pay for them half in printing and half in cash, and that the bill was to go in part payment, but that the contract for the purchase of the lots was within the statute of frauds, and that there was no valid and binding contract with reference thereto. *Morgan v. McLaren*, 4 G. Greene, 536.

VIII. The judgment.

The ordinary rules as to the substance and form of a judgment in garnishment are, of course, applicable generally, when the garnishee is an executor or administrator, and all that is sought here to be shown is such particular application or modification of such rules as is occasioned by their representative relation.

Thus, the judgment on an attachment execution in which an executor or administrator is summoned as garnishee is that the debt attached in the hands of the garnishee shall be sold, or so much thereof as will satisfy the debt, interest, and costs of the plaintiff. *Bank of Chester v. Ralston*, 7 Pa. 182.

And a garnishee order against executors designed to reach a sum ordered to be paid to a separate account in an administration suit, merely naming the persons charged and professing to make them personally liable, is improper, as they ought to be described as executors. *Stevens v. Phillips*, 44 L. J. Ch. N. S. 689, L. R. 10 Ch. 417, 23 Week. Rep. 716.

A judgment on an attachment execution against a debtor as garnishee in his own right, and as executor of another, to reach the interest of a legatee or distributee for a certain sum *de bonis propriis*, is improper: the judgment should be against the executor as such for the amount of the plaintiff's judgment, to be levied on the interest of the defendant in the estate of the decedent. *Maurer v. Kerper*, 102 Pa. 444.

Or it should be against the money, goods, or property of the defendant in the executor's or administrator's hands. *Lorens v. King*, 88 Pa. 98.

And no judgment can be rendered against a

garnishee summoned to answer as to his indebtedness to the defendant in attachment, where he appears and answers that a certain person, deceased, was indebted in a particular sum to the defendant, and that he is the executor of the deceased person, until he is summoned to answer in his representative capacity, as it is the levy on the debt in the hands of the garnishee in the capacity in which it is held, which gives the court jurisdiction. *Tillinghast v. Johnson*, 5 Ala. 514.

And a judgment against an executrix as garnishee of a debtor entitled to a distributive share *de bonis testatoris* does not bind the administratrix personally, and judgment on a process of garnishment against an administratrix brought to reach the interest of a distributee does not bind the decedent's estate in her hands, as process of garnishment at law will not lie against personal representatives, and equity will not decree payment of such demand out of the estate. *Bickle v. Chrisman*, 76 Va. 678.

So, process of garnishment issued against two executors, but only served on one, who alone answers, does not authorize a verdict and judgment against both executors. *Terry v. Lindsay*, 3 Stew. & P. (Ala.) 317.

But a judgment in garnishment rendered against parties as administrators is not rendered erroneous by the fact that process had issued against them as executors where one of them answered as such, the statute of amendment providing that no judgment shall be reversed for any mistake in the name, etc., if the name of any of the parties be right in any part of the proceedings. *Ibid.*

IX. Exclusiveness of the remedy.

The exclusiveness of the remedy of a creditor by garnishment of an executor or administrator seems to depend upon whether under the facts of the case it really is an adequate remedy.

Thus, a bill in equity will not lie against a debtor and the sole surviving executor of a will to compel the executor to pay to the complainant or to the auditors in attachment moneys in his hands due to the defendant in attachment from his father's estate, where an appropriate remedy is given by statute for the recovery thereof. *Egbert v. Hawk*, 12 N. J. Eq. 80.

And a judgment creditor of an administratrix, who summons her as garnishee, basing the proceeding upon an indebtedness of the estate to her, evidenced by a judgment obtained by her against her husband in his lifetime, and gets a judgment against his debtor's debtor, may have execution according to his judgment; but he has no right to mark a judgment in favor of his debtor to his own use, and issue a *scire facias* thereon to revive it, as it is only in equity that he can claim subrogation to any of the collateral means held by his debtor for securing the debt attached. *Wherry v. Wherry*, 179 Pa. 84, 36 Atl. 185.

But where a judgment debtor has possession as administrator of an estate of moneys belonging to himself individually as his distributive share, which are not subject to garnishment in his hands for the satisfaction of the judgment against him, equity will compel him to apply such money in payment of the judgment, as there is no adequate legal remedy. *Casady v. Grimmelman*, 108 Iowa, —, 77 N. W. 1087.

And a proceeding in the nature of an equitable L. R. A.

able garnishment is proper to reach funds in the hands of a trustee in which the beneficiary has a vested right which cannot be reached in the hands of the executor or trustee on execution or by garnishment under the statute. *Pickens v. Dorris*, 20 Mo. App. 1.

So in *Moore v. White*, 3 Gratt. 139, it was held that it is competent, in Virginia, for a creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate, to go into a court of equity for the purpose of having a division and distribution of the estate of the decedent, and of procuring payment of his debt out of the share of the absent debtor in the estate.

X. Summary.

From the above cases it seems to have been well settled that an executor or administrator could not be garnished at common law, either with reference to a debt of the decedent, or a debt of a legatee or distributee previous to the settlement of the estate and judicial direction for a distribution, for the reason that the estate was then in the custody of law, and the representative having it in hand could not be regarded as indebted, either to the creditor, or the legatee or distributee. But after settlement and a decree of distribution garnishment would lie, because then the representative ceased to hold as an officer of the law and in his representative capacity, and became a personal debtor of the persons entitled to payment of a debt, or to a legacy or distributive share. Executors and administrators have been held liable to garnishment, however, to some extent under statutes providing for attachment and garnishment generally, the question whether or not they will be held liable depending upon a proper construction of the particular statute in question. And in quite a number of the states they have been specifically designated by statute as subject to garnishment and attachment execution, and under some, though not all these statutes, the liability attaches immediately upon qualification, and is not postponed until settlement and a decree of distribution, and generally the fact that the particular fund sought to be reached had not yet come to hand at the time of service of process will not affect the liability of the executor or administrator to garnishment, though he must be in possession of the estate as a whole.

The fact that the representative is himself the debtor entitled to a legacy or distributive share does not as a general rule prevent his garnishment, as personally and in his representative capacity he is regarded as two different persons. It is only with relation to his ordinary capacity, however, that an executor or administrator may be garnished. It cannot be done when a trust is conferred upon him and he holds as trustee. Set-off against the garnishing creditor of claims against the debtor is allowed when the claims were mutual, or when the debtor owes a legal duty to pay before he can demand his legacy or distributive share, and the judgment should not be personal, but against the garnishee in his representative capacity. The remedy by garnishment against executors and administrators will be deemed exclusive and final so as to preclude equitable or other remedies, only when, under the circumstances of the case, it is adequate.

F. H. B.

GEORGIA SUPREME COURT.

HENDERSON, Marshal of Cartersville, *Plff.*
in *Err.*,
v.

James B. HEYWARD.

(.....Ga.....)

- *1. What is known as the "general welfare" clause in a municipal charter does not authorize the passage of an ordinance making it penal for one who has lawfully purchased without the limits of the municipality alcoholic liquors to receive the same therein without paying a specific tax, of a given amount, for the privilege of so doing.
2. The above is true notwithstanding the sale of such liquors is absolutely prohibited within the limits of such municipality.

(December 1, 1899.)

ERROR to the City Court of Cartersville to review a judgment in favor of petitioner in a habeas corpus proceeding to obtain his release from custody to which he had been committed for violation of an ordinance prohibiting the receiving of intoxicating liquors from a carrier without paying a specific tax thereon. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. Akin for plaintiff in error.

Messrs. James B. Conyers and *Ben J. Conyers* for defendant in error.

Cobb, J., delivered the opinion of the court:

Heyward was arrested under a warrant charging him with the violation of an ordinance passed by the municipal authorities of the city of Cartersville, of which the following is a copy:

"Whereas, this being a prohibition city and county by a vote of the people, and after their best efforts to protect themselves from the curse of intoxicants, the shipment of vinous, malt, and distilled liquors continues to be made in our community to the injury and detriment of the morals, good order, prosperity, and general welfare of this community; and should be prevented or controlled: Therefore, the mayor and aldermen of the city of Cartersville, in the exercise of the general welfare, police, and other powers vested in them by the laws and the charter of the said city, and to accomplish the purposes heretofore enumerated, do enact and ordain as follows:

"Sec. 1. That on and after the 4th day of March, 1899, it shall be unlawful for any person or persons, corporation or company to receive from any common carrier or person any package, jug, demijohn, or bottle of vinous, malt, or distilled liquors in said

city until he, she, or they have paid a specific tax of five dollars on each gallon or fraction thereof. Said specific tax must be paid to the treasurer of the city and a receipt of the treasurer must be presented to any common carrier or person before the delivery of such packages of intoxicants.

"Sec. 2. Be it further ordained by the authority aforesaid, that any person or persons, company or corporation who shall receive or have delivered to them any package or packages of distilled, vinous, or malt liquors, without first procuring and exhibiting the receipt of the treasurer for the specific tax on such package or packages of intoxicants aforesaid, shall, on conviction thereof, pay for each violation of this ordinance a fine of fifty dollars or be worked thirty days in the chain gang of the city, either or both at the discretion of the court.

"Sec. 3. Be it further ordained that any express company, railroad company, or other carrier, public or private, or any agent or employee thereof, who shall deliver to any person in said city any of the packages hereinbefore enumerated without having produced to such carrier the receipt from the treasurer hereinbefore provided for, shall also be subject to the same penalties prescribed herein for violation of this ordinance.

"Sec. 4. Provided, that this ordinance shall not apply to the bringing and delivery, by one citizen of said city, to another citizen of said city, of not exceeding one quart of spirituous liquors for medical purposes, to be furnished only upon the prescription of a sober, reputable physician that the same is necessary and to be used for medical purposes only."

Section 5 repeats conflicting laws.

While in custody, Heyward applied to the judge of the city court of Cartersville for a writ of habeas corpus, alleging in his petition that the ordinance which he was charged with having violated was invalid, for the reason that the municipal authorities had no power to pass the same, and that therefore he was held in illegal custody. Upon the return of the writ a hearing was had, and a judgment rendered discharging the petitioner from custody on the ground that the ordinance was void. To this judgment the marshal excepted.

Counsel for plaintiff in error did not expressly concede that the ordinance in question could not be upheld as an exercise either of the taxing or license power of the municipal authorities of Cartersville, but his entire argument was directed to the establishment of the proposition that the passage of the ordinance was a legitimate exercise of the police power. If we regard the amount required by the ordinance to be paid as a condition precedent to the reception and delivery of the liquors therein enumerated as a tax upon property, it must fail as such, for it is neither *ad valorem* nor uniform. Nor can it be regarded as a specific tax, or the imposition of a sum in the nature of a

*Headnotes by COBB, J.

NOTE.—For discrimination against intoxicating liquors brought from other state for the purchaser's own use, see *State v. Holleyman* (S. C.) 45 L. R. A. 567.
47 L. R. A.

license fee, because, under its charter, the city of Cartersville has authority to impose such a tax or license fee only upon an occupation or business; and the buying of a single vessel containing whisky certainly cannot be properly regarded as an occupation or business. We pass, therefore, to a discussion of the question as to whether the ordinance can be upheld as a valid exercise of the police power of the municipality. It is conceded that the authorities had no express charter authority to pass the ordinance in question, but it is contended that it had the power under the general welfare clause of its charter, which is in the following language: "The mayor and aldermen shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort, and security of the city and the citizens thereof, not inconsistent with the Constitution and laws of this state and of the United States." Laws 1872, p. 181. The police power of a state may be exercised by the general assembly directly or indirectly, through the medium of the subordinate public corporations of the state. It may be that the state would have a right to prohibit the purchase of whisky. That the state has a right to prohibit absolutely the sale of whisky is no longer an open question either in this court or in the Supreme Court of the United States. *Perdue v. Ellis*, 18 Ga. 586; *Hill v. Dalton*, 72 Ga. 314; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. None of the decisions of this court, however, go to the extent of holding that a law prohibiting the sale of liquor in a designated territory has the effect of destroying entirely all property right in alcoholic liquors which may be brought into such territory. On the contrary, it has been expressly held that the fact that the sale of liquor was prohibited in a designated part of the territory of the state does not destroy the right of a person to own such an article within such territory. *Fears v. State*, 102 Ga. 274, 29 S. E. 463. It may be contended with great force that if the state, notwithstanding it recognized a property right in alcoholic liquors, can, under its police power, entirely destroy the right of the owner of such liquors to sell or dispose of the same within the limits of the state, which would in some instances be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whisky are upheld as constitutional upon the ground that its sale is against the best interests of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of individuals. If this be true, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would, if effectually enforced, prohibit the buying; and so, also, the prohibition of the purchase would like-

wise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law making penal the sale would not, without more, make penal the buying; but the practical effect of such a law, if enforced, would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying. But, be this as it may, we are clear that a municipal corporation cannot, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquors from one lawfully authorized to sell the same.

It may be laid down as a general rule that, in addition to its express powers, a municipal corporation can only exercise those which are necessarily or fairly implied in, or incident to, its express powers, and those that are indispensable to the declared objects and purposes for which the corporation was created. 1 Dill. Mun. Corp. § 80. The power to pass a law making penal the purchase of intoxicating liquors is certainly not indispensable to the purpose for which the city of Cartersville was incorporated, and there is no express grant of authority to this effect; and hence the power is wanting, unless it can be implied from its general welfare clause, above quoted. A municipal corporation has no power to adopt ordinances for the prohibition or regulation of the sale of liquors, unless expressly authorized to do so, or unless such ordinances fairly and legitimately fall within the scope of the powers conferred upon them in general terms. Black, *Intoxicating Liquors*, § 220. As an instance of the strictness with which the powers of municipal corporations over the subject of liquors have been construed, see *Hill v. Decatur Comrs.* 22 Ga. 203. In that case, notwithstanding it appeared that the commissioners of the town of Decatur had authority "to restrict, prohibit, and regulate the sale, vending, and distribution" of intoxicating liquors, "provided, no license to retail spirituous liquors shall exceed \$50," it was held that the commissioners had no power to prohibit absolutely the sale of liquor, and that they had authority only to grant a license upon the payment of a fee not exceeding \$50. In *Sanders v. Butler Comrs.* 30 Ga. 679, it was held that the power "to regulate the rates of tavern licenses" does not confer the power to grant licenses; there being in existence a different system of issuing such licenses. It was further ruled that the power to grant tavern licenses was not embraced in a general clause of a town charter conferring upon it the power of general legislation for itself; Judge Stephens assigning as a reason for the latter ruling that the courts "will not infer that the legislature intends to authorize any local departure from a general policy of the state, unless the local exception is expressed in specific terms." In the case of *Leesburg v. Putnam*, 103 Ga. 110, 29 S. E. 602, it was held that neither the general welfare clause usually found in municipal charters, nor the special power "to license and regulate the

management of barrooms, saloons," etc., includes the power to establish and operate under municipal agency a dispensary for the sale of spirituous and malt liquors. This decision was made at a time when it could not be said to have been against the general legislative policy to operate dispensaries, for a number were being operated in the state under direct sanction of the general assembly. But the court construed the grant of power strictly, and said that a dispensary was neither a barroom nor a saloon, in legislative contemplation. If the general welfare clause of a municipal charter would not authorize the city authorities to establish and operate a dispensary, as a means of regulating and restricting the sale of liquors, it is difficult to see upon what principle such a clause would authorize the passage of an ordinance prohibiting the purchase of such license, or interfering with the right to receive the same after a purchase from one who was lawfully authorized to sell. The one would be no less a regulation than the other. It would seem, therefore, to follow from these decisions that a municipal corporation would not, without express legislative sanction, have authority to prohibit either the selling or buying of intoxicating liquors within its limits. They may, of course, regulate, to a certain extent, the traffic in such liquors; but even then their powers, under the decisions above referred to, are not very broad, under the usual general welfare clauses found in municipal charters. If the rule is so strict as regards the sale of whisky, which the general assembly has seen fit to deal with as being within the police power of the state, and which, under the settled public policy of the state, has been either prohibited altogether, or allowed under the most rigid regulations, how much stricter ought it to be as regards a subject with which the general assembly has never seen fit to deal in any way whatever! Whenever the general assembly has, by direct enactment, or by its settled public policy, derivable from the various statutes passed from time to time, brought within the police power of the state any particular subject, then the municipal authorities of a town or city would seem to have the power, under the usual general welfare clause in municipal charters, to deal with such subject by proper ordinance, limited only by the established rule that they cannot deal with an act which is declared to be a violation of the criminal laws of the state. See, in this connection, 1 Dill. Mun. Corp. § 329. The sale of liquor is absolutely prohibited in some of the counties of this state. In other counties its sale is only permitted under licenses granted by the proper authorities. In still others, liquors are sold under governmental agency. In each of such localities the general assembly directly brings within the police power the subject of the sale of this article by expressly prohibiting it, on the one hand, or by regulating its sale, on the other. Having thus declared that the sale of liquors is a matter legitimately within the police power of the state, and having

47 L. R. A.

passed regulations in reference to the same, it necessarily follows that, when it grants to a municipal corporation the power usually conferred upon such corporations, they may deal with the sale of liquors within their limits as a subject which is within the police regulation of the state; and therefore ordinances passed for the purpose of furthering this end are legitimately within the authority of a municipal corporation, under its general welfare clause. Such is what we understand to be the reason at the foundation of the decisions of this court in *Paulk v. Sycamore*, 104 Ga. 728, 31 S. E. 200; *Brown v. Social Circle*, 105 Ga. 834, 32 S. E. 141; and *Papworth v. Fitzgerald*, 106 Ga. 378, 32 S. E. 363. These decisions were departures from the strict rule of construction employed in the earlier cases; and we think, under the principle announced in them, a municipal corporation may, under authority of its general welfare clauses, pass ordinances, within reasonable limits, dealing with the subject of the sale of intoxicating liquors. But the general assembly never has seen proper to deal in any way whatever with the subject of the purchase of intoxicating liquors, except as such subject may grow incidentally out of the subject of the sale. The general assembly has never passed any law making penal the purchase of liquors. The policy of a state is to be ascertained from its published statutes and laws. There never having been in force any law making penal the purchase of intoxicating liquors within this state, it may fairly be said that such a law would be a departure from its settled public policy; and any such departure must commence with the general assembly itself, either by a direct law to this effect, or by granting to some subordinate public corporation of the state express authority to make such a departure. The purchase of liquor from one who is himself violating the law in making the sale is, although not a crime under the law of this state, certainly such a transaction as is contrary to public policy. However, the purchase of liquor in this state from one who is lawfully authorized to make the sale is an act which, in its nature, is neither criminal nor contrary to public policy. It therefore follows that the reception by the purchaser of liquor so bought is not an act which can be legitimately dealt with by the authorities of a municipal corporation as an act within the police power of the state, in the absence of express power so to do.

It necessarily follows from the foregoing that, when the general assembly gave to the city of Cartersville the power embraced in its general welfare clause above quoted, it did not confer upon it authority to pass the ordinance now under consideration. It is true that the ordinance does not in express terms prohibit absolutely the buying of liquor; and, even if the condition annexed to the privilege of buying does not practically amount to prohibition, it certainly has the effect of deterring a person from exercising, and hampers a person in the exercise of, a right which is neither prohibited by express

law, nor which can be said to be in any way contrary to the public policy of the state, as it is at this time established. The ordinance does not purport to deal exclusively with the subject of the reception of liquor from one who has no authority to sell the same. On the contrary, taking into consideration the entire ordinance, the conclusion is inevitable that the purpose of the ordinance is to deal with the subject of the recep-

tion of liquors by one who has lawfully purchased the same without the limits of the city. So construing it, it is void for want of authority in the municipal legislature to pass it. The judge of the city court did not err, therefore, in ordering that the petitioner be discharged from custody.

Judgment affirmed.

All the Justices concur.

KANSAS SUPREME COURT.

STATE of Kansas

v.

C. L. HAUN, Appt.

(.....Kan.....)

*1. Chapter 145 of the Laws of 1897, entitled "An Act to Secure to Laborers and Others the Payment of Their Wages, and Prescribing a Penalty for the Violation of This Act, and Repealing Sections 2441, 2442, and 2443 of the General Statutes of 1889, and All Acts and Parts of Acts in Conflict Herewith," is not to be construed as an exercise by the legislature of its power to alter and amend corporate charters.

2. The act is unconstitutional and void, in that it violates the Fourteenth Amendment to the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(Doster, Ch. J., dissents.)

(December 9, 1899.)

A PPEAL by defendant from a judgment of the Court of Appeals for the Southern Department, Eastern Division, affirming a judgment of the District Court for Crawford County convicting defendant of violating the anti-scrip act. *Reversed.*

Statement by Smith, J.:

The appellant was convicted in the district court for a violation of chapter 145 of the Laws of 1897, which reads:

"An Act to Secure to Laborers and Others the Payment of Their Wages, and Prescribing a Penalty for the Violation of This Act, and Repealing Sections 2441, 2442, and 2443 of the General Statutes of 1889, and All Acts and Parts of Acts in Conflict Herewith.

"Be it enacted by the legislature of the state of Kansas:

"Sec. 1. It shall be unlawful for any person, firm, company, corporation, or trust, or the agent, or the business manager of any such person, firm, company, corporation, or trust to sell, give, deliver, or in any way

*Headnotes by SMITH, J.

NOTE.—As to statutes requiring wages to be paid in lawful money, see note to *Avent-Beattyville Coal Co. v. Com.* (Ky.) 28 L. R. A. 278. 47 L. R. A.

directly or indirectly to any person employed by him or it, in payment of wages due or to become due, any scrip, token, check, draft, order, credit on any book of account or other evidence of indebtedness, payable to bearer or his assignee, otherwise than at the date of issue, but such wages shall be paid only in lawful money of the United States, or by check or draft drawn upon some bank in which any person, firm, company, corporation, or trust, or the agent, or the business manager of any such person, firm, company, corporation, or trust, has money upon deposit to cash the same.

"Sec. 2. All contracts to pay or accept wages in any other than lawful money, or by check or draft, as specified in section one of this act, and any private agreement or secret understanding that wages shall be or may be paid, in other than lawful money, or by such check or draft, shall be void, and the procurement of such private agreement or secret understanding shall be unlawful and construed as coercion on the part of the employer.

"Sec. 3. If any person shall violate any of the provisions of either section one or two of this act, or shall compel, or in any manner attempt to compel, or coerce any employee of any corporation, or trust, to purchase goods, or supplies from any particular person, firm, corporation, company, or trust or at any particular store or place, he shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty or more than ninety days, or by both such fine and imprisonment for each violation.

"Sec. 4. This act shall apply only to corporations or trusts or their agents, lessees, or business managers, that employ ten or more persons.

"Sec. 5. The county attorney of any county upon complaint made to him shall proceed to prosecute the violators of this act as prescribed in other cases of misdemeanor.

"Sec. 6. That sections 2441, 2442, and 2443 of the General Statutes of Kansas of 1889, and all acts and parts of acts in conflict with the provisions of this act, are hereby repealed.

"Sec. 7. This act shall take effect and be in force from and after its publication in the official state paper.

"Approved March 2, 1897. Published in official state paper March 12, 1897."

The information filed in the cause against the appellant charges, in substance, that on or about the 22d day of September, 1897, the defendant, C. L. Haun, being the agent and cashier of the Kansas Commercial Coal Company, a corporation doing business in Crawford county, Kansas, operating coal mines, and employing more than ten persons, did unlawfully, on behalf of said coal company, give and deliver a certain order, commonly called "punch check," to one E. P. Graves, as follows:

Fuller, Kansas, 9/22/1897.

\$2.00. Kansas Commercial Coal Company.

Please accept this as my order for store merchandise to the amount of two dollars, and charge the same to my account. Not transferable.
E. P. Graves.

The said order was delivered to Graves for wages to become due, then and there earned by his personal labor in the coal mines of the coal company; said Graves being employed by said company to work in and about its mines. The order commonly called "punch check" was delivered to said Graves upon his personal application made between pay days of said coal company. On appeal to the court of appeals the judgment of conviction was affirmed. 7 Kan. App. 509, 54 Pac. 130.

Messrs. Perry & Crain and Morris Oliggett for appellant.

Mr. A. A. Godard, Attorney General, for appellee:

The title of an act may be as broad and comprehensive as the legislature may choose to make it, or so broad and comprehensive as to include innumerable minor subjects, provided all these minor subjects are capable of being so combined and united as to form only one grand and comprehensive subject.

State v. Barrett, 27 Kan. 213; *Bowman v. Cockrill*, 6 Kan. 311; *Sedgwick County Comrs. v. Bailey*, 13 Kan. 601; *Division of Howard County*, 15 Kan. 194; *Prescott v. Beebe*, 17 Kan. 320; *Swayze v. Britton*, 17 Kan. 625; *Davis v. Turner*, 21 Kan. 138; *Eureka v. Davis*, 21 Kan. 578; *Re Holcomb*, 21 Kan. 632; *State v. Ewing*, 22 Kan. 708; *Woodruff v. Baldwin*, 23 Kan. 491; *Werner v. Edmiston*, 24 Kan. 147; *Philpin v. McCarty*, 24 Kan. 393; *Keith v. Keith*, 26 Kan. 39; *Atchison Bd. of Edu. v. State ex rel. Johnston*, 26 Kan. 44; *Marion County Comrs. v. Harvey County Comrs.* 26 Kan. 181; *Marion County Comrs. v. Winkley*, 29 Kan. 36; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Burroughs v. Norton County Comrs.* 29 Kan. 196; *John v. Reaser*, 31 Kan. 406, 2 Pac. 771; *Hardten v. State*, 32 Kan. 637, 5 Pac. 212; *Re Wheeler*, 34 Kan. 96, 6 Pac. 278; *State v. Snyder*, 34 Kan. 425, 8 Pac. 860; *Re Wood*, 34 Kan. 645, 9 Pac. 758; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Wichita v. Burleigh*, 36 Kan. 40, 12 Pac. 332; *Cherokee County Comrs. v. State* 47 L. R. A.

ex rel. Stockslager, 36 Kan. 337, 13 Pac. 558; *State v. Brown*, 38 Kan. 390, 16 Pac. 259; *State ex rel. Bradford v. Cross*, 38 Kan. 696, 17 Pac. 190; *Missouri P. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793; *State v. Stunkle*, 41 Kan. 456, 21 Pac. 675; *State ex rel. Robb v. Kiowa County Comrs.* 41 Kan. 630, 21 Pac. 601; *State ex rel. Kellogg v. Sanders*, 42 Kan. 228, 21 Pac. 1073; *State v. Bush*, 45 Kan. 138, 25 Pac. 614; *Norton County Comrs. v. Snow*, 45 Kan. 332, 25 Pac. 903; *Re Pinkney*, 47 Kan. 89, 27 Pac. 179; *Barber County Comrs. v. Smith*, 48 Kan. 331, 29 Pac. 565; *Pittsburg v. Reynolds*, 48 Kan. 360, 29 Pac. 757; *State v. Campbell*, 50 Kan. 433, 32 Pac. 35; *State ex rel. Ives v. Kansas City*, 50 Kan. 508, 31 Pac. 1100; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *State ex rel. De Geer v. Pierce*, 51 Kan. 241, 32 Pac. 924; *State ex rel. Little v. Lewelling*, 51 Kan. 562, 33 Pac. 425; *Wilkerson v. Belknap Sav. Bank*, 52 Kan. 718, 35 Pac. 792; *Re Sanders*, 53 Kan. 191, 23 L. R. A. 603, 36 Pac. 348; *Blaker v. Hood*, 53 Kan. 499, 24 L. R. A. 854, 36 Pac. 1115; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168; *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666; *Rogers v. Morrill*, 55 Kan. 737, 42 Pac. 355; *Aikman v. Edwards*, 55 Kan. 751, 30 L. R. A. 149, 42 Pac. 366; *Atchison, T. & S. F. R. Co. v. Kearny County Comrs.* 58 Kan. 20, 48 Pac. 583; *Re Greer*, 58 Kan. 268, 48 Pac. 950; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668.

The legislature must necessarily determine whether their purpose cannot be expediently accomplished by a general law. Their discretion and sense of duty are the chief, if not the only, securities of the public for an intelligent compliance with that provision of the Constitution.

State ex rel. Johnson v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Darling v. Rodgers*, 7 Kan. 592; *Beach v. Leahy*, 11 Kan. 23; *Noffziger v. McAllister*, 12 Kan. 315; *Robinson v. Perry*, 17 Kan. 248; *McBride v. Reitz*, 19 Kan. 123; *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 303; *Norton County Comrs. v. Shoemaker*, 27 Kan. 77; *Jockers v. Borgman*, 29 Kan. 113, 44 Am. Rep. 625; *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50; *Knowles v. Topeka Bd. of Edu.* 33 Kan. 692, 7 Pac. 561; *Wichita v. Burleigh*, 36 Kan. 34, 12 Pac. 332; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177.

This scrip act operates upon all of a certain class, to wit, all corporations or trusts employing ten or more persons. It is not discretionary with any body or council, but prohibitive to all coming within this class.

State ex rel. Kellogg v. Sanders, 42 Kan. 228, 21 Pac. 1073; *Hughes v. Milligan*, 42 Kan. 396, 22 Pac. 313; *Koester v. Atchison County Comrs.* 44 Kan. 141, 24 Pac. 65; *Barber County Comrs. v. Smith*, 48 Kan. 331, 29 Pac. 565; *State ex rel. Little v. Lewelling*, 51 Kan. 562, 33 Pac. 425; *Eichholts v. Martin*, 53 Kan. 486, 36 Pac. 1064; *Re Greer*, 58 Kan. 486, 36 Pac. 950.

The act here in question applies to all sorts of corporations or trusts who employ

ten or more hands, whatever the nature of such employment may be.

Gulf, O. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *Shaffer v. Union Min. Co.* 55 Md. 74; *Frorer v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 189, 6 L. R. A. 359, 10 S. E. 288; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

The freedom of contract may be abridged.

A party is not permitted to contract away his right of exemption.

Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46.

Nor his right to stay of execution.

McLane v. Elmer, 4 Ind. 239.

Parties cannot contract away their right to go to court for redress.

Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354.

Nor that a cause shall not be removed to the Federal court.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Smith, J., delivered the opinion of the court:

In sustaining the constitutionality of the act under consideration, the court of appeals held that it applied only to corporations and trusts severally employing ten or more persons, and, further, that the act is constitutional as a valid exercise of legislative authority to alter and amend corporate charters. The fact has been ignored that the complaint upon which the appellant was tried and convicted does not charge that the coal company for which he was acting was incorporated under the laws of this state. The agreed statement of facts recites merely that the Kansas Commercial Coal Company was a duly-organized corporation, engaged in the business of mining coal for private gain, among other places, in Crawford county, Kansas. There is neither allegation nor proof that the corporation obtained its charter in Kansas. Nor can there be a presumption in a criminal case that it was a domestic corporation in order to sustain a conviction. While the state might prohibit a foreign corporation from doing business here, it can hardly be claimed that it could alter or amend a corporate charter granted by the laws of another state. We will proceed, however, by assuming that the coal company was a Kansas corporation. There is no suggestion in the title of the act that the provisions of corporate charters are to be in any wise affected. The title reads: "An Act to Secure to Laborers and Others the Payment of Their Wages, and Prescribing a Penalty for the Violation of This Act, and Repealing Sections 2441, 2442, and 2443 of the General Statutes of 1889, and All Acts 47 L. R. A.

and Parts of Acts in Conflict Herewith." Turning to the General Statutes of 1889, we find that §§ 2441, 2442, and 2443, repealed, have no reference to corporate charters. The sections repealed are incorporated in the Laws of 1887 (chap. 171), entitled "An Act to Secure to Laborers in and about Coal Mines and Manufactories the Payment of Their Wages at Regular Intervals, and in Lawful Money of the United States." A person engaged in the pursuit of information regarding the extent of corporate powers under the laws of this state would receive no hint from the title of the act of 1897 that the law in question was intended for any such purpose. In the General Statutes of 1897 the act is made a part of chapter 73, under the head of "Labor and the Protection of Laborers," and nowhere appears classified in that part of the statute relating to corporations. This is mentioned as indicating that the compiler of the General Statutes saw nothing in the act which indicated to him that it in any wise affected the powers of corporations. The 1st section of the act makes it unlawful for any person, firm, company, corporation, or trust to give any scrip, token, check, or order to any employee. The application of this section to persons, firms, companies, and trusts makes it quite clear that the general scope and purpose of the law are defined in its title, and that the alteration or amendment of corporate charters was never intended by the legislature, and is not expressed in the body of the act, when the true rules of construction are applied thereto. In the concurring opinion of Mr. Chief Justice Doster in *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151-155, 55 Pac. 875, the same reasons are employed to show that the "fellow-servant" law of 1874 could not be regarded as amendatory of corporate charters. To hold that corporate charters are affected is to set at naught § 16 of article 2 of the Constitution, as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title." This requirement is mandatory. *Sedgwick County Comrs. v. Bailey*, 13 Kan. 600. No information appearing in the title that corporate charters are affected, such subject is not only not clearly expressed, but is not expressed at all. The object of this constitutional command is thus stated: "To prevent the practice . . . of embracing in the same bill incongruous matters, having no relation to each other or to the subject specified in the title, by which measures were often adopted without attracting attention." Sutherland, Stat. Constr. §§ 78-85, and cases cited; *State v. Barrett*, 27 Kan. 213; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668. To satisfy the constitutional requirement, the language of the act should be broad enough to show that corporate rights were either increased or abridged. In the view taken by the court of appeals, the sanction of the act is visited upon corporations and trusts employing ten or more persons, treating trusts as equivalent to corporations. Our statute defines a trust. Section 14 of chapter 145 of the General Statutes of 1897

reads: "A trust is a combination of capital skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes." (Then follow the particular acts prohibited.) Just how the court of appeals concluded that the act we are now considering did not apply to individuals, but to trusts and corporations only, when a trust may be composed of persons or firms associated together, we do not understand. A trust may or may not be endowed with corporate powers. If not, then it is a mere aggregation of individuals or partnerships, and could hardly be regulated under a law, the constitutionality of which can be sustained only upon the ground that it alters and amends corporate charters. We are clearly of the opinion that a construction of the act which attributes to it a purpose to alter or amend corporate charters is erroneous.

We have no hesitation in saying that if this statute had, without defect as to title, clearly and in express terms amended corporate charters, retaining the section classifying corporations to which it was applicable by the number of men in their employ, it would be obnoxious to the 14th Amendment to the Constitution of the United States. The law is partial and unequal in its operation. The 1st section of the act makes it "unlawful for any person, firm, company, corporation, or trust, or the agent, or the business manager of any such person, firm, company, corporation, or trust," to do certain things. Section 2 declares that "all contracts to pay or accept wages in any other than lawful money, or by check or draft, as specified in section one, of this act, and any private agreement or secret understanding that wages shall be or may be paid, in other than lawful money, or by such check or draft, shall be void." So far the act is general, and applies to all persons and aggregations of persons alike. In § 3 partiality commences. Any person, says that section, who "shall compel or in any manner attempt to compel, or coerce any employee of any corporation or trust to purchase goods, or supplies, from any particular . . ." store or person shall be guilty of a misdemeanor. If, therefore, any person compels or attempts to compel or coerce any employee, other than an employee of a corporation or trust, he is guiltless of wrong, and may proceed with his compulsion without fear of prosecution. Section 4 provides that the act "shall apply only to corporations or trusts or other agents, lessees, or business managers, that employ ten or more persons." Not only is the attempted act of compulsion or coercion denounced in § 3 made applicable only to corporations and trusts, but the denunciation of § 4 does not touch a corporation or trust that employs less than ten men. Thus an act of an agent or a corporation or trust of a given class is unlawful, while the same act of the same man is lawful if he works for an individual or another class of corporations or trusts. Again, the same act of the same man would be unlawful to-day if his

employer was a corporation or trust and employed ten men, while to-morrow it would be lawful, provided in the meantime the corporation or trust had discharged one of its employees. *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931. The obvious intent of the act is to protect the laborer, and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? If such law is beneficial to wage earners in the one instance, why not in the other? The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them, when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. Such inequality destroys the law. In the instance cited, two of the eleven men might quit the employment of the company for which they worked, and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of an act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. *Re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102. In *Leeper v. Texas*, 139 U. S. 462-468, 35 L. ed. 225-227, 11 Sup. Ct. Rep. 579, it is said: "No state can deprive particular persons, or classes of persons, of equal and impartial justice under the law. . . . Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

If the classification attempted by this act is a constitutional one, it follows that the legislature might have made the law applicable only to corporations employing married men or persons over a certain age, or to corporations a proportion of whose employees were women, or applied any other arbitrary or capricious means of distinction. In the language of Mr. Justice Brewer, *infra*: "In all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification." A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character. Judge Cooley, in his *Constitutional Limitations*, in discussing such laws, says: "Everyone has a right to demand that he be governed by general rules, and a special statute, which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be

such an arbitrary mandate as is not within the province of free governments. Those who make laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plough.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Cooley, Const. Lim. 5th ed. 484.

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Id. 486. Such legislation is violative of the 14th Amendment of the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Corporations are regarded as persons, within the meaning of said amendment. *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737. The equal protection mentioned by the enforcement of this statute is denied by making one of two men engaged in the same business, under precisely similar circumstances, in the same town or building, a criminal, and imposing no penalty whatever upon the other for the same act; the only difference being that one worked for a co-partnership, and the other for a corporation.

In the late case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, the Supreme Court of the United States passed upon a statute of Texas which provided that any person having a bona fide claim for services, labor, damages, overcharges on freight, or for stock killed

or injured by any railway company, not exceeding \$50, might present the same, verified by affidavit, for payment to such corporation, by filing it with the station agent; and if, at the expiration of thirty days, such claim was not paid, he might immediately institute suit thereon, and, if he should obtain judgment, he should be entitled to recover the amount of the claim and all costs, and in addition thereto a reasonable attorney's fee, not to exceed \$10. It was held that the statute deprived the railway companies of property without due process of law, and denied to them its equal protection in that they were singled out of all citizens and corporations, and required to pay in certain cases attorney's fees to the parties successfully suing them, while it gave to them no corresponding benefit. A large number of decisions bearing upon the question are collected in this opinion. Mr. Justice Brewer, in deciding the case, among other things, said: "If it be said that this penalty is cast only upon corporations; that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads, of all corporations, are selected to bear this penalty. The rule of equity is ignored. . . . But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and, while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification." In the case of *State v. Goodwill*, 33 W. Va. 179-182, 6 L. R. A. 623, 10 S. E. 286, a statute prohibiting any person, firm, company, corporation, or association engaged in mining or manufacturing from using in payment for labor any order or other paper, unless redeemable for its face value in lawful money of the United States, was held to be void. The court said: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no

public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another." Again, in *Fraser v. People use of School Fund*, 141 Ill. 171-180, 16 L. R. A. 495, 31 N. E. 307, Scholfield, J., in passing upon a scrip law similar to the one in question, says: "If the general assembly may thus deprive some persons of substantial privileges allowed to other persons under precisely the same conditions, it is manifest that it may, upon like principle, deprive still other persons of other privileges in contracting, which, under precisely the same circumstances, are enjoyed by all but the prohibited class. And it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination is conclusive, . . . since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen; and it might find that the public welfare required that society should be divided into an indefinite number of classes, each possessing or being denied privileges in contracting and acquiring property as favoritism or caprice might dictate."

However much the employed might profit by the necessities of the employer desiring to exchange property for labor at a value advantageous to the former, all such beneficial agreements are prohibited by this law. In short such legislation infringes upon natural rights and constitutional grants of liberty. It treats the laborer as a ward of the government, and discourages the employment of those talents which lead to success in the fields of commercial enterprise. Persons *sui juris* need no guardians. Those who seek to put a protector over labor reflect upon the dignity and independence of the wage earner, and deceive him by the promise that legislation can cure all the ills of which he may complain. Such legislation suggests the handiwork of the politician rather than the political economist. In the case of *State v. Loomis*, 115 Mo. 307-315, 21 L. R. A. 789, 22 S. W. 350, Mr. Chief Justice Black, in an able opinion, held a scrip law substantially like the statute under consideration to be void, as an unwarranted interference with the liberty of the citizen. The Missouri statute provided that it should be unlawful for any corporation, person, or firm engaged in manufacturing or mining to issue or circulate for payment of the wages of labor any order, check, or memorandum payable otherwise than in lawful money of the United States, unless the same was negotiable, and redeemable at its face value, without discount, in cash or in goods, at the option of the holder, at the store or other place of business of such firm, person, or corporation. Referring to such statutes, the learned justice says: "They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons: 'You cannot contract for labor payable alone in goods,

wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men may make such contracts, but you cannot.' They say to the mining and manufacturing employees: 'Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may.' It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary everyday contracts,—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract. Now, it may be that instances of oppression have occurred and will occur on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce everyday contracts. Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principles of constitutional law before stated, we can come to no other conclusion than this: That these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact 'to promote the general welfare of the people.' We place our conclusion on the broad ground that these sections of the statutes are not 'due process of law,' within the meaning of the Constitution." To the same effect, see *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Godcharles v. Wigeman*, 113 Pa. 431-437, 6 Atl. 354. The latter case was an action brought by Wigeman to recover wages as a puddler. Plea of payment, etc. During the time of his employment the plaintiff asked for and received orders from defendants on different persons for coal and other articles, which orders were honored by the persons on whom drawn, and the defendants paid them. An act of the legislature made all orders given to their workmen by employers engaged in the business of manufacturing, payable in goods or anything but money, void. Speaking of these sections of the act, the court said: They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringe-

ment alike of the right of the employer and the employee. . . . He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." See also *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Re Eight Hour Bill*, 21 Colo. 29, 39 Pac. 328; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Under the penal provisions of the statute in question, a laborer who works for a corporation or trust employing ten or more persons is deprived of his freedom of contract, in that he cannot bargain to receive anything in payment for his labor but lawful money of the United States. While it might be desirable and profitable to the employee of such corporation to receive a horse, or a cow, or a house and lot, in payment for his wages, yet the legislature prohibits payment in that way, and places the laborer under guardianship; classifying him, in respect to freedom of contract, with the idiot, the lunatic, or the felon in the penitentiary. It has been sought by some judges to justify legislation of this kind upon the theory that, in the exercise of police power, a limitation necessary for the protection of one class of persons against the persecution of another class may be placed upon freedom of contract. As between persons *sui juris*, what right has the legislature to assume that one class has the need of protection against another? In this country the employee to-day may be the employer next year, and laws treating employees as subjects for such protective legislation belittle their intelligence, and reflect upon their standing as free citizens. It is our boast that no class distinctions exist in this country. An interference by the legislature with the freedom of the citizen in making contracts, denying to a part of the people, possessing sound minds and memory, the right to bargain concerning the equivalent they may desire to receive as compensation for their labor, is to create or carve out a class from the body of the people, and place that class within the pale of protective laws which invidiously distinguish them from other free citizens; thus dividing by arbitrary fiat equally free and intelligent people into distinctive classes or grades, the one marked by law as the object of legislative solicitude, the other not. This discrimination has been justified by writers defending the doctrine of paternalism, and by some judges, upon the asserted fact that labor is constantly engaged in an unequal contest with capital, 47 L. R. A.

and that the former must be re-enforced by the legislative power of the state, to prevent its overthrow in the conflict. Freedom of action—liberty—is the corner stone of our governmental fabric. Laws which infringe upon the free exercise of the right of a workingman to trade his labor for any commodity or species of property which he may see fit, and which he may consider to be the most advantageous, is an encroachment upon his constitutional rights, and an obstruction to his pursuit of happiness. Such laws as the one under consideration classify him among the incompetents, and degrade his calling. The proportion of lawful money in circulation is small, compared with the value of other property in the United States. Accumulated wealth, much or little, is represented in a very small part by money. To say that a free citizen can contract for or agree to receive in return for his labor one kind of property only, and that which represents the smallest part of the aggregate wealth of the country, is a clear restriction of the right to bargain and trade, a suppression of individual effort, a denial of unalienable rights. In Tiedeman, Pol. Power, § 178, the author says: "Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments, are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant, except for the purpose of preventing frauds and trespasses."

It will be noted that in the case at bar the appellant did not urge or compel the employee Graves to take the order for merchandise. Graves voluntarily applied for and requested that the same be given to him between pay days. Had he been content to have waited until the regular pay day, he would have received his wages in money. It was his option to take the order, and for compliance with his request the appellant was convicted. Here was no force or compulsion on the part of the appellant, and he committed no fraud or trespass. We conclude therefore: First, that chapter 145 of the Laws of 1897 is not to be construed as altering or amending corporate charters; second, it is in violation of the 14th Amendment of the Constitution of the United States, in that it denies to persons within this state the equal protection of the laws.

The judgment of the Court of Appeals and of the District Court is reversed, and the appellant discharged.

Johnston, J., concurs.

Doster, Ch. J., dissenting:

I dissent from the decision of this case.

Appellant is an employee of a corporation. Therefore the legislature may rightfully control his action to the extent that it can control the action of the corporation whose agent he is. Inasmuch as a corporation can only act by agents, the law must, in consequence, visit upon the latter such penalties as will insure compliance with the requirements imposed upon the former. The corporation represented by the appellant is a voluntary association of individuals, who sought and obtained the special privilege, under the statutes of this state, of acting together, as an ideal, intangible entity, in the business of mining for coal. They might have prosecuted their enterprise as individuals, or in conjunction with each other as partners. They did not choose to do so, but, on the contrary, preferred to avail themselves of the greater rights and advantages known or supposed to belong to a corporate organization. This they had the right to do, but they could only do so by virtue of the special permission and subject to the special conditions of the Constitution and statutes of the state. The chief of these conditions is the reserved power of the legislature to alter or amend the laws pertaining to their organization and methods of transacting business. The Constitution of the state ordains that "no special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked, or repealed by the same body; and this power shall be exercised by no other tribunal or agency." Bill of Rights, § 2. "Corporations may be created under general laws, but all such laws may be amended or repealed." Article 12, § 1. Questions as to the extent of the power reserved in constitutional or statutory provisions similar to those above quoted have been frequently raised. The result of the various decisions upon the subject is thus summarized in 7 Am. & Eng. Enc. Law, 2d ed. p. 675: "It may be safely stated, however, that the legislature has authority to make any alteration or amendment in a charter granted subject to such reserved power which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which it may deem proper to secure either that object, or other public or private rights." The Supreme Court of the United States has repeatedly affirmed the efficacy of the power to amend corporate charters within the limitations above stated, when expressly reserved, as in our Constitution. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

Counsel for appellant do not question the soundness of the doctrine, as an abstract proposition of law; nor do they question its application to the case under discussion, except to inveigh against it through mere generalities and platitudes, as that "vested rights cannot be destroyed or impaired under such reserved power," and "the exercise of the reserved power must not defeat or substantially impair the object of the grant." The assertion of these truisms, however, is nothing more than a restatement

of the rule of law in the very terms of its admitted limitations. The reserved power to amend corporate charters is not, of course, the power to destroy vested rights, or to defeat the object of the grant; but to assert that a statutory amendment to a charter imposing upon the corporation the obligation to pay the wages of its employees in current money instead of orders for goods, and invalidating prospectively all contracts to pay other than in money, impaired the object of the grant to the corporation, or any vested right held by it, would be to impeach the intelligence of the court addressed. Indeed, such a statute does but give express force to the implied agreement contained in every contract solvable in money, that it shall be so discharged; and it does but aid in the execution of the sovereign power of the nation to provide and maintain a standard of value, and a medium of exchange. These considerations, as bases upon which to rest legislation of the kind in question, were stated and elucidated by the supreme court of Indiana in *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253, with a strength and cogency of reasoning which, so far as I know, has never even been assailed. If, therefore, the act under consideration is in the nature of an amendment to the statutes providing for the organization of corporations, and prescribing regulations for the transaction of their business, it is beyond attack from any of the constitutional grounds assumed by the counsel for appellant. Hence the meritorious question in the case is not whether the Kansas legislature has the power to impose upon a Kansas corporation the obligation to pay its employees in money, but whether it has actually done so. It is a fundamental rule of judicial action to resolve all reasonable doubts as to the constitutional validity of a legislative enactment in favor of the statute. Indeed, the perception of a reasonable doubt as to whether the enactment is constitutionally valid is to determine the question in favor of the act. This has been declared so often by this and other courts, and is so well understood as an elementary principle, that reference to the decisions would encumber, not fortify, an opinion. I need go, therefore, no further than to show that a reasonable doubt exists as to whether the act under discussion violates the organic law. I do not have to demonstrate its constitutional validity.

The argument of my associates is based upon two propositions, the first of which is that neither the title of the act, nor the act itself, purports to be in amendment of corporate charters, and therefore its enactment was not in execution of the constitutionally reserved power of amendment. The supposed defect more specifically pointed out by them is in the title of the act. They say that, "no information appearing in the title that corporate charters are affected, such subject is not only not clearly expressed, but is not expressed at all;" and hence, as they say, the statute is repugnant to the constitutional requirement that the subject of an act shall be clearly expressed in its title. This,

indeed, is refining to a most filmy and tenuous degree. If in fact an act amends the statutes relating to corporate organization or methods or powers, it need not name itself as an amendatory act. It is sufficient if it contain provisions regulative of corporation methods, or in enlargement or restriction of corporate powers. The subject-matter of such act does not exist in the assertion of its amendatory character, but it exists in the substantive provision newly inserted in place of, or supplemental to, the old one. If this substantive provision is clearly expressed in the title of the act, the act is valid, whether it, in its title, purports or does not purport to be in amendment of the corporate charter. It becomes an amendment by force of the fact that it relates to the powers, or is regulative of the methods, of the corporation. It does not derive its validity and binding force from the fact (if such should be the case) that it declares itself to be amendatory, but it derives it from the fact that such is its nature and effect. This proposition is so reasonable, so nearly self-evident, that it has been challenged, I think, but once before. That was in *Timm v. Harrison*, 109 Ill. 593. I quote from the opinion in that case: "It is insisted that the act of June 15, 1883, is, in effect, an amendment of chapter 43 of the Revised Statutes of 1874, known as the 'Dramshop Act,' and that it violates the provision of § 13, art. 4, of the Constitution of 1870, that 'no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title,' in that the title of the act does not profess to make such amendment. It is said that, if an existing law is amended, the fact that the new act is in amendment of the prior law must be expressed in the title of the new act, because such fact is the 'subject' of the new law. The subject-matter of each of the three sections of the act of June 15th is embraced in the title. If such subject-matter operates to amend or to repeal any prior law, that will be but the effect of the subject-matter; and it is only the subject which the constitutional provision requires to be expressed in the title, and not the effect thereof. This precise question we regard as determined by the decision in *People ex rel. Klocke v. Wright*, 70 Ill. 388. The court there say of the act which they were called upon to construe: 'Although that act does not, in terms, profess to be an amendment of the charter of the city of Chicago, it is manifest that such was its necessary effect. It is entitled "An Act to Establish a Board of Police in and for the City of Chicago, and to Prescribe Their Powers and Duties." It requires the organization of an executive department of the municipal government of the city, to be known as the Board of Police of the City of Chicago," and to this board it transfers the control and management of the entire police of the city, and also of all public police property. Certain powers theretofore exercised by the mayor and common council are thereafter to be exercised by the board of police. . . . It (the act) became fundamental,—

a part of the organic law of the municipality,—in other words, an amendment of its charter; and the mere fact the act, in its title, does not profess to amend the city charter, is unimportant. It professes to, and does, enact that which makes new organic law for the city government, and this is sufficient.'"

The doctrine of the majority of the court, reduced to a finality, is that no act affecting corporations, later than the original one, is valid, unless in its title it purports to be amendatory of the existing law. That is to say, carried to its logical extent, that corporations are not required to take notice of the general body of the statute law, but only of such portions of it as specifically relate to them, and declare such relationship in their titles. The individual citizen, however, continues to be charged with a knowledge of the law, whether he in fact possesses it or not. I do not put my brethren in a false position by this statement and illustration. I but unmask the position they already occupy. Take the statute under consideration, for an instance. It purports in its title to be an act to secure to laborers the payment of their wages, etc. Now, all classes of persons and associations employ laborers, and become indebted to them for wages. Corporations do, trusts do, partnerships do, individuals do; so, likewise, the managers and agents of corporations, trusts, partnerships, and individuals. Admit this statute to be constitutional as against every objection save the one under consideration (and the fact of its being unconstitutional upon other grounds does not deprive the illustration of its pertinence), and the resulting law, as my associates would have it, is that every one of the above-named classes of persons and associations, save corporations, are required to take notice of and be governed by its provisions. Every employer of labor, except a corporation employer, must obey its requirements, or, if not, abide its penalties. This exemption of the corporation from the common obligation to know the law and obey its mandate is placed upon the sole ground that the statute does not profess, in its title, to be amendatory of the original charter of incorporation. Corporations employ laborers, and are under obligation to pay them, and it is within the admitted power of the legislature to secure by appropriate enactment the payment of wages due from corporations as well as from other classes of employers; but, nevertheless, an act which by its title professes generally to secure wages to laborers from all classes of employers does not secure them from corporations, because it does not in its title specifically purport to do so. This is the very madness of unreason. It not only leads to the conclusion, but is itself the conclusion, that not a single act concerning corporations passed subsequently to the original one is of any validity, unless the subject of corporations is indicated or comprehended in its title. This court has never heretofore decided cases affecting corporations upon any such assumption. On the contrary, the companion case to this, *State*

v. *Wilson* (which was submitted along with this one, and just decided) 58 Pac. 981, was determined upon the exactly opposite theory. The act under consideration in that case was entitled "An Act to Regulate the Weighing of Coal at the Mine." It did not in its body any more than in its title, profess to apply to corporations. Nevertheless, two of us held it to apply to a corporation; and Mr. Justice Smith, who dissented, did not rest his objections to the act upon the ground that the subject of corporations was not expressed in the title.

I know the answer to the argument I have thus advanced. It is not expressed, or perhaps even implied, in the opinion of the majority; but it is the only one which can be made with sufficient show of reason to command a moment's attention. It is that statutes may be regulative of the business in which corporations as well as individuals engage, and that such a statute, applying rather to the business prosecuted than the power to prosecute it, is not to be held amendatory of the charters of corporations engaging in it; and hence the statute we are considering, dictating as it does the payment in money of wages due from natural persons as well as from corporations, assumes to regulate a business common to all, not a right of the corporations concerned. In this way my learned associates reach the conclusion: First, that the statute is not amendatory; and, second, that not being amendatory, it is an unjustifiable restriction upon the constitutional freedom of contract. With the first of these conclusions only do I have any present concern. That conclusion is the conception of a distinction without a difference, and is appreciable only by one who is capable of understanding how a statute may regulate the business of a corporation without at the same time regulating the corporation itself. It is a fiction, pure and simple. Although not expressed in the words here employed, hardly expressed at all, in the cases of *Union Trust Co. v. Thomason*, 25 Kan. 1; *Rouse v. Harry*, 55 Kan. 589, 40 Pac. 1007, and *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875, it nevertheless was made to serve in part, at least, as a basis for the decision of those cases. Without raising the question of the correctness of those decisions from other standpoints and for other reasons, I repudiate the idea that the business of a corporation may be regulated without also regulating the corporation itself in the exercise of its corporate rights or methods. Take again, for illustration, the statute under discussion. In order to test the reasonableness of the theory of regulating the business without regulating the owner of it, assume the statute to be constitutionally unobjectionable. Before its enactment, corporations possessed the right to pay their employees in any medium that might be agreed upon. This was a right necessarily implied in their charters, because, unless otherwise restricted, corporations may do business exactly the same as natural persons. The statute took away this charter right, and commanded

payment to be made in money. Now, I ask, is this a regulation of the business in which corporations are engaged, or is it a regulation of the corporations themselves? Does it relate solely to the business which natural persons together with corporations are prosecuting, or does it impose a substantive limitation upon the charter powers of corporations? Whatever court should hold in express terms that it relates to the business of the corporation, and not to the corporation itself (and those are the ultimate terms to which such decision would reduce itself), would be regarded as having perpetrated a judicial jest, rather than a judicial decision.

The objection that the act under consideration does not itself profess to be amendatory of the existing law is of a piece with the objection to the title. If the act is in fact amendatory, if it adds anything to the body of the law upon the subject, it must of necessity be regarded, legally speaking, as amendatory.

It is also said that this act cannot be regarded as amendatory of the corporation laws because it contains provisions applicable to others than corporations, and hence it could not have been the legislative intent to give it the character of an amendment to corporate charters. This is but a statement in another form of the objections already noticed and answered. It will be observed that the body of the act does apply to corporations, *eo nomine*. It is evident, therefore, that the legislature designed that corporations should be affected by the act; that they, as well as individuals and other classes of associations, should be laid under the obligation to pay their employees in money. This, I repeat again, makes the act, as to corporations, amendatory in nature. The design to produce the effect, the purpose to impose new restrictions upon corporate powers, is the intent to amend. It may be incongruous to join natural persons with artificial ones in a statute such as this, which, as to the artificial ones, can only operate as an amendment to the Code already governing them: but, if it is done, the natural, the necessary effect of the new law as an amendment of the old one is not thereby prevented.

I come now to consider the last of the two propositions upon which my associates rest their judgment that the statute is not an amendment of corporate charters. It is not advanced by them in that portion of their opinion devoted to the specific topic. It is clearly indicated, however, as a substantive objection, in their discussion of the invalidity of the act as a police regulation, and its consequent repugnance to the 14th Amendment to the Federal Constitution. It is that the act being, as they endeavor to show, invalid as to natural persons and associations of natural persons, it is likewise invalid as to the corporations which along with the others are included in its terms. I grant that a part of an act violative of the fundamental law nullifies the entire statute, if the bad cannot be separated from the good. This is familiar law, but, assuming the objection

to the portions of the act we are considering to be well founded, I deny that such portions cannot be separated from those which otherwise would be good. The rule upon the subject is thus stated by an eminent jurist and law writer: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley, Const. Lim. 5th ed. 212. The provisions of the statute under consideration as to natural persons and associations of natural persons are not so "connected in subject-matter" with the similar ones relating to corporations that if one falls the others must likewise fall. Those concerning the one class are not so dependent as that on those of the other class. They do not all "operate together for the same purpose," nor are they all "so connected together in meaning" that it cannot be presumed that the legislature would not have passed the one provision without the other. The provisions of the statute concerning the several classes of persons are not "essentially and inseparably connected in substance." The legislature desired to secure to laborers generally the payment of their wages in money. It had the undoubted right to thus secure the wages of corporation employees. It conceived, wrongly we will assume, that it also had the right to likewise secure the wages of employees of others than corporations, and it undertook to do so. Can it with any reason be said that it would not have exercised its constitutional power over corporations in the respect named, because it could not exercise a similar power over other employers of labor? Or, to ask the question in the only terms which I am required to employ, is it not reasonable to doubt that it would abnegate its power over the one class because it could not exercise it over the others? The asking of the question, as it seems to me, carries with it an affirmative answer. We are not, however, without authority upon the precise question. In *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, the constitutional validity of a statute which laid certain obligations upon railroad companies and individual persons was consid-

ered. The court held the act invalid as to the individuals, but valid as to the corporations, declaring that, "if, in a statute as to contracts with employees, unconstitutional provisions as to natural persons are inserted, they may be eliminated, where the remainder of the statute relates to corporations and is valid." This case is identical, so far as concerns our particular question, with the one under discussion. It declares the true rule, and, so far as I know, there is not a single opposing authority, but, on the contrary, there are many which support it. *Tiernan v. Kinker*, 102 U. S. 123, 26 L. ed. 103; *State v. Amery*, 12 R. I. 64; *State ex rel. Moore v. New Orleans*, 32 La. Ann. 726.

Stress is laid upon the fact that the act under consideration applies only to corporations and others employing ten or more men, and it is held by the majority that, admitting it to be an amendment of corporate charters, it nevertheless, in the respect mentioned, unreasonably discriminates between classes of corporations, and is consequently invalid. Much of the argument made, and nearly all of the illustrations used to picture the claimed inequalities of the law, are from the standpoint of the laborer himself. It is said: "The obvious intent of the act is to protect the laborer, and not to benefit the corporation. Why should not the nine employees who work for one corporation be equally protected with the eleven engaged in the same line of employment for another corporation? The nine men lawfully paid for their labor in goods at a truck store would, with much reason, complain that the protection of the law was unequal as to them, when they saw eleven men paid in money for the same service performed for another corporation engaged in a like business. Such inequality destroys the law," etc. I deny that the act is to be viewed in such respect from the standpoint of the employee. The corporations cannot be heard to say, as a legal objection to the act, that its operation produces as an incidental consequence discrimination among their laborers. They cannot be allowed to put themselves in the position of the laborer, and say, as though with his mouth: "The law does not compel my employer to pay me in current money, but does compel my neighbor's employer to pay him in such medium. It is therefore bad." To make the law a bad one, unjust discrimination must be made between the corporations themselves, so that some of them can say, in their own behalf: "This law withholds privileges from me which it accords to others. It is therefore bad." Suppose the law produced none of the claimed inequalities as to corporations, but, as to their employees, produced all that have been so indignantly denounced by my associate, Mr. Justice Smith. Would any of the corporations be heard to say that the law was bad, not because of its effect upon them, but because of its effect upon their workmen? The simple asking of the question is enough. So far as concerns the

charge of discrimination between the corporations themselves, viewed in respect to the power of the legislature to amend their charters (and the power to discriminate has to be viewed in connection with the power to amend), we may, I think, reach an accurate conclusion by asking whether the legislature could have made the discrimination in the original act providing for the organization and prescribing the powers of corporations. Whatever could have been done in the first instance can yet be done, save that vested rights acquired under the license to be a corporation cannot now be impaired; nor (what is the same thing) can the right to pursue the purpose or object of the grant be substantially impaired, save by repeal. Subject to the limitations stated, the legislature may now do anything which it originally might have done. In the face of this obvious legal truth, it would be a waste of effort to try to prove that a distinction can now be made between corporations employing ten men and those employing more. Whoever denies that it can now be made is driven by the logic of his position to deny that the legislature, the creator of corporations, could not have drawn the distinction in the first place. But we are not without authority upon this precise point. In the case of *State v. Peel Splint-Coal Co.* 36 W. Va. 802-831, 17 L. R. A. 385, 15 S. E. 1000, an act to provide for the screening of coal by the operators of coal mines employing more than ten men was upheld as against the same charge of discrimination that is here urged; and in *Shaffer v. Union Min. Co.* 55 Md. 74, an act similar to the one we are now considering, requiring coal-mining companies employing more than ten men to pay their laborers in money, was also upheld as against the same charge of discrimination. The Supreme Court of the United States has likewise committed itself to the same doctrine. In the case of *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, an act of the legislature of that state fixing the maximum charges of grain elevators in cities of 130,000 population or more, but exempting elevator owners in cities of less population, was attacked on the score of unjust discrimination, violative of the 14th Amendment to the Federal Constitution. The act, however, was sustained. The court ruling its validity in the following language: "Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 or more of the equal protection of the laws." In this case the right of the legislature to regulate the charges of grain elevators was rested, as it had been in former cases, upon the public character of such agencies; but the right to discriminate between them (a right apart from the right of regulation) was not placed upon the ground of their public character, but upon the ground that the act operated equally upon all the elevator owners within each of the two classes into which elevators had been divided. Classification or discrimination in such respect is

allowable, within the rule of equality thus declared. The supreme court of Iowa well expressed the theory of legislative right to discriminate between classes of persons. It said: "The number of citizens affected by a law does not control its validity, under § 6, art. 1, and § 30, art. 3, of the Constitution. If the law operates upon every person within the relations or circumstances provided for, it is sufficient as to uniformity." *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338.

Reference is made in the majority opinion to my concurrence in the decision of *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 155, 55 Pac. 875. I concurred in that case, but, as distinctly stated, "only upon the assumption that the 'fellow-servant act' of 1874 is not an amendment of the general railroad incorporation law." After stating the contentions of those who did not regard the act as amendatory, I said: "The questions herein suggested were not discussed before us, and as to what should be the proper view to be taken of them I have no matured judgment. However, I yield formal assent to the decision made, but without feeling myself bound by it as in other and ordinary cases." I have no wish to deprive my brethren of whatever weight the above expression of opinion may possess.

The majority of the court, after first conceiving the act under consideration to be without the license contained in the reserved power of the Constitution to amend corporate charters, proceed to dispose of its remaining claim to validity as an exercise of the police power of the state. Believing it to be amendatory in character, and therefore valid irrespective as to its nature as a police regulation, there is no occasion, therefore, for me to express an opinion upon the latter subject, nor upon the corollary subject of its conflict with the Fourteenth Amendment to the Federal Constitution, further than I have done in showing that it does not unlawfully discriminate between classes, and consequently does not withhold from any of them the equal protection of the laws.

Re J. T. DALTON.

(.....Kan.....)

*Chapter 114 of the Laws of 1891 (chapter 78, pp. 781, 782. Gen. Stat. 1897), being an act providing that eight hours shall constitute a day's work for all laborers, work-

*Headnote by SMITH, J.

NOTE.—As to statutory limitation of hours of labor, see *People v. Phylle* (N. Y.) 19 L. R. A. 141, and note; also note to *State v. Loomis* (Mo.) 21 L. R. A. on page 796; *Low v. Rees Printing Co.* (Neb.) 24 L. R. A. 702; *Ritchie v. People* (Ill.) 29 L. R. A. 79; *State v. McNally* (La.) 36 L. R. A. 533; *Holden v. Hardy* (Utah) 37 L. R. A. 103 (Affirmed in 42 L. ed. U. S. 780); *State v. Holden* (Utah) 37 L. R. A. 108; *Short v. Bullion, B. & C. Min. Co.* (Utah) 45 L. R. A. 603; and *Re Morgan* (Colo.) 47 L. R. A. 52.

men, mechanics, and other persons employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality in the state, etc., is a direction of the state to its agents, and is constitutional and valid.

(December 9, 1899.)

PETITION for a writ of habeas corpus to procure petitioner's discharge from the custody of the sheriff of Geary County to which he had been committed for alleged violation of the statute against employing men more than eight hours per day on public work. *Writ denied.*

Statement by Smith, J.:

The petitioner, J. T. Dalton, complains that he is unlawfully restrained of his liberty by the sheriff of Geary county, alleging that he is held in custody under a warrant issued by a justice of the peace, in which he is charged with a violation of chapter 114 of the Laws of 1891 (Gen. Stat. 1897, chap. 73, pp. 781, 782). The return of the sheriff to the writ sets out the complaint which was filed with the magistrate, and upon which said warrant was issued. The first count is as follows: "That at the county of Geary, in the state of Kansas, on the 3d day of October, A. D. 1899, J. C. Zeigler and J. T. Dalton, being then and there contractors with the board of county commissioners of the county of Geary, in the state of Kansas, who had entered into a contract with said board by which they had contracted and agreed for a certain consideration to do or cause to be done all the labor and to furnish all the materials for the construction of a certain public building, to wit, a county courthouse and jail, for and within said county, which contract was in full force and effect, and having hired C. W. Peterson to perform for them, as such contractors, certain labor in the construction of said building, to wit, the labor of laying stone as a stone mason, did then and there knowingly, wilfully, and unlawfully permit and require the said C. W. Peterson to work, as aforesaid, more than eight hours, to wit, ten hours, on said calendar day, at and upon said labor of laying stone as a stone mason, there being then and there no extraordinary emergency arising in time of war, nor any necessity for said C. W. Peterson, or any others engaged on or about said work, to work more than eight hours for the protection of property or of human life; contrary to the statute in such case made and provided, and against the peace and dignity of the state of Kansas." The second count, after alleging that Zeigler and Dalton had entered into a contract with the board of county commissioners for the performing of all labor and the furnishing of all material for the construction of the courthouse and jail, set out that Zeigler and Dalton agreed with John Devine to perform and cause to be performed for them, as such contractors, certain labor, to wit, the hauling from the quarry stone to be used in the building at a certain price per perch, and did knowingly,

wilfully, and unlawfully connive at, encourage, and permit John Devine to require and permit James Walker and other laborers by him, the said John Devine, hired and employed in and about said work of hauling stone, to work more than eight hours on a calendar day, there being no emergency, etc. The third count charges that Zeigler and Dalton employed one John Devine to haul from the quarry to the building stone to be used therein, said Devine to receive for his wages a certain price per perch for the stone so hauled, and did permit him to labor at the work more than eight hours, to wit, ten hours, on a calendar day, there being no extraordinary emergency or necessity, etc. The fourth count alleged that said Zeigler and Dalton, having employed C. W. Peterson to perform the labor of laying stone as a stone mason on said building, and having agreed to pay him wages at the sum of 30 cents per hour, did unlawfully permit said Peterson to labor at said work more than eight hours, to wit, ten hours, on a calendar day, there being no extraordinary emergency, etc. The fifth count charges that Zeigler and Dalton hired and employed one Peterson to perform the labor of laying stone as a stone mason, and did unlawfully hire said Peterson to labor on the basis of ten hours as constituting a day's work, by contracting to pay him a certain sum, to wit, 30 cents per hour, and no more, the current rate of wages for said work being then and there, in that locality, the sum of \$3 per day; and did unlawfully exact and require of Peterson that he should work ten hours each calendar day in order to be entitled to or be paid said current wage of \$3 per day.

The statute under which the petitioner is prosecuted reads:

"An Act Constituting Eight Hours a Day's Work for All Laborers, Workmen, Mechanics and Other Persons Employed by or on Behalf of the State of Kansas, or by or on Behalf of Any County, City, Township, or Other Municipality in Said State, or by Contractors or Others Doing Work or Furnishing Material for the State of Kansas, or Any County, City, Township, or Other Municipality Thereof, and Providing Penalties for Violation of the Provisions of This Act.

"Be it enacted by the legislature of the state of Kansas: Section 1. That eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons now employed, or who may hereafter be employed by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, except in cases of extraordinary emergency which may arise in time of war or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: provided that in all such cases the laborers, workmen, mechanics, or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: provided further, that not less than the cur-

rent rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the state of Kansas, or any county, city, township, or other municipality of said state; and laborers, workmen, mechanics, and other persons employed by contractors or subcontractors in the execution of any contract or contracts within the state of Kansas, or within any county, city, township, or other municipality thereof, shall be deemed to be employed by or on behalf of the state of Kansas, or of such county, city, township, or other municipality thereof.

"Sec. 2. That all contracts hereafter made by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state, with any corporation, person, or persons, for the performance of any work or the furnishing of any material manufactured within the state of Kansas, shall be deemed and considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for any such corporation, person, or persons to require or permit any laborer, workman, mechanic, or other person to work more than eight hours per calendar day in doing such work or in furnishing or manufacturing such material, except in the cases and upon the conditions provided in § 1 of this act.

"Sec. 3. That any officer of the state of Kansas, or of any county, city, township, or municipality of said state, or any person acting under or for such officer, or any contractor with the state of Kansas, or any county, city, township, or other municipality thereof, or other person violating any of the provisions of this act, shall for each offense be punished by a fine of not less than \$50 nor more than \$1,000 or by imprisonment not more than six months, or by both fine and imprisonment in the discretion of the court.

"Sec. 4. This act shall not apply to existing contracts.

"Sec. 5. This act shall take effect and be in force from and after its publication in the statute book."

Laws 1891, chap. 114.

Mr. J. R. McClure, for petitioner, cited: *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Low v. Rees Printing Co.* 41 Neb. 127, 27 L. R. A. 702, 59 N. W. 362; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Cooley*, Const. Law, 5th ed. 745; *Re Housebill*, No. 203, 21 Colo. 29, 39 Pac. 431; *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343.

Mr. G. C. Clemens, with **Mr. A. A. Godard**, Attorney General, for respondent: The act is constitutional.

Re Ashby, 60 Kan. 101, 55 Pac. 336; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Kansas City v. Union P. R. Co.* 59 Kan. 427, 53 Pac. 468; *Cooley*, Const. Lim. p. 196; *Peo-*

ple v. Warren, 77 Hun, 120, 28 N. Y. Supp. 303.

The act is not, in reality, a law at all. It is but a direction by the state to its agents.

1 Paine, Political Works, p. 373; *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128; *People ex rel. Warren v. Beck*, 10 Misc. 77, 30 N. Y. Supp. 473; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Knapp v. Swaney*, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162; *Baker v. Bryan*, 64 Iowa, 561, 21 N. W. 83.

As to the state's own work and its own contractors, the law is valid as a direction from a principal to agents.

Pfefferle v. Lyon County Comrs. 39 Kan. 432, 18 Pac. 506.

Smith, J., delivered the opinion of the court:

The law for a violation of which the petitioner is prosecuted is to be regarded as a direction by a principal to his agent,—a matter of concern to the principal and agent alone. The state declares by this statute that all laborers, workmen, or mechanics engaged in its service shall not work thereunder more than eight hours per day; that it will make no contracts for longer hours. A by-law of a corporation might provide that none of its agents should employ persons to labor in its behalf more than eight hours in any one day. Such by-law would be a matter of private concern between the corporation and the persons who sought employment by it. Here the state has seen fit to declare (and for what reason it is unnecessary to inquire) that eight hours shall constitute a day's work for all persons employed by it or by any of its political subdivisions. A contractor, in bidding for work to be done by the state, county, city, or township, understands, in making his estimates, that under the law eight hours per day is the maximum time which his employees may work. He is in no wise prejudiced, for all other bidders for the same work have equal knowledge of the rule which the state has established governing the hours of labor to be performed in its behalf. The position which the state has taken in no wise differs from that of an individual who, in the employment of labor, refuses to permit his employees to labor more than eight hours. It is certainly lawful for one to refuse to employ men to work more than a given number of hours per day. In the case of *United States v. Martin*, 94 U. S. 400-404, 24 L. ed. 128, in passing upon an act of Congress declaring that eight hours shall constitute a day's work for laborers, workmen, or mechanics employed by or on behalf of the government of the United States, the court said: "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest." In *People ex rel. Warren v. Beck*, 10 Misc. 77, 30 N. Y. Supp. 473, the superior court at Buffalo, in passing upon an ordi-

nance of that city forbidding contractors for public improvements to accept more than eight hours for a day's work except in cases of necessity, said: "If the government has the power of determination in this regard, then it must follow that it has also the power to make its determination effective, and provide by penalty the enforcement of the law. This is the ordinary and frequent exercise of governmental power. . . . Does this in any wise interfere with the laborer? Is his right above the conceded power of government in this respect? His right is the right to offer his labor in the market equally with every other laborer of his class, and no more. If he offer it to the government, he knows what terms the government has prescribed; and if he is not willing to accede to its terms he may not be compelled thereto. But where does the power reside, or did it ever reside, in the law, which will compel the government to change its terms to compliance with what the laborer demands? His right is presently, at the place where he offers his labor, but it is subject to the rights of the party, at the same time and place, to whom the labor is offered." We see in this law no infringement of constitutional rights. There can be no compulsion of a contractor to bid upon public work, nor is the laborer bound to take employment from a person having such contract. If the terms relating to the hours of labor do not suit either the contractor or the employee, there is no compulsion upon either the one or the other to take the contract, or to perform any labor for the state. The terms of employment are, by this statute, publicly proclaimed; and, if a person insists upon working more than eight hours a day, he must seek other employment. His liberty of choice is not interfered with, nor his right to labor infringed. *People v. Warren*, 77 Hun, 120, 28 N. Y. Supp. 303. Whatever orders the state may give directly to its own agents it may require of its political subdivisions,—instrumentalities of said government, such as counties, cities, and townships. These subdivi-

sions are merely involuntary political or civil divisions of the state, created by statute to aid in the administration of government. "A county is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence." 7 Am. & Eng. Enc. Law, 2d ed. p. 900. See *State v. Shawnee County Comrs.* 28 Kan. 431; *Pfefferle v. Lyon County Comrs.* 39 Kan. 432, 18 Pac. 506; *Askeo v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730. It has been held competent for the legislature to establish a state road, and cast the cost and expense thereof upon the county in which the road lies, without the consent of the officers or people of the county. And in like manner it may require the county to build a certain kind or number of bridges at specified places, another county to build roads in a particular locality, and another to build public buildings; and for this and other public purposes the counties or other municipalities could be required to levy a tax, and make other provisions for the payment of such improvements. *State v. Shawnee County Comrs.* 28 Kan. 431; *State ex rel. McCausland v. Elk County Comrs.* 61 Kan. —, 58 Pac. 959. Indeed, everything relating to the management of counties, cities, and townships not defined and limited by the Constitution may be taken away by the state, acting through its legislature; and as to these political divisions and their agents the legislature has the same power that it possesses over state officers. We conclude, therefore, that the statute under consideration is a mere direction of the state to its agents, and a proper exercise of its power in that respect.

The writ will be denied, and the petitioner remanded to the custody of the sheriff.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

Albert S. FARLEY, *Appt.*,
v.

Mary S. LAVARY.

(.....Ky.....)

A licensed carrier within a city, hauling for all persons who require his services, is liable as a common carrier while carrying goods outside of the city under an agreement to take them to a certain point, without any further contract, although he could not have been compelled to carry outside the city.

(January 18, 1900.)

NOTE.—For person trucking goods as common carrier, see *Faucher v. Wilson* (N. H.): 89 L. R. A. 431.
47 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Fayette County in favor of plaintiff in an action brought to recover damages for the destruction of certain property while in defendant's possession for transportation. *Affirmed*.

The facts are stated in the opinion.

Messrs. Webb & Farrell, for appellant:

A common carrier may become a private carrier under certain circumstances.

Hutchinson, Carr. § 44.

Common carrier by wagon cannot be required to carry to a point or by a route to which his business does not extend.

Hutchinson, Carr. § 56b.

A common carrier can select the manner in which he will hold himself out as a com-

mon carrier, and when he does only so hold himself he is liable only to that extent.

Tunnel v. Pettijohn, 2 Harr. (Del.) 48; *Honeyman v. Oregon & C. St. Co.* 13 Or. 352, 57 Am. Rep. 20; *Dickson v. Great Northern R. Co.* L. R. 18 Q. B. Div. 176.

Mr. George S. Shanklin, for appellee:

A common carrier is one who undertakes for hire or reward to transfer goods for such as choose to employ him from place to place.

Robertson v. Kennedy, 2 Dana, 431, 26 Am. Dec. 466; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Lee v. Burgess*, 9 Bush, 652; *Hutchinson*, Carr. 2d ed. § 47; 2 *Parsons*, Cont. p. 163; 2 *Kent*, Com. 598; *Story*, Bailm. 496; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133.

White, J., delivered the opinion of the court:

This action was brought by appellee for damages for the destruction of certain household goods. The allegations of the petition are that appellant, doing business as the Farley Transfer Company, contracted, for hire, to carry these household goods from Lexington to Nicholasville, and that while the goods were in the possession of appellant they were destroyed by reason of the negligence of the servants and employees of appellant in charge of the wagon. It is alleged that appellant is engaged in the business of, and is, a common carrier. The damage claimed is \$500. The answer denied that appellant was a common carrier at all; admitted a contract with appellee to haul by wagon her household goods from Lexington to Nicholasville, and admitted that while in transit certain of the goods were destroyed by fire, and other articles damaged, but denied that by reason thereof appellee was damaged to the extent of \$500, or in any sum exceeding \$250. The answer further pleaded that the destruction and damage to the goods by fire were without fault on his part, and denied that the fire was caused by the negligence of any of his servants. The issue was tried before a jury, who returned a verdict for \$400 for appellee. Judgment was entered accordingly, and from that judgment this appeal is prosecuted.

The facts proved on the trial without material controversy are that appellant, doing business as the Farley Transfer Company, had a number of vehicles running in the city of Lexington, all duly and regularly licensed to haul for hire; that in such business he hauled for any and all persons, and goods and merchandise of all kinds; that he hauled in the city and about the city, to the fair grounds, and other places. There was no dispute as to the contract with appellee to haul the household goods, nor of the fact of damage. As the cause of the fire, there was some proof that the driver was smoking; and, unless the fire caught from his pipe or cigar, it is unexplained how it originated. The proof as to the amount of the loss is conflicting.

The court gave to the jury an instruction as follows: "If the jury believe from the evidence that the fire which damaged or destroyed the goods of the plaintiff was caused

by the negligence or carelessness of the defendant's agents or employees in charge of the wagon upon which said goods were being carried, or if the jury believe from the evidence that the defendant at the time of said fire was a common carrier, and was conveying said goods as a common carrier, the jury should find for the plaintiff." The court then defined a "common carrier" and also gave the counterpart of No. 1, and as to the measure of damages. Appellant seriously objects to instruction No. 1, quoted, and to its counterpart. Counsel insists that there was not sufficient proof of negligence of the employee in charge of the wagon to sustain a recovery on that ground, and also that there was no evidence that appellant was, as to these goods, and this contract with appellee, a common carrier. Counsel therefore insists that instruction No. 1, *supra*, was error, for which a reversal must be had. The instruction is based upon two ideas; i. e. appellant is liable if the loss occurred by reason of negligence of his employee; appellant is liable if he was a common carrier. If from the evidence the court was authorized to submit to the jury the question of appellant being a common carrier the question of negligence becomes unimportant. If appellant was a common carrier in carrying these goods his liability stands admitted; for he nowhere pleads that the damage was caused by the act of God, the public enemy, or the inherent quality of the goods. We are of opinion that by the evidence of appellant himself it is shown that he was a common carrier within the limits of the city of Lexington. He admits that he hauled for all or any persons, and had obtained a license so to do. Being a common carrier, appellant could have been compelled to haul for appellee within the territory in which he was engaged, but she could not have compelled him to go outside his territorial limit. In this case, however, he contracted to go beyond his territory. Applying the facts to a railroad, we should say he agreed to go beyond the end of his line. It has repeatedly been held that, while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracted to convey beyond its line, it would be liable as a common carrier for the whole distance. In the case of *Ireland v. Mobile & O. R. Co.* 20 Ky. L. Rep. 1586, 1589, 49 S. W. 188, 453, this doctrine is well settled. In the dissenting opinion by Mr. Justice Burnam (Justice DuRelle concurring) this principle is admitted and emphasized; the dissent contending that beyond its line a carrier may, by special contract, make its liability less than at common law. It being clear by the proof that appellant was a common carrier, and agreed to carry these goods from some point in Lexington to Nicholasville, without any further contract, the liability of a common carrier attached the whole distance. The instruction given was therefore not error. There appears to us no error in the record.

The judgment is therefore affirmed, with damages.

MARYLAND COURT OF APPEALS.

Hiram J. LEWIS, *Appt.*,
v.
Emma TAPMAN.

(.....Md.....)

1. A contract to marry is not within the provision of the statute of frauds requiring agreements not to be performed within a year to be in writing.
2. A contract to marry "within three years" may possibly be performed within a year, and is therefore not within a provision of the statute of frauds as to "an agreement not to be performed within a year."
3. An exception to a ruling on a question to a witness does not show error if it does not appear that the question was answered.
4. The communication by a woman to her family, of the fact of her engagement to marry, when admissible to show the mutuality of the agreement, may be proved by her own testimony.
5. Evidence of the social degradation of the mother of the plaintiff in a suit for breach of promise to marry is not admissible, either to bar the action, or mitigate damages, when the defendant was not induced to make or continue the engagement, either by misrepresentation or wilful suppression of the facts concerning the plaintiff's family.
6. Testimony by the plaintiff in a suit for breach of promise to marry, that she supposed a phrase in one of defendant's letters had reference to getting married, though it is the province of the jury to interpret the phrase, does no injury, because it is inconclusive and merely gives her supposition.
7. A letter written by defendant pending a suit for breach of promise to marry, and adduced solely for the purpose of contradicting him, is not inadmissible for that purpose because it might have been, but was not, offered in chief.
8. A defendant who has had the benefit of an inspection of a letter offered to contradict his testimony, and who has testified that he did not write it, is not injured by the fact that he was not shown the letter or asked in regard to it until after it was read in evidence.
9. An assumption of a fact by an instruction will not be considered on appeal, if there is nothing in the record to show that objection was made to it, or that it was passed upon in the court below.
10. The refusal to carry out a contract of marriage may entitle the other party to bring a suit for the breach, even though the time within which the contract was to have been performed has not expired.
11. An agreement to marry is not void merely because its performance is intended to depend on the happening of a contingency.

(January 9, 1900.)

NOTE.—On the general question of a right of action for breach of promise of marriage, see *Albertz v. Albertz* (Wis.) 10 L. R. A. 584, and *note*.

For the statute of frauds as affecting actions on contracts not to be performed within a year, see *Seddon v. Rosenbaum* (Va.) 3 L. R. A. 337, and *note*; *Thomas v. Armstrong* (Va.) 5 L. R. A. 529; *Lowman v. Sheets* (Ind.) 7 L. R. A. 47 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Wicomico County in favor of plaintiff in an action brought to recover damages for breach of promise of marriage. *Affirmed*.

The facts are stated in the opinion.

Messrs. A. P. Barnes, Joshua W. Miles, and Henry L. D. Stanford, for appellant:

The best evidence of the understanding or knowledge would be the testimony of the friends and relatives themselves to whom the communication was made, and their testimony on this point, and not that of the plaintiff, should be offered.

Clark v. Hodges, 65 Vt. 273, 27 Atl. 726.

In estimating damages the jury can take into consideration the altered social condition of the plaintiff in relation to her home and family.

Berry v. DeCosta, 1 Harr. & R. 291, L. R. 1 C. P. 33; *Smith v. Woodfine*, 1 C. B. N. S. 660.

Promises to marry constitute contracts which may fall within the 5th section of the statute of frauds.

Derby v. Phelps, 2 N. H. 515; *Nichols v. Weaver*, 7 Kan. 373; *Ullman v. Meyer*, 10 Fed. Rep. 241.

If by the terms of contract a time was specified showing that the contract was not to be performed within a year, or if the contract was regarded by the parties as one not to be performed within a year, then such a contract, if not in writing, is void under this statute.

McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983; *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142; *Herrin v. Butters*, 20 Me. 123; *Lawrence v. Cooke*, 56 Me. 193, 96 Am. Dec. 443.

The question as to whether or not the contract of marriage which plaintiff set up was regarded and treated by plaintiff and defendant as a contract not to be performed within a year ought to have been submitted to the jury.

Nichols v. Weaver, 7 Kan. 376.

Messrs. Toadvine & Bell also for appellant.

Messrs. Charles O. Melvin, James E. Ellegood, and G. Grier Ratcliff, for appellee:

It was competent for the plaintiff to testify as to disclosures made to her mother respecting her engagement, for the purpose of showing the understanding of her family in regard to the same.

4 Am. & Eng. Enc. Law, 2d ed. pp. 886, 887.

784, and *note*; *Wooldridge v. Stern* (C. C. W. D. Mo.) 9 L. R. A. 129; *Arkansas Midland R. Co. v. Whitley* (Ark.) 11 L. R. A. 621, and *note*; *Brown v. Throop* (Conn.) 13 L. R. A. 646; *Weatherford Mineral Wells & N. W. R. Co. v. Wood* (Tex.) 28 L. R. A. 526; and *Carrig v. Carr* (Mass.) 85 L. R. A. 512, and *note* (as to contracts for permanent employment).

After a promise of marriage is established it is competent for the plaintiff to prove her own statements in order to show her assent and acceptance.

Moritz v. Melhorn, 13 Pa. 331; *Peppinger v. Low*, 6 N. J. L. 384; *King v. Kersey*, 2 Ind. 402; *Cates v. McKinney*, 48 Ind. 562, 17 Am. Rep. 768.

Facts relating to family history are not of themselves essentials of the contract, and no disclosures or information need be made in regard to them.

Van Houten v. Morse (Mass.) 26 L. R. A. 430, note, p. 432; *Sherman v. Rawson*, 102 Mass. 395.

A refusal to fulfil a contract before the time of performance entitles the plaintiff to sue.

Burtis v. Thompson, 42 N. Y. 250, 1 Am. Rep. 516; *Cole v. Singerly*, 60 Md. 354; *Baltimore Breweries Co. v. Callahan*, 82 Md. 111, 33 Atl. 460, 4 Am. & Eng. Enc. Law, 2d ed. p. 888.

McSherry, Ch. J., delivered the opinion of the court:

This is a suit to recover damages for a breach of promise to marry. That there was an agreement, of some sort, between the plaintiff and defendant to marry, is certain; but whether that agreement was absolute or conditional is one of the grounds of contention.

It is insisted by the plaintiff that the defendant agreed to marry her within three years from a designated date; whilst, upon the other hand, it is alleged by the defendant that his promise was conditional, and that, in no event, was the promise set up by the plaintiff to be fulfilled until the expiration of three years from the time it was made. We need not, though it would be quite entertaining if we did, refer to the evidence bearing on these controverted issues of fact, and we need not refer to it because the legal questions involved can be disposed of without quoting from the testimony.

There is an inquiry suggested at the very threshold, and arising for the first time in Maryland, that may as well be considered and settled at once. Upon the assumption that the contract to marry was in fact made with a stipulation that it was not to be solemnized until after the expiration of three years, does it fall within that clause of the 4th section of the statute of frauds which prohibits any action from being brought upon an agreement not to be performed within a year, unless the agreement be reduced to writing, and be signed by the party to be charged therewith? This is the question which the rejected prayer interposed by the defendant at the close of the case made by the plaintiff and set forth in the ninth bill of exceptions, presents.

A contract to marry was treated at common law, so Blackstone states, bk. 1, p. 433, "in no other light than as a civil contract," but it is in reality something more. Questions relating to marriage were from a very remote period cognizable only in the ecclesiastical courts, which had no authority to

award damages, but imposed censures, as was supposed, for the welfare of the soul. It is curious and interesting to trace the conflicts between these courts and the common-law courts, and, in a measure, the court of chancery, in the efforts of the last-named tribunals to expand their jurisdiction, and correspondingly to restrict that of the former over these contracts.

This expansion gradually grew until the last remnant of the ecclesiastical court's jurisdiction was swept away by 20 & 21 Vict. chap. 85, except as to the granting of licenses. As the ecclesiastical courts formerly possessed sole authority in questions relating to marriage (this was conceded by Lord Chief Justice Vaughan [*Holcroft v. Dickinson*] Carter, C. P. 233), but as they had no power in cases of a breach of promise, other than to decree a performance of the marriage (4 Bacon, Abr. title *Marriage & Divorce*, 530), which jurisdiction was taken away by 26 Geo. II. chap. 33, the common-law courts, after the adoption of the statute of frauds in 1676, began to entertain civil actions for a breach of a contract *per verba de futuro*, and that jurisdiction, Lord Chief Justice Raymond observed in 1733 "was a point not to be disputed." *Holt v. Clarencieux*, 2 Strange, 937. After considerable discussion it was finally adjudged that the two courts could not act concurrently, but that if an appeal were had to the ecclesiastical court to compel a performance, the common-law courts could not hear a suit for damages, and so *é converso*. The suit at common law was at first greatly opposed because the party had his remedy in the spiritual court. But, notwithstanding this, it was resolved the party had his election of either remedy, and that by bringing an action at common law the remedy in the spiritual court was waived and released; "for now," as remarked by Lord Chief Justice Holt, "in lieu of performance of the contract, he shall recover damages." *Collins v. Jessot*, Holt, 458. In another particular, there was, with respect to such contracts, flat contradiction in the early cases. *Philpott v. Wallet*, 3 Lev. 65, decided in the thirty-fourth year of the reign of Charles II., and five years after the statute of frauds had been adopted, was the first case which held that a promise to marry was within the other clause of the 4th section relating to contracts made in consideration of marriage. But this construction was departed from and overruled eleven years later, in *Harrison v. Cage*, 1 Ld. Raym. 386; and is no longer the law, either in England or in Maryland. *Cork v. Baker*, 1 Strange, 34; *Ogden v. Ogden*, 1 Bland, Ch. 284. In the reign of Charles the First, the court of chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract to marry (*Tothill*, 124, as cited in 2 Campbell, Lives of Lord Chan. p. 138); but it does not appear that the power was ever exercised.

These conflicts of jurisdiction, these variant decisions, serve to emphasize, what is otherwise perfectly apparent, that there has always been about the marriage contract

that which renders it different from any other contract known to the law. A recent writer thus describes that difference: "It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other, but they cannot modify the terms upon which they are to live together nor superadd to the relation a single condition. Being once bound, they are bound forever. Mutual consent, as in all contracts, brings them together, but mutual consent cannot part them. Death alone dissolves the tie, unless the legislature, in the exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce." Schouler, Dom. Rel. § 13. And Mr. Justice Story, in his *Conflict of Laws*, § 108, though treating marriage as in its origin a contract of natural law, proceeds in note 3 to remark: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts." So, Fraser, while defining marriage as a contract, adds: "Unlike other contracts, it is one instituted by God Himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." 1 Fraser, Dom. Rel. 87.

A learned American writer (Bishop, Mar. & Div. 6th ed. § 18), not only pronounces for this doctrine, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation. But this is not all. Prior to the adoption of our constitutional provision prohibiting the legislature from passing special laws granting divorces, it had been the custom of the general assembly to divorce, by statute, from the bonds of marriage; and this court held that such legislation could "be viewed in no other light than as regular exertions of legislative power." *Crane v. Meginnis*, 1 Gill & J. 474, 19 Am. Dec. 237. What other contract can the legislature annul? Even the inhibition in the Federal Constitution which denies to a state the power to pass any law impairing the obligation of a contract, does not prevent the dissolution of the marriage contract by an act of assembly. "It never has been understood," said Chief Justice

Marshall in the *Dartmouth College Case*, 4 Wheat. 519, 4 L. ed. 630, "to restrict the general right of the legislature to legislate on the subject of divorce." Marriage, holds the supreme court in a much later case, is not a contract within the meaning of the prohibition in the Federal Constitution against the impairment of contracts by state legislation. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723.

It is true that many of the observations just quoted from the text writers refer to the marriage relation or status; and it is also true that there is a distinction between the contract of marriage and a contract to marry. But the terms "contract of marriage" and "contract to marry" are used to express the same idea, though, perhaps, it may not be strictly accurate to so use them.

There is no reason for distinguishing the contract of marriage, if by that term is meant the marriage relation, from all other contracts, that does not equally apply to the contract to marry, which precedes and is the foundation of the consummated agreement. As the contract of marriage or the contract to marry, treating them as identical, is so essentially different from every other contract known to the law, it cannot be assumed that Parliament, by the use of the words "any agreement" intended to include the contract to marry within the prohibition contained in the clause of the 4th section of the statute of frauds, which requires an agreement that is not to be performed within a year to be reduced to writing. As we have seen, no action was maintainable in the common-law courts on an agreement to marry when the statute was passed. Such an agreement was obviously not one of the contracts then contemplated by the lawmakers as being within the statute. The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract. The relation it has in view is wholly distinct from the relation which any other contract could contemplate. The capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement. It can only be made between a man and a woman. It has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it.

Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor, and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir Frederick Pollock observed in *Hall v. Wright*, El. Bl. & El. 793: "I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feeling of mankind, and is supported by no authority."

The fact that parties to a breach of promise suit could not testify until the 32 & 33 Vict. chap. 68, gave them the right to do so

in England, made it exceedingly improbable that a specific contract to marry at a time more than a year from the date of entering into the agreement could be proved at all, except in rare instances, particularly as the method of proving a contract to marry differs very materially from the mode of proving any other contract.

The Parliament knowing, as it must be presumed that it did know, that it had not been definitely settled, when the statute of frauds was passed, that a suit at common law could be brought for a breach of promise to marry, it is scarcely legitimate to infer that a contract to marry, the precise terms of which were rarely, if ever, capable of exact proof, was designed to be included within the provisions of the statute.

Looking, then, to the nature of the contract to marry, to its origin, its antiquity and its objects, and having regard to the early method of enforcing it in the spiritual courts, and considering how distinct it is, in all the particulars we have indicated, from every other kind of contract which can be entered into; and bearing in mind that it is, as Lord Robertson, a distinguished Scottish judge, declared, "the very basis of the whole fabric of civilized society"—we are unwilling to say that it falls, or was intended to fall, within the term "any agreement," as that term is used in the statute of frauds.

There were three American cases cited by the appellant's counsel in support of the contention that a contract to marry, if not to be performed within a year, is unenforceable under the statute. These were *Derby v. Phelps*, 2 N. H. 515; *Nichols v. Weaver*, 7 Kan. 373; *Ullman v. Meyer*, 10 Fed. Rep. 241. On the other hand, we are referred by the appellee's counsel to *Briok v. Gannor*, 36 Hun, 52, and we have found *Blackburn v. Mann*, 85 Ill. 222, which sustains the opposite view.

But no English case was called to our attention, and after a diligent search we have discovered none on either side of the question. In *Blackburn v. Mann*, 85 Ill. 222, the court says: Contracts of marriage, although defined as civil contracts, are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. Contracts of marriage until a breach is shown that terminates them may be regarded as containing contracts by consent of the parties, and hence are, in no just sense, within the statute of frauds.

The cases relied on by the appellant turned upon the construction of the state statutes involved, which are not identical in phraseology with the statute of 29 Car. II. It is stated in 3 Parsons on Contracts, p. 3, that although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied. But in Maryland the statute of 29 Car. II. is in force, not because there is any enactment transcribing it, but because the provisions of article 5 of the declaration of rights, which declares that the inhabitants of Maryland are entitled to the 47 L. R. A.

benefit of such of the English statutes, in force in the state on the 4th of July, 1776, as have been found applicable to their local and other circumstances. In *Ullman v. Meyers*, 10 Fed. Rep. 241, it was conceded by District Judge Wallace that, "as an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry." "They are," he went on to say, "agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them."

But, after all, a contract "not to be performed within a year, and specifically so agreed," is the only one within this clause. *Denison, J., in Fenton v. Emblers*, 3 Burr. 1278.

There was evidence in the cause that the contract to marry was to be performed within three years, and there was no evidence of a specific agreement that it should not be performed within a year. According to all the cases, if there was a possibility of its being performed within a year, and there was no stipulation that it should not be, then the contract would not be within the statute, even though it had relation to a subject-matter to which the statute was applicable. *Cole v. Singerly*, 60 Md. 348; *Ellicott v. Turner*, 4 Md. 476.

There was no error committed in rejecting the prayer presented by the defendant at the close of the plaintiff's case and set out in the ninth exception, because, first, a contract to marry is not within the statute of frauds, and because, secondly, even if it were, there is nothing in the record to show that it was a term of the contract that the marriage should not be performed within a year. For the same reasons the second prayer of the defendant, contained in the eleventh bill of exceptions, was properly rejected. This prayer is defective in another respect.

Even had the contract been within the statute, to be binding on both parties it was necessary that both should sign it, but the prayer asserts the proposition that the contract would be binding on both if signed by either.

Before disposing of the other prayers we will turn to the bills of exception relating to the rulings on questions concerning the admissibility of evidence.

The first and second exceptions need not be considered, because it does not appear that the questions objected to were answered. We are unable, therefore, to see whether any injury was done to the defendant by permitting the questions to be put. According to the well-settled practice, there must be both error and injury to justify a reversal, and both must appear on the record. *Jackson v. Jackson*, 82 Md. 32, 34 L. R. A. 773, 33 Atl. 317.

The third and fourth exceptions relate to the same subject, and will be treated to-

gether. The evidence elicited by the questions objected to was to the effect that the plaintiff had communicated to her family the fact of her engagement to the defendant. The ground of the objection is that the members of the family, and not the plaintiff herself, should have been interrogated as to that fact. But if the evidence was admissible at all, it was admissible because relevant, and not because one rather than another of two equally competent witnesses was called to deliver it.

The mutual promise of the parties is the consideration of an agreement to marry. Statements made by the plaintiff to members of her family have been held admissible to show such a mutuality. *Peppinger v. Low*, 6 N. J. L. 384. The fact that such statements were made, is the material thing, and it is material simply as showing mutuality. Since, however, the parties to the contract to marry are now competent witnesses, it is not perceived upon what principle they are not just as capable to depose to the fact of such a communication as is the person to whom the communication was made.

As the whole object of this sort of evidence is to show mutuality in the promise, even if there had been error in these rulings, there was palpably no injury, because both the oral testimony of the plaintiff and her letters put in evidence by the defendant, conclusively showed a promise on her part. Her answer to the questions set forth in these two exceptions neither strengthened nor made more manifest that fact. There is therefore nothing to complain of in the rulings embraced within these two exceptions.

The sixth, seventh, and eighth exceptions relate to the same subject, and will be treated as one. The object of the questions which were propounded was to throw discredit upon the character of the plaintiff's mother, and thereby show the social degradation of the plaintiff. These questions were obviously incompetent. The answer to them—no matter what the answer might be—would not have barred the action or mitigated the damages.

The answer would not have barred the action because there is no pretense that the defendant was induced to make the promise or to continue the engagement either by misrepresentation or by wilful suppression of the real state of circumstances of the plaintiff's family, as in *Wharton v. Lewis*, 1 Car. & P. 529. The answer would not have mitigated the damages, because evidence of her mother's misconduct with which the plaintiff had no connection could not affect the plaintiff. *Sherman v. Rawson*, 102 Mass. 395.

The fifth bill of exceptions contains a question addressed to the plaintiff whilst being examined in chief. She was asked to tell the jury what a phrase in one of the defendant's letters referred to. She replied that she supposed it had reference to getting married. As the contract was evidenced in part by the letters produced, and in part by parol, its construction was for the jury. *Roberts v. Bonaparte*, 73 Md. 191, 10 L. R. A. 689. 20 Atl. 918. Properly, therefore, it

was the province of the jury to interpret the phrase. But no injury was done by the ruling permitting the plaintiff to place a construction on it, because her answer was inconclusive, and gave merely her supposition. The ruling did no injury.

The tenth exception presents no error. The defendant had testified that "he had never written to plaintiff any endearing letters at any time after October, 1897, the time when he ceased his visits" to her. In rebuttal the plaintiff was called to the stand and produced a letter which she received from the defendant on December 22, 1898, after this suit had been instituted, and she identified it as being in his handwriting. To the admissibility of this letter the defendant objected, because, first, it ought to have been offered in chief; secondly, because matters arising after suit brought are generally not admissible; and thirdly, because if offered for the purpose of contradicting the defendant, he should have been afforded an opportunity to inspect it. Neither of these objections is tenable. The fact that it might have been offered in chief was not of itself sufficient to exclude it when offered in rebuttal. It was a letter written after the suit had been brought, and was adduced solely for the purpose of contradicting the defendant.

Whilst he was not shown the letter, and was not asked in regard to it before it was read in evidence, he was subsequently recalled and denied its authenticity. He had the benefit of an inspection of the letter, and testified that he did not write it, and the mere fact that this did not precede the reading of the letter to the jury is no ground for reversal. It was not offered to prove a substantive fact constituting the cause of action, but was only produced to contradict.

The eleventh bill of exceptions contains the prayers. The defendant excepted to the granting of the plaintiff's two prayers as amended by the court, and to the rejection of his second, third, and fourth prayers, and to the granting of his sixth prayer as amended by the court. There was no exception reserved to the rejection of his sixth prayer as offered, and it is therefore not before us. *Cloud v. Needles*, 6 Md. 501. We have considered the defendant's second prayer in discussing the ninth bill of exceptions.

The plaintiff's first prayer is objected to because it assumes, so it is alleged, that there was evidence from which the jury might infer that the defendant had refused to marry the plaintiff; whereas there was, so it is contended, no such evidence in the case. But there is nothing in the record to show that such an objection was made in the court below, or was passed upon by it, and we are in consequence precluded by § 9, art. 5, of the Code, from considering such an objection on appeal.

The plaintiff's second prayer relates to the measure of damages, and has not been criticised. The theory of the defendant's fourth prayer is that the suit was prematurely brought, if the jury should find that the promise to marry was made in February,

1896, and was not to be performed until the expiration of three years, unless the promise was intended to relate back to February, 1895. But there was evidence in the cause from which the jury might well have concluded that the defendant exacted immoral conditions from the plaintiff before performing the contract, and that upon her refusal to yield to his solicitations he ceased altogether to visit her.

There was therefore evidence of a refusal on his part to carry out the contract, and if he refused to carry out the contract a suit could have been brought for the breach, even though the time within which the contract was to have been performed had not expired. *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Frost v. Knight*, L. R. 7 Exch. 111, Approved in *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460. *Frost v. Knight* was an action for a breach of promise to marry.

In *Hochster v. De La Tour*, 2 El. & Bl. 678, the doctrine was laid down that where there is an executory contract to do something at a future time, and before the advent of that time the promisor notifies the promisee of his intention not to fulfil the contract, such notification constitutes a breach for which an action can be brought at once without waiting for the arrival of the period when, under the contract, the thing agreed to be done was to be done. When *Frost v. Knight* was heard before Kelly, Chief Baron, L. R. 5 Exch. 322, he held that the doctrine of *Hochster v. De La Tour* did not apply to contracts to marry, but this ruling was reversed on appeal in L. R. 7 Exch. *supra*, Lord Chief Justice Cockburn delivering a lucid judgment, wherein he showed that there was every reason for including breaches of promises to marry within the doctrine of *Hochster v. De La Tour*. The case was this: The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought suit. The Lord Chief Justice said: "Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations, and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status—that of betrothment—at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally

accomplished by marriage. To the woman, more especially, is it all important that the relation shall not be put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage.

To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury by preventing the party from forming any other union, and, by reason of advancing age, rendering the probability of such a union constantly less."

In *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509, this court adverted to the case of *Hochster v. De La Tour*, and again in *Dillon v. Connecticut Mut. L. Ins. Co.* 44 Md. 392, but the principle decided was neither approved nor repudiated; the cases in 36 Md. and 44 Md. being decided on other grounds.

In 36 Md. 582, it was observed that *Hochster v. De La Tour* had not apparently settled the law on that subject in England, because no decision had up to that time been made by the House of Lords in affirmance of the doctrine of that case. Since then, that is in 1884, the principle has received the sanction of Lord Blackburn in the House of Lords. *Mersey Steel & Iron Co. v. Naylor*, L. R. 9 App. Cas. 435. There is no occasion to adopt, and we do not adopt, *Hochster v. De La Tour* further than it applies, under *Frost v. Knight*, to an action for a breach of promise to marry.

Now the fourth prayer entirely ignores this doctrine, and permits the action to be defeated if the three years for the performance of the contract had not expired when the suit was brought, even though there had been a flat refusal on the part of the defendant to perform the agreement. The omission to include this hypothesis in the prayer, going as the prayer does to the right of recovery, was a vice which made the prayer defective. The defendant's third prayer was very properly abandoned at the argument.

We do not see what injury was done to the defendant by the granting of his sixth prayer as amended by the court below. The prayer as granted is in the precise words of the sixth prayer as asked, with the single exception that the contingency upon which the marriage was to take place is stated in the exact language of the defendant when on the witness stand, while in the prayer as originally presented the same contingency is meant, but it is not stated in words. There was no other contingency mentioned in the evidence but the one set forth in the prayer and testified to by the defendant, and it would have been error had the question been left at large as to a contingency when there is no pretense that there was any other than the contingency which the defendant relied on. We do not mean to say that the prayer is in all respects right. It would

have been better had it been rejected as offered, and not granted at all.

But the error was in favor of the defendant, and he cannot complain that he was injured when in fact he was placed in a far more favorable position before the jury than he had a right to occupy. If the contract was dependent on a contingency to be determined by the defendant, then the contract was not void; but until the defendant had decided the contingency there was no contract at all.

The prayer, however, did not require the jury to find whether the defendant had determined the contingency; it simply told the jury that the agreement to marry was void if its performance was intended to depend on the happening of a contingency. This was error, because a contract to marry to be consummated on the occurrence of an event is valid. *Cole v. Cottingham*, 8 Car. & P.

75. This was the ecclesiastical law as early as the reign of Edward IV.: "A promise on condition made the performance of it depend on some event, and till that took place it had no effect unless a *carialis copula* intervened, or the condition was such as the law pronounced to be *turpis*." 2 Reeve, *History English Law*, 104.

The prayer was therefore wrong. It ought to have been rejected, but the granting of it was an error which did not prejudice the defendant.

Besides this, it was an error which he, himself, requested the court to commit in his own interest. He cannot be heard to complain of such an error.

For the reasons we have given, the judgment, which was for the plaintiff, will be affirmed.

Judgment affirmed, with costs above and below.

MISSOURI SUPREME COURT.

Nickolina KELLER, *Resp't*,
v.

City of St. LOUIS, *Appt*.

(.....Mo.....)

1. The duty of supporting a child which by divorce decree is given to the care and custody of the mother is still left to the father, if the decree makes no provision on that subject.
2. A mother is not entitled to damages for injuries to a minor child, the care and custody of which have been given to her by a divorce decree, where the father is still charged with the duty of supporting the child.

(December 12, 1890)

A PPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused to plaintiff's son by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. B. Schnurmacher and Charles Glavin Allen, for appellant:

During the joint lives of the father and mother, the duty of supporting the infant children of the marriage devolves upon the father, and correlatively, and as some of the cases say, in compensation therefor, he is entitled to their labor.

Bishop, Mar. Div. & Sep. (1891) § 1158; 17 Am. & Eng. Enc. Law, p. 755; 18 Am. & Eng. Enc. Law, p. 379; *Buck v. People's Street*

NOTE.—For cases denying the liability of a father for support of a child after divorce, see *Ramsey v. Ramsey* (Ind.) 6 L. R. A. 682; *Fulton v. Fulton* (Ohio) 29 L. R. A. 678; *Brown v. Smith* (R. I.) 80 L. R. A. 680; *Foss v. Hartwell* (Mass.) 87 L. R. A. 589.

For enforcement of liability of father after divorce, see *Re Zillely* (Wis.) 40 L. R. A. 579; *McKay v. San Francisco City & County Super. Ct.* (Cal.) 40 L. R. A. 585; and *Gibson v. Gibson* (Wash.) 40 L. R. A. 587.

47 L. R. A.

R. Electric Light & P. Co. 46 Mo. App. 555; *Whitehead v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 60; *Hennessey v. Bavarian Brewing Co.* 63 Mo. App. 111.

After the death of the father, the same duty is imposed upon the mother, and the same right to services is conferred upon her.

Bishop, Mar. Div. & Sep. (1891) § 1158; Reeve, *Dom. Rel.* 4th ed. 369; *Matthews v. Missouri P. R. Co.* 28 Mo. App. 75; *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348; *Dooley v. Missouri P. R. Co.* 45 Mo. App. 308; 17 Am. & Eng. Enc. Law, p. 379.

Some authorities, however, apply the above rule only while the mother remains a widow.

Bishop, Mar. Div. & Sep. (1891) § 1158; *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403.

The parental duty is not changed by a decree of divorce between the parents, the children being no parties to their controversy; and even though their custody is taken from the father and awarded to the mother, his obligations to them remain the same, and hers are not increased,—at least not in the absence of provision in the decree awarding her a portion of his estate for their maintenance. Therefore, the obligations of the father continuing, his right to the earning of the children continues.

Biffle v. Pullam, 114 Mo. 50, 21 S. W. 450; *Conn v. Conn*, 57 Ind. 323; *McCarthy v. Hinman*, 35 Conn. 538; *Welch's Appeal*, 43 Conn. 342; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652; *Covels v. Covels*, 8 Ill. 435; *Plaster v. Plaster*, 47 Ill. 290; *Holt v. Holt*, 42 Ark. 495; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Thomas v. Thomas*, 41 Wis. 229; *Courtright v. Courtright*, 40 Mich. 634.

Messrs. Seneca N. Taylor, Charles Erd, and William Bush, for respondent:

The statute is decisive that, where a hus-

band has abandoned his wife and failed to support her she shall be entitled to the proceeds of her own earnings and also the earnings of her minor children.

Mo. Rev. Stat. 1889, §§ 6856, 6859; *State use of Garner v. Mertz*, 14 Mo. App. 58; *Harris v. Bohle*, 19 Mo. App. 530; *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 349.

Missouri Rev. Stat. 1889, § 6864, reads: "A married woman shall be deemed a *femme sole*, so far as to enable her to carry on and transact business on her own account, and contract and be contracted with, and sue and be sued, and to enforce and have enforced against her property such judgment as may be rendered for or against her, or may sue and be sued, at law or in equity, with or without her husband being joined as a party.

Bains v. Bullock, 129 Mo. 120, 31 S. W. 342; *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517; *Brown v. Dressler*, 125 Mo. 593, 29 S. W. 13.

Duty of a parent to support and right to receive wages commence and end together. The obligation and right are correlative. The latter grows out of the former.

Buok v. People's Street R. Electric Light & P. Co. 46 Mo. App. 561; *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107; *Ramsey v. Ramsey*, 121 Ind. 221, 6 L. R. A. 682, 23 N. E. 69; *Brow v. Brightman*, 136 Mass. 187; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581; *McElmurray v. Turner*, 86 Ga. 219, 12 S. E. 359; *Jenness v. Emerson*, 15 N. H. 489.

When the custody of the child is decreed to the mother in a divorce from its father, the latter, having no right to the child's services, is free from liability to the mother for the child's support.

Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; *Ramsey v. Ramsey*, 121 Ind. 215, 6 L. R. A. 682, 23 N. E. 69; *Brow v. Brightman*, 136 Mass. 187; *Jenness v. Emerson*, 15 N. H. 489; *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581; *McElmurray v. Turner*, 86 Ga. 219, 12 S. E. 359; *Schouler*, Dom. Rel. 5th ed. last par. § 237, also § 254; 2 Bishop, Mar. & Div. § 557; 9 Am. & Eng. Enc. Law, pp. 872, 873; *Harris v. Harris*, 5 Kan. 46; *Chandler v. Dye*, 37 Kan. 765, 15 Pac. 925; *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62; *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854, *Brown v. Smith*, 19 R. I. 310, 30 L. R. A. 680, 33 Atl. 466.

Brace, P. J., delivered the opinion of the court.

In this action the plaintiff seeks to recover damages for injuries to her minor son, Arthur Lauer, caused by the collision of a wagon in which he was riding with a sewer manhole in one of the streets of the city, which projected above the surface of the street. In the trial court the plaintiff obtained judgment for \$225, and the defendant appeals.

At the time the suit was brought the father of the said Arthur was living, but he and his wife, the plaintiff, had been previously divorced, and the custody of the child awarded to the plaintiff by the decree. The 47 L. R. A.

only question presented for our determination is whether, in such case, the divorced wife can maintain the action. That while both parents are living the duty of maintaining their minor children rests upon the father, that upon his death this duty is cast upon the mother, and that out of this duty arises the right of the parent to the services of the children during their years of minority, and to maintain an action therefor, or for an injury to the minor, *per quod servitium amisit*, may be conceded as established law, and are not disputed in this case. And, if the father had been dead when this action was instituted, there could be no question of plaintiff's right to maintain the action. But, being alive, the right of action was in him, unless the effect of the divorce was to deprive him of such right, and confer it upon the plaintiff. The statute provides that, "when a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable. . . ." Rev. Stat. 1889, § 4505. Divorce, as known to our law, is the creature of statute, and the power the court has over the rights and liabilities of the husband and wife is to be measured by the terms of the statute. In the decree in this instance no order was made "touching the maintenance of the children." The order made was limited to the "care and custody" of the children, which were awarded to the plaintiff. So far as this decree is concerned, the duty of maintenance and the correlative right to the service of the children were left just where they were before the decree was entered, unless the order transferring the right of the husband to the care and custody of the children to the wife had the effect, *ex vi termini*, of transferring to her his duty of maintenance, with its reciprocal right to the services of the children. That it had such effect the learned counsel for the respondent contends, and in support of his contention cites us to many authorities, all of which we have carefully examined, and find that the conclusion to be deduced from them, in connection with those cited by counsel for the appellant, is well stated by an eminent author after a thorough discussion of the whole subject in the light of those authorities. Mr. Bishop, in his recent work on Marriage, Divorce, and Separation, superseding his work on Marriage and Divorce, in summing up on this subject, says: "There have been differences of opinion, amounting in some instances to a stumbling on the 'not-thought-of' rock, as to the effect of a decree simply giving the custody to the wife, yet silent as to the maintenance. Does such decree, to which the children were not parties, deprive them of the right to be supported by the father? Does it so take from him their services as to relieve him of the duty to maintain them? We have one case in which the court decided that because, after the decree, 'he had no right either to take the child and support it himself, or to employ

anyone else to support it, without the mother's consent, he was not answerable for necessities furnished by a third person. But it was his own wrong that deprived him of the custody. And it is fundamental, equally in our law and in natural reason, that no one can cast off an obligation by refusing to keep it, or any duty by evil doing. Therefore a better-reasoned case holds that the duty of support is not evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability." 2 Bishop, Mar. Div. & Sep. § 1223. In the recent case of *Biffle v. Pullam*, 114 Mo. 50, 21 S. W. 450, in which we held that the father was not deprived of his right of homestead by a decree of divorce giving the custody of the children to the mother, we gave the doctrine thus announced our approval. And now, after a more thorough examination of all the authorities, the leading cases of which are cited in the briefs of counsel, and need not be reviewed here, we are only the better satisfied of its soundness, as having the support, not only of "right reason," but of nearly, if not quite, all the cases, when they are read with discrimination, and confined to the facts in judgment, and to the effect of a decree of divorce in which the care and custody of the minor child, only, are given to the mother, without imposing upon her the duty of its maintenance. What the effect of such an imposition might be, need not be discussed in this case. It follows, then, that, as the duty of supporting the child was not transferred by the decree to the mother, it still remained with the father; and, as the right to the services of the child rests upon the duty to support, the right of action in this case is in him, and not in the plaintiff, and cannot be maintained by her.

The judgment of the Circuit Court will therefore have to be, and is, reversed.

All concur, except Marshall, J., not sitting.

STATE of Missouri *ex rel.* James McCAF-
FERY *et al.*

v.
Louis P. ALOE *et al.*

(.....Mo.....)

1. A judgment that a statute is invalid cannot be based on an admission.
2. Equity has no jurisdiction of a suit merely to bar the entrance of a person to office by injunction, and to declare his title to the office invalid.

NOTE.—On the question of injunction to protect political rights, see also *Fleming v. Guthrie* (W. Va.) 3 L. R. A. 53; *Alderson v. Kanawha County Ct. Comrs.* (W. Va.) 5 L. R. A. 834; *Fletcher v. Tuttle* (Ill.) 25 L. R. A. 148; *Green* 47 L. R. A.

3. The remedy of a bill *quia timet*, by which one may go into a court of chancery to prevent the occurrence of events which he fears will be so disastrous that they will be beyond remedy in a court of law, is not available merely because one fears that, if events are left to take their course, he will be forced to plead in a court of law, when the remedy at law will be ample.
4. A chancery court has no power to protect by injunction purely political rights, such as the rights of citizens as voters.
5. Restricting persons to remedies at law, to the exclusion of equitable remedies, for contesting title to office or the vindication of political rights, is not a denial of due process of law, nor of the equal protection of the laws.
6. The dissolution of an injunction on issuing an order to show cause why a writ of prohibition should not issue against the injunction suit may be ordered, although it is only necessary for the information of those concerned, so that there can be no doubt as to the effect of the rule to show cause, which of itself, if not qualified, would dissolve the injunction.
7. Remedy by motion to dissolve an injunction, and an appeal on final judgment, will not preclude a writ of prohibition against an injunction to test the title to an office, when the term of office would probably expire before the appeal could be heard and decided.

(December 5, 1899.)

APPLICATION for a writ of prohibition to prevent defendants from proceeding with an injunction suit to prevent the enforcement of a statute relating to the composition of the board of election commissioners of the city of St. Louis. *Writ awarded.*

The facts are stated in the opinion.

Messrs. Edward C. Crow, Attorney General, Sam. B. Jeffries, and W. J. Stone, for plaintiffs:

The object of the writ of prohibition is to prevent an inferior tribunal from assuming the jurisdiction of a matter with which it is not legally vested, or where, having jurisdiction, it has exceeded its legitimate powers.

State ex rel. Laolade Bank v. Lewis, 76 Mo. 370; High, Extr. Legal Rem. § 789; *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *Thomas v. Mead*, 36 Mo. 233; *People ex rel. Scannell v. Whitney*, 47 Cal. 584; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, *sub nom. State ex rel. St. Louis, K. & S. R. Co. v. Wear*, 33 L. R. A. 341, 36 S. W. 357.

The suit of injunction shows on its face that it has been instituted for the sole purpose of challenging the right of plaintiffs herein to the office of board of election commissioners of the city of St. Louis.

Equity has no jurisdiction in such cases, and parties in interest must resort to the legal remedy afforded.

Fahy v. Johnstone, 21 App. Div. 154, 47

v. Mills (C. C. App. 4th C.) 80 L. R. A. 90; *Fealer v. Brayton* (Ind.) 82 L. R. A. 578; *State ex rel. Cranmer v. Thorson* (S. D.) 83 L. R. A. 582; *Kearns v. Howley* (Pa.) 42 L. R. A. 235

N. Y. Supp. 402; *Fort v. Thompson*, 49 Neb. 772, 69 N. W. 110; *Secomb v. Wurster*, 83 Fed. Rep. 856; *Brower v. Schuykill County Comrs.* 21 Pa. Co. Ct. 311; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 51 N. E. 758; *Ewing v. Jefferson City Bd. of Edu.* 72 Mo. 438; *State ex rel. Patterson v. McReynolds*, 61 Mo. 203.

The constitutionality of an act of the legislature under which an office is created must be contested by quo warranto against the incumbent.

People ex rel. Bolt v. Riordan, 73 Mich. 508, 41 N. W. 482; *People v. Maynard*, 15 Mich. 463; *Taggart ex rel. Mason v. Perkins*, 73 Mich. 303, 41 N. W. 426; *Atty. Gen. ex rel. Crane v. Amos*, 60 Mich. 372, 27 N. W. 571; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *Smith v. McCarthy*, 56 Pa. 359; *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375, 9 N. E. 692; *Kemp v. Ventulett*, 58 Ga. 419.

The bill for injunction does not present a case of irreparable injury. The injustice complained of is too remote, and may never happen.

There is no complaint that a cloud has been placed upon the title of defendant's property.

Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13, 245; *Doolittle v. Broome County Supers.* 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318; *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598.

The matters involved are of a political nature, and the circuit court was not warranted in exercising its chancery powers in relation thereto.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Green v. Mills*, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721.

To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government, or of the courts of common law.

Fletcher v. Tuttle, 151 Ill. 41, 25 L. R. A. 143, 37 N. E. 683; *Sheridan v. Colvin*, 78 Ill. 237; *Diekey v. Reed*, 78 Ill. 261; *Harris v. Schryock*, 82 Ill. 119; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *Bevard v. Hoffman*, 18 Md. 484, 81 Am. Dec. 618; *People v. Canal Board*, 55 N. Y. 393.

Messrs. George D. Reynolds, John W. Noble, George H. Shields, and Morton Jourdan, for defendants:

The supreme court is limited by the state Constitution to appellate jurisdiction.

The application of plaintiffs, and prayer for preliminary order dissolving the preliminary injunction, are an attempt to confer original jurisdiction in an injunction case on the supreme court, and are not in aid of its appellate jurisdiction.

Mo. Const. (1875) art. 6, § 2; *Martin v. Sloan*, 98 Mo. 252, 11 S. W. 558; *State ex rel. Brown v. Klein*, 116 Mo. 259, 22 S. W. 693; *Lane v. Charless*, 5 Mo. 285. 47 L. R. A.

The want of jurisdiction must be pleaded and denied before the writ will issue.

State ex rel. Jones v. Laughlin, 9 Mo. App. 486, 73 Mo. 443.

The circuit court was that of original jurisdiction.

Spaulding v. Brady, 128 Mo. 653, 31 S. W. 103; *State ex rel. Hughlett v. Hughes*, 104 Mo. 471, 16 S. W. 459; *Copeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281.

The court has jurisdiction of the general class of cases to which the particular case belongs.

State ex rel. Younger v. Stratton, 136 Mo. 423, 38 S. W. 83; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. Dawson v. St. Louis Ct. of Appeals*, 99 Mo. 216, 12 S. W. 661; *State ex rel. Webster v. Johnson*, 132 Mo. 105, 33 S. W. 781; *State ex rel. Alderson v. Moehlenkamp*, 133 Mo. 134, 34 S. W. 468; *Ex parte Dux*, 116 Ala. 491, 23 So. 2; *American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416; *Fischer v. Tuolumne County Super. Ct.* 98 Cal. 67, 32 Pac. 875; *Sherwood v. New England Knitting Co.* 68 Conn. 543, 37 Atl. 388; *Goldsmith v. Owen*, 95 Ky. 420, 26 S. W. 8; *Ex parte Ellyson*, 20 Gratt. 10; *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711; *State ex rel. Scott v. Smith*, 104 Mo. 419, 16 S. W. 415.

If the court has jurisdiction to entertain proceedings of the general class to which the case belongs, prohibition will not lie.

State ex rel. Union Depot R. Co. v. Southern R. Co. 100 Mo. 59, 13 S. W. 398.

That the petition below does not state a cause of action, or that plaintiff had not legal capacity to maintain the action, does not authorize a writ of prohibition.

State ex rel. Union Depot R. Co. v. Southern R. Co. 100 Mo. 59, 13 S. W. 398.

The constitutionality of a statute will not be determined by the supreme court on an application for a writ of prohibition in advance of the trial, where the right of appeal exists.

State ex rel. Crozier v. Rost, 49 La. Ann. 1451, 22 So. 421; *Huntington v. East*, 149 Ind. 255, 48 N. E. 1025; *Parsons v. Durand*, 150 Ind. 204, 49 N. E. 1047.

Injunction will issue until title can be determined by proper proceedings.

Mechem, Pub. Off. § 994; Brady v. Sweetland, 13 Kan. 41.

The legal remedy is inadequate, since it cannot act prospectively and prevent the threatened action.

High, Inj. §§ 1315, 1319, 1327; Bradley v. Powell County Comrs. 2 Humph. 428; *Brady v. Sweetland*, 13 Kan. 41.

The appointment under an unconstitutional law may be prevented.

Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.

It would be a misapplication of terms to call one an officer who holds no office, and a public office can only exist by force of law.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

The petition for a prohibition is in the nature of a suggestion, and the issuing of a preliminary writ adjudicates no right, and

should not undertake to undo even what a final writ might possibly undo.

State ex rel. Rogers v. Rognbauer, 105 Mo. 103, 16 S. W. 695; *State ex rel. Macklin v. Rognbauer*, 104 Mo. 619, 16 S. W. 502; 19 Am. & Eng. Enc. Law, *Prohibition*, p. 281.

The parties plaintiff were legally entitled to institute the action in the circuit court of the city of St. Louis.

Newmeyer v. Missouri & M. R. Co. 52 Mo. 81, 14 Am. Rep. 394; *Matthis v. Cameron*, 62 Mo. 504; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *Dennison v. Kansas*, 95 Mo. 416, 8 S. W. 429; *Ranney v. Bader*, 67 Mo. 476; *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *Oopeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281; *Mechem*, Pub. Off. 996; *Throop*, Pub. Off. 852.

The authorities justify the present proceeding and authorize the injunctive powers of the court to be invoked, at least to the extent of temporarily restraining the execution of the law till its constitutionality could be tested.

Dennison v. Kansas, 95 Mo. 416, 8 S. W. 429; *High*, Inj. § 1308; *Overall v. Ruensel*, 67 Mo. 206; *Book v. Earl*, 87 Mo. 246; *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 394; *Valls v. Ziegler*, 84 Mo. 218; *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028; *Armatage v. Fisher*, 74 Hun, 167, 26 N. Y. Supp. 364, 4 Misc. 315, 24 N. Y. Supp. 650; *Stahlhut v. Bauer*, 51 Neb. 64, 70 N. W. 496; *Mooney v. Clark*, 69 Conn. 241, 37 Atl. 506, 1080; *State v. Bader*, 13 Ohio C. C. 23; *State ex rel. Fairbanks v. Snohomish County Super. Ct.* 17 Wash. 12, 48 Pac. 741; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Davis v. Fastig*, 128 Ind. 271, 27 N. E. 726; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649.

The circuit court was authorized by express statute and an unbroken line of precedents to proceed to enforce its jurisdiction by a preliminary order of injunction against a threatened legal wrong.

Mo. Rev. Stat. 1889, § 5510; 2 High, Inj. § 1327; *State ex rel. Circuit Attorney v. Saline County Ct.* 51 Mo. 350; *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025; *Parsons v. Durand*, 150 Ind. 204, 49 N. E. 1047; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *State ex rel. Hughlett v. Hughes*, 104 Mo. 459, 16 S. W. 489.

Where there is appeal allowable, there can be no prohibition.

State ex rel. Perillous v. Wilder, 49 La. Ann. 1211, 22 So. 661; *State ex rel. Williams v. Anthony*, 65 Mo. App. 543; *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

It will not lie to restrain the exercise of judicial functions.

Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *State ex rel. Morse v. Burckhardt*, 87 Mo. 533.

Nor to take the place of an appeal or writ of error.
47 L. R. A.

Wilson v. Berkstresser, 45 Mo. 283; *Bowman's Case*, 67 Mo. 146; *State ex rel. Spickerman v. Fox*, 85 Mo. 61; *State ex rel. Brown v. Klein*, 116 Mo. 259, 22 S. W. 693; *State ex rel. Hofmann v. Scarritt*, 128 Mo. 331, 30 S. W. 1026; *Mastin v. Sloan*, 98 Mo. 252, 11 S. W. 558; *State ex rel. Johnson v. Withrow*, 108 Mo. 1, 18 S. W. 41; *State ex rel. Brown v. Walls*, 113 Mo. 42, 20 S. W. 883.

Missouri practice was followed by petitioners.

State ex rel. Younger v. Stratton, 136 Mo. 423, 38 S. W. 83; *State ex rel. Aull v. Field*, 119 Mo. 593, 24 S. W. 752; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *Black v. Ross*, 37 Mo. App. 257; *Matthis v. Cameron*, 62 Mo. 504; *State ex rel. Circuit Atty. v. Callaway County Ct.* 51 Mo. 396; *Overall v. Ruensel*, 67 Mo. 207; *Robins v. Latham*, 134 Mo. 472, 36 S. W. 33; *Towne v. Bowers*, 81 Mo. 496; *State Sav. Bank v. Kercheval*, 65 Mo. 688, 27 Am. Rep. 310; *State v. Curators of State University*, 57 Mo. 182; *State ex rel. Cramer v. Hager*, 91 Mo. 455, 3 S. W. 844.

On what principle are the officers of the state, or the citizens, voters, and taxpayers, to wait until their rightful officers are ousted, or surrender their public trusts and the possession of public property to illegal outsiders, until their public funds are misappropriated and their taxes increased, and then contest the continuing trespasser's right to so act by quo warranto, in the meanwhile suffering irreparable injury from the continuing trespass, when the law and statute of the state give them a preventive remedy by injunction?

Sherlock v. Kansas City Belt R. Co. 142 Mo. 186, 43 S. W. 629; *Jones v. Williams*, 139 Mo. 37, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353; *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822; *Veeder v. Baker*, 83 N. Y. 156; *Atchison. T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. 229; *Osburn v. McCartney*, 121 Ill. 408, 12 N. E. 72; *Forman v. Stickney*, 77 Ill. 575; *Griggs v. Gear*, 8 Ill. 2; *Taylor v. Moran*, 4 Met. (Ky.) 127.

Equity will enjoin an unconstitutional law.

Hartwell v. Armstrong, 19 Barb. 166; *High*, Inj. §§ 1320, 1327; *Rice v. Smith*, 9 Iowa, 570; *People v. Canal Board*, 55 N. Y. 390; *People ex rel. Nequa v. Dwyer*, 90 N. Y. 409; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15.

Valliant, J., delivered the opinion of the court:

This is an original proceeding in this court, the object of which is to obtain a writ of prohibition directed to the circuit court of the city of St. Louis to forbid its entertaining jurisdiction of a certain suit particularly described in the petition of relators, the general nature of which may be thus stated: Louis B. Aloe and others, citizens and taxpayers residing in the city of St. Louis, filed their petition in the circuit court of the city of St. Louis in the nature of a bill in equity against these relators and the individuals then composing the board of

election commissioners of St. Louis, wherein they referred to the act of the general assembly of May 31, 1895, creating boards of election commissioners for cities having over 100,000 inhabitants, and prescribing their duties, and the several amendments to that act, and stated that three of the defendants in their petition named, to wit, McCaffery, Brady, and Wurzbarger, had been duly appointed, qualified, inducted into office, and were then members composing the board of election commissioners for the city of St. Louis, in possession of the office and all the property and appurtenances belonging to it, ballot boxes, booths, registration lists and books, and all records of the office, all of which were the property of the city, and of the value of \$10,000; that their terms had not expired, no successors were appointed, and they were the legal and actual incumbents of the office; and that the act of the general assembly of 1895, above named, with the amendments mentioned, constituted the only law on that subject in the state, and that it was then in full force and effect in the city of St. Louis. The petition then goes on to refer to the act of the general assembly entitled "An Act to Provide for the Registration of Voters in Cities now Having or Which Hereafter May Have 300,000 Inhabitants or More; to Provide for the Creation of a Board of Election Commissioners, Provide for Its Appointment and Define Its Duties; to Govern Elections in Such Cities, Defining Offenses, and Providing Penalties Therefor, and to Prescribe Rules and Regulations Governing Registration and Elections Therein, and to Repeal All Acts or Parts of Acts in Conflict or Inconsistent Herewith," approved June 19, 1899, which the petition characterizes as a "pretended act," and denounces as a violation of certain provisions of the Constitution of this state, and of the 1st section of the 14th Amendment of the Constitution of the United States, specifying the particulars in which it is deemed to offend the organic law of the state and nation. Then the petition states that under the terms and provisions of the act last named the governor had signified to the secretary of state that he had appointed these relators, McCaffery, Kingsland, and Kobush, to compose the board of election commissioners for the city of St. Louis, and that they were about to be commissioned as such, and about to qualify and enter into their offices, and take possession of all the property, paraphernalia, records, etc., appertaining to the office, and threaten to commence to provide all the necessary and proper equipment for the registration of voters and the conduct of elections, and to perform all the duties imposed on them as such board of election commissioners by the act,—all which would be at the expense of the city as that act provides; and that McCaffery, Brady, and Wurzbarger, composing the old board, were about to surrender possession of their offices, with all the property, books, records, etc., appertaining to the same, to these new appointees as soon as they should qualify. The petition prayed the court to enjoin the new ap-

pointees from qualifying or taking possession of the offices, of the property, books, records, etc., or from discharging any of the duties, appurtenant thereto, and to enjoin the members of the old board from surrendering the same to the new. The petition was filed in the circuit court of the city of St. Louis, August 16, 1899, and assigned in due course to division No. 3 of that court, presided over by the Honorable James E. Withrow, who on that day granted a temporary injunction, as prayed for, which was duly served on the defendants named in that petition. The act of the general assembly complained of in that petition, not having passed with an emergency clause, did not take effect until August 21, 1899, which was ninety days after the adjournment of the legislature. The injunction was issued, therefore, five days before the act became a law. The relators, McCaffery, Kingsland, and Kobush, who were appointed by the governor, under the act of 1899, to be election commissioners for the city of St. Louis, finding themselves barred out from the offices to which they were appointed, and enjoined from attempting to obtain possession, or from performing any of the duties of the offices, or from claiming to be such officers, on August 21, 1899, caused this original suit to be instituted here to arrest the proceedings of the circuit court in the suit above mentioned, and dissolve the temporary injunction therein granted. A rule to show cause why a writ of prohibition should not issue was made by judges of this court in vacation, directed to the judge of that court who granted the injunction, and to the plaintiffs in that suit, returnable October 11, 1899. The returns of the judge and the plaintiffs in that suit are to the effect that the circuit court is a court of general jurisdiction in law and equity, having jurisdiction in that kind of cases, with power to issue injunctions; and that the act of 1899 was unconstitutional, and therefore, in the case made by the plaintiffs' petition, the court had authority to issue the injunction as it did, and in doing so did not transcend its jurisdiction; and for that reason, if the relators are aggrieved, they have a remedy by further proceedings in that court or by appeal on final judgment. The cause is submitted for the judgment of this court on a motion of the relators to strike out those returns.

The pleadings and motions, with their recitals and exhibits, make a voluminous record, but their substance is contained in the foregoing statement; and the question involved may be briefly stated thus: Is it lawful for a chancery court, or a chancellor in vacation, upon the filing of the bill, at the very threshold of the case, on the motion of one and in the absence of the other party, to enjoin the defendant from asserting his right to, or taking possession and performing the duties of, a public office to which he has been regularly appointed, upon the mere suggestion that the statute under which he claims the office is unconstitutional, when there has been no adjudication to

that effect? Upon the oral argument it was contended that the relators' position in this court is such that the statute under which they claim is confessed to be unconstitutional. By this we understand the contention to be that the motion to strike out the return is to be treated as a demurrer confessing the facts pleaded. While it is true that a demurrer confesses the facts well pleaded in a plea against which it is directed, yet it does not confess conclusions of law drawn from those facts; and even statements made as of facts designed to show the invalidity of a statute are not to be taken as true upon demurrer, like other statements in a case. A public law is not the property of any man, and cannot be confessed away. When the judiciary undertakes to pass judgment on an act of the legislature in the light of the Constitution, it exercises the highest function of government known under our free institutions. In such case parties and counsel may aid the court in its search for truth, both as to facts and law, but the responsibility for its findings and conclusions is upon the court alone. There is nothing in the pleadings, briefs, or arguments of counsel for the relators to indicate that they regard the law under which they claim to be in violation of the Constitution; on the contrary, by the very claim they make to the offices in question, they assert the validity of the law. The petition in the circuit court on which the injunction issued undertakes to trace the act of 1899 through the legislature from the introduction of the bill in the house of representatives to its passage in the senate and final approval by the governor, and makes statements in regard to its progress to show that certain provisions of the Constitution directing the method of procedure by the general assembly in passing a bill were ignored or violated: and chiefly for those reasons the act is charged to be unconstitutional, and it is the statements in regard to those matters that the relators are supposed to confess by their motion to strike out. But this court, as early as 1855, has decided that a judgment of invalidity of a statute could not be predicated on an admission. *State v. Rich*. 20 Mo. 393, which has been approved and followed in *State v. York*. 22 Mo. 462; *State v. Wiley*, 109 Mo. 439, 19 S. W. 197; *Ex parte Renfro*, 112 Mo. 591, 20 S. W. 682; and *State v. Searcy*, 46 Mo. App. 421. When the validity of a statute is drawn in question, the court approaches the subject as one involving the gravest responsibility, and to be considered with the greatest caution. The general assembly is presumed to have been as careful to observe the requirements of the Constitution in enacting the statute as the court in applying it. Every presumption is to be indulged in favor of the validity of the act, and that presumption is to continue until invalidity is made to appear beyond a doubt. *State ex rel. Circuit Attorney v. Cape Girardeau & S. L. R. Co.* 48 Mo. 468; *State ex rel. Harris v. Laughlin*, 75 Mo. 147; *Phillips v. Missouri P. R. Co.* 86 Mo. 540; *State ex rel. Brown v. Missouri P. R. Co.* 92 Mo. 47 L. R. A.

137, 6 S. W. 862; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Deal v. Mississippi County*, 107 Mo. 464, 14 L. R. A. 622, 18 S. W. 24; *State ex rel. Martin v. Wofford*, 121 Mo. 61, 25 S. W. 851; *Edwards v. Lesueur*, 132 Mo. 410, 31 L. R. A. 815, 33 S. W. 1130. But in the case at bar these presumptions seem to have been reversed, the statute held prima facie invalid, the will of the legislature blocked before it could take effect, and the officers appointed forbidden to put themselves in position where they could, as officers, defend it.

What was the object—the main, if not the only, purpose—of the suit in the circuit court? The plaintiffs, in their petition, said that they were citizens, property owners, and taxpayers of the city of St. Louis, and that the defendants, if not enjoined, would, under the requirements of that statute, take possession of the personal property pertaining to the office of election commissioners, which belonged to the city, and would enter on the business of registration of the voters and preparation for elections, and incur expense in that behalf, to be borne by the city, from which would result great and irreparable injury to the city. It is not suggested in the petition that the city is unable to defend itself from the threatened irreparable pecuniary loss, or that the city officials having its interests in charge are unwilling to do their duty. They do not say that they brought the suit to protect their own property from extra taxation that would result if Mr. Kingsland were suffered to take Mr. Brady's place, and Mr. Kobush that of Mr. Wurzbarger. Having set out in the beginning of the petition with the statement that they were property owners and taxpayers, they leave it to be conjectured what that has to do with the case. It is perfectly plain from the whole petition that protection to their property or pecuniary interest was not even a secondary object in bringing the suit, and that those statements were thrown in to give them, as it were, a color of right to bring the suit, and under that fictitious guise contest the title of the relators to a public office. Fictitious issues are now almost obsolete in actions at law, and were never favored in suits in equity. The real and only purpose of the suit in the circuit court was to bar the entrance to the office of board of election commissioners by injunction, and to obtain a decree of a chancery court declaring relators' title to the office invalid. That is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons who have rights of that nature which have been violated, and ample means are afforded in those courts for the vindication of such rights and the redress of their wrongs. High, Inj. § 312; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Hunter v. Chandler*, 45 Mo. 452; *State ex rel. Atty. Gen. v. Vail*, 53 Mo. 98; *State ex rel. Cannon v. May*, 106 Mo. 488, 17 S. W. 660. It is said in support of the injunction that, since no one was in possession of the

office, there was no one against whom a writ of quo warranto could be directed. But the petition in that case stated that these relators were about to enter into the office, and would do so if unrestrained, as soon as the act of the legislature, on its face, should go into effect. While the main virtue of an injunction is to anticipate and prevent a threatened wrong, which, if committed, a court of law could not adequately redress, yet a court of chancery cannot, in excursions beyond its domain, produce conditions to make jurisdiction for itself by forestalling events which would, if left alone, have no more injurious effect than to land the case in a court of law whose process is equal to the emergency.

The petition in the circuit court is aimed to be in the nature of a bill *quia timet*. Under that head of equity jurisprudence one may go into a court of chancery to prevent the occurrence of events, which he fears will be so disastrous that they will be beyond remedy in a court of law, but he cannot do so merely because he fears that, if events are left to take their course, he will be forced to plead in a court of law,—ample to afford all the remedy the case demands. According to their own statement, if these taxpayers had waited five days, the conditions would have been such that the courts of law would have been wide open to them; and, if the remedy should not be so speedy as an injunction issued on their *ex parte* hearing, it would, at least, have more the meritorious appearance of fairness and deliberation, and be not more inconvenient than the founders of the common law, in their wisdom and experience, may be presumed to have anticipated when they assigned the trials of such cases to courts of law. There is another aspect of that case that places it beyond the scope of the chancellor's view, and that is the character of the interests involved. In their petition the plaintiffs in that case say: "That for said last-named defendants [the relators here] to pretend to register citizens as voters, and to divide the city into election districts, will produce irreparable confusion and mischief, and it will result in leading many citizens to believe they are legally registered when in fact and in law such will not be the case, and they will be thus deprived of their rights and privileges as voters and citizens." There is no disguise of purpose in that statement. The powers of the chancery court are there plainly invoked to protect by injunction purely political rights. No such jurisdiction has ever been conceded to a chancery court, either in the Federal or state judiciary. The political rights of a citizen are as sacred as are his rights to personal liberty and property, but he must go into a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers and on an *ex parte* hearing. Neither in England nor America has this power been suffered to extend to political affairs. The supreme court of Illinois have said: "We would not be understood as holding that political rights are not a mat-

ter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection; but we think they do not come within the proper cognizance of courts of equity. . . . Wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law." *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 143, 37 N. E. 683. The United States circuit court of appeals, fourth circuit, per Fuller, Circuit Justice, says: "It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature. . . . To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government, or of the courts of common law. . . . Nor will equity interfere by injunction to restrain persons from exercising the functions of public offices on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum." *Green v. Mills*, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90. The Supreme Court of the United States has gone further than this, and further than we are willing to follow, saying, in effect, that the judiciary is altogether unable to afford redress for the violation of political rights by an unconstitutional act of Congress. This is the language of that court: "By the 2d section of the 3d article of the Constitution, 'the judicial power extends to all cases in law and equity arising under the Constitution, the laws of the United States,' etc., and, as applicable to the case in hand, 'to controversies between a state and citizens of another state,'—which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction,—that is, jurisdiction to grant an injunction to restrain a party for a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power. The rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity." *Georgia v. Stanton*, 6 Wall. 50, loc. cit. 75, 76, 18 L. ed. 721, 724, 725. That, being a suit in equity really

did not call for a decision concerning any other than equity jurisdiction, and Chief Justice Chase limited his concurrence to the conclusion that in the particular case made in the bill the court had no jurisdiction. In that case, also, an effort was made in the bill to give it the appearance of a suit to protect property interests,—the public buildings and personal property records, etc., of the state. On that point the court said: "But it is apparent that this reference to property, and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed, the case, as made in that bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us." 6 Wall. loc. cit. 77, 18 L. ed. 725.

In denying those plaintiffs the right to prosecute the suit in question we do not deprive them of any right they have under the 14th Amendment to the United States Constitution. Every state has the right to construct its judiciary as it sees fit, and the people of this state have seen fit to observe the distinctions that existed of old between legal and equitable jurisdiction; and it is not denying plaintiffs due process of law, nor equal protection of law, to tell them that when they wish to contest the title of another to a public office, or to vindicate their political rights, they must go into the law courts, and not into those whose jurisdiction is peculiar and limited, and not adapted to complaints of that kind.

It is perfectly plain that the circuit court had no jurisdiction of the case as made in the petition before it, and that it exceeded its jurisdiction when it issued the temporary injunction. Prohibition is the proper remedy to prevent a court from assuming a jurisdiction it has not, or exceeding a jurisdiction it has. The point is advanced by learned counsel that this court exceeded its jurisdiction in dissolving the injunction when it issued the order to show cause why the writ of prohibition should not issue. After the circuit court and the parties were admonished to proceed no further in the case until this court could look into the matter, the maintenance of the injunction already issued would have been as unlawful as further procedure in the case. The order dissolving the injunction was only necessary for the information of those concerned, so that there could be no doubt as to the effect of the rule to show cause. Undoubtedly, this court or the judges in vacation could, if conditions had seemed to call for it, have qualified the rule to show cause by expressly leaving the injunction in force until the further order or final judgment of this court. But, in the absence of such qualification, the pre-

liminary rule not only arrests further proceedings, but undoes what has been done.

It is also contended by learned counsel that relators had their remedy by motion to dissolve, and by appeal on final judgment. Prohibition is an extraordinary remedy, and will not lie where the party claiming it has adequate remedy by ordinary means. But the ordinary means that will defeat the application for this extraordinary writ must be sufficient to afford the relief the case demands. If the relators should await to follow the course pointed out by their adversaries, it would, in all probability, be a year before their appeal could be heard and decided, and it would be perhaps two years if the cause took its regular course, without advancements both in the trial and appellate courts. In the meantime they are out of office, and the important public duties the law requires of them are left unperformed. The remedy would be entirely inadequate. *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, loc. cit. 397, 398, 10 L. R. A. 640, 647, 24 Pac. 139. It is said by an eminent law writer that, before the writ of prohibition should issue, it ought to appear that the party applying for it has applied in vain to the inferior tribunal for relief (High, Extr. Legal Rem. § 765), and that author cites in support of the proposition a decision of the supreme court of Arkansas, which does so declare. *State ex rel. Butler v. Williams*, 48 Ark. 227, 2 S. W. 843. But while we agree to that general rule, we do not apply it as the counsel who invoke it here insist. It is not a jurisdictional requirement; it is not essential, like a motion for a new trial before appeal. The writ of prohibition does not issue *ex debito justitiae*, but only in the discretion of the court. When the applicant has made out his *prima facie* case bringing it within the technical requirements of the law, the question still remains for the court, Does the real right and justice of the case call for this extraordinary remedy? In determining the question, if there is anything in the circumstances suggesting that the party has neglected to apply for relief that was reasonably available, the writ would be withheld, at least until such relief was sought. The supreme court of California, in the case last cited, took this view of the subject, and held that the failure to apply to the lower court to discharge the receiver did not justify a denial of the writ of prohibition. *Havemeyer v. San Francisco City & County Super. Ct.* 84 Cal. 327, loc. cit. 397, 398, 10 L. R. A. 646, 647, 24 Pac. 139, citing *London v. Cox*, L. R. 2 H. L. 278-280. The point is not presented in the briefs of the learned counsel accompanied with any suggestion on their part that an application to the circuit court would have availed, but they present it as a fixed bar to the relators' application for this writ. We do not so regard it.

The record shows that the Honorable Daniel D. Fisher, one of the judges of the circuit court of the city of St. Louis, named in relators' petition, has never had anything to

do with the case in question, and has never assumed to exercise any jurisdiction over it. Therefore this proceeding should be dismissed as to him.

The motion to strike out the returns is

sustained, and the writ of prohibition, except as to Judge Fisher, is awarded as prayed.

All concur, except Sherwood, J., absent.

MONTANA SUPREME COURT.

Daniel R. NOYES *et al.*, *Appts.*,

v.

A. E. ROSS *et al.*, *Respts.*

(.....Mont.....)

1. A relationship between a mortgagor and a mortgagee in a chattel mortgage will not invalidate it as against other creditors, if the mortgage is given for a debt that is honestly due.
2. The inclusion in a partnership mortgage, of the debt of one of the partners, will not invalidate the mortgage in favor of subsequent lien creditors of the partnership.
3. A reasonable monthly allowance to a mortgagor, provided for in a chattel mortgage as compensation for his services to the mortgagee after the latter takes possession, will not make the mortgage fraudulent.
4. A mortgage by a merchant of all his property for the security of certain creditors will not constitute in law an assignment for creditors invalid because partial, where the mortgagor intends to keep up his business if he can, with no intention to divest himself of title to and control over the property.
5. A provision for the retention of possession by a mortgagor of a stock of goods, with the right to sell them in the ordinary and usual course of trade, does not make the instrument invalid, provided it appears that the sales are to be for the benefit of the mortgagee, and the mortgagor is to account to him for the proceeds of the sales.
6. A provision that a mortgagor of a stock of goods may retain his necessary living expenses out of the proceeds of sales for which he is to account to the mortgagee does not make the mortgage invalid.
7. A provision that a mortgagor may give credit for thirty days on sales from a mortgaged stock of goods, for which he is to account to the mortgagee, does not show bad faith, or make the mortgage invalid.
8. Credit sales should, under a chattel mortgage of a stock of goods permitting the mortgagor to retain possession and sell for cash or credit, all be deemed cash payments paid over to apply on the debt, in favor of other creditors of the mortgagor, although they are in fact uncollected at the time of the accounting.
9. Creditors who have no title or right of possession to mortgaged property cannot complain that the mortgagee takes possession thereof and sells at auction before the maturity of his debt, and without any authority contained in his mortgage to sell at that time.

(December 18, 1899.)

NOTE.—As to the effect, upon the validity of a mortgage of merchandise, of a provision or agreement giving the mortgagor possession with power of sale, see note to *Ephraim v. Kelleher* (Wash.) 18 L. R. A. 604.
47 L. R. A.

APPEAL by plaintiffs from a judgment of the District Court for Yellowstone County in favor of defendants in a proceeding to set aside a chattel mortgage on a stock of drugs. *Affirmed.*

Statement by Hunt, J.:

The plaintiffs, Daniel R. Noyes *et al.*, brought this action against A. E. Ross and A. A. Fenske, copartners under the firm name of A. E. Ross & Co., and L. H. Fenske, defendants, in aid of supplemental proceedings to have declared void a chattel mortgage executed and delivered by A. E. Ross and A. A. Fenske, under the firm name of A. E. Ross & Co., to L. H. Fenske, and to have the said L. H. Fenske account to the plaintiffs for certain property of the said firm of Ross & Co. alleged to have come into his hands under the said mortgage. It is alleged in the complaint that on July 9, 1895, plaintiffs obtained a judgment against the said defendants A. E. Ross and A. A. Fenske, partners as aforesaid, for the sum of \$1,985.45, together with interest; that execution was issued on said judgment on July 10, 1895, but that the same was returned unsatisfied; that thereafter, in November, 1895, proceedings were had supplementary to execution, and an order made on November 18, 1895, authorizing plaintiffs to bring an action against the defendants herein to determine the validity of the mortgage heretofore referred to; that the defendants Ross & Co. prior to February 16, 1895, and subsequent to the contracting of the indebtedness upon which the judgment of the plaintiffs was recovered, owned a certain stock of drugs and fixtures, contained in their drug store, in the city of Billings; and that the said stock and fixtures were then of the value of about \$7,000. It is further averred that on February 16, 1895, the firm of Ross & Co. fraudulently, and for the purpose of hindering, delaying, and defrauding their creditors, made and delivered, or pretended to make and deliver, to the defendant L. H. Fenske, a certain chattel mortgage, covering all of the stock of drugs, etc., in the said store of the said firm, but that the said chattel mortgage was without any valuable consideration, and was fraudulent and void, and made with the intent to hinder, delay, and defraud creditors of said firm, and especially these plaintiffs, and that the said defendant L. H. Fenske, for the sole purpose of helping the said firm and the partners thereof in their scheme to hinder, delay, and defraud the creditors of the firm, took the property described in the mortgage at the said time and at all times since, and still does claim and pretend to be the holder thereof by virtue of said chattel mortgage. The mortgage

contains the usual formal recitals included in chattel mortgages under the laws of Montana, and, in addition thereto, covers all the shelving, show cases, drugs, medicines, wines, liquors, etc., contained in the drug store of the plaintiffs, and is broad enough in its terms to cover all the goods and chattels used in connection with the said drug business, and all stocks that might have been subsequently put into the said store to keep up the said business. The mortgage was given to secure the payment of a promissory note for \$4,500, dated at Billings, February 16, 1895, and due on or before one year after date, by A. E. Ross and A. A. Fenske to L. H. Fenske. It was provided in the mortgage that, in case default was made in the payment of the principal or interest, the mortgagee or the sheriff was empowered to sell the goods and chattels as prescribed by the terms of the mortgage, and out of the money arising from such sale to retain the principal and interest, and the overplus, if any there should be, was to be paid on demand to the said parties of the first part; that is, the firm of Ross & Co. It was also provided that, in case the power of sale should be executed, such sale should be advertised for five days, and might be either public or private. Furthermore, the mortgage permitted the mortgagors to remain in the possession of the property, and to sell the goods described in the mortgage, until default, but provided that if, prior to the maturity of the indebtedness of the firm, the property, or any part thereof, was attached or claimed by any other person, or if at any time the mortgagee should consider the possession of said property, or any part thereof, essential to the security of the payment of the mortgagor's note or to the preservation of said property, then the mortgagee or the sheriff should have the right to immediately take possession of the said property, and the whole or any part thereof, and should have the right, at his option, to take possession from any person having or claiming the same, with or without suit or process, and for that purpose might enter upon the premises where the property might be found. The mortgage also included the following provisions: "It is further expressly provided and agreed by and between the parties to this mortgage that the parties of the first part [Ross & Co.] may, and they are hereby authorized to, sell from said stock of drugs and goods, wares, and merchandise, and from other goods hereafter added thereto, at retail, to the regular and other customers in the usual and general way of business, for cash, or on not to exceed thirty days' credit to responsible parties; but the parties of the first part shall keep accurate account of all such sales, and during banking hours of each day deposit the proceeds of such sales in bank to the credit of the party of the second part, to apply on said note, retaining in the said store only sufficient of such proceeds to pay current bills and expenses of carrying on said business, and for making change. And it is further agreed that the parties of the first part will at least once a month, to

47 L. R. A.

wit, on or before the tenth day of each month, during the continuance of this mortgage, or the extension thereof, account to the party of the second part [L. H. Fenske] for all sales and collections made during the previous month, and pay over to the party of the second part at such times of accounting the proceeds of all such sales and collections, to apply towards the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said drug business, and the actual and necessary living expenses of the said A. E. Ross, one of the parties of the first part, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission hereinafter granted. And it is further agreed that the said parties of the first part may from time to time purchase new goods, wares, and merchandise for cash, or its equivalent, to replenish and keep up said stock of goods now on hand, and all such goods, wares, and merchandise so purchased shall be considered as covered by this mortgage from and after their arrival in the said city of Billings, before they are placed in the said store as well as after; and, whenever the word 'store' is used in this mortgage, it shall be construed and understood to mean the front or sales room and the rear room or ware room of said store, and also the basement situate under said store."

The defendants by answer admitted the facts pleaded in relation to the judgment obtained against the firm of Ross & Co., but denied that the stock of goods and fixtures were of the value of \$7,000, or of any greater value than \$4,000. They admitted the execution of the chattel mortgage, but denied all allegations of fraud, and averred that the said chattel mortgage was executed and delivered and accepted in good faith, and to secure a bona fide indebtedness, as set forth in the mortgage and the answer. They affirmatively alleged that on and before February 16, 1895, defendant A. A. Fenske was indebted to the defendant L. H. Fenske in the sum of \$1,110 and interest, which sum had been advanced before that time by said L. H. Fenske to A. A. Fenske, and had been used by the latter in the purchase of an interest in the drug business of A. E. Ross & Co. It was alleged that L. H. Fenske at the time of the execution and delivery of the mortgage was a stockholder in the Yellowstone National Bank of Billings, and that on said February 16, 1895, A. E. Ross and A. A. Fenske were indebted to said bank in the sum of \$2,150, with interest, and said bank being desirous of having said indebtedness secured, and the said Ross and Fenske desiring to secure the payment thereof, it was agreed between said Ross and A. A. Fenske, the said bank, and the said L. H. Fenske that the said L. H. Fenske should become responsible to the Yellowstone National Bank for the payment of said indebtedness, and that the same should be secured by the firm of Ross & Co. by giving the chattel mortgage described in this suit to the said L. H. Fenske, and that the amount due the bank, together with certain other

debts of said firm, might be included in the said mortgage, and a note made by the members of said firm to L. H. Fenske, including the money due the bank and the indebtedness of \$1,110 to L. H. Fenske, and the further sum of \$1,000 due by the said Ross and Fenske to H. T. Ramsey, of Billings, for part of the purchase price of the drugs and the drug business; that it was agreed that, for the purpose of assisting the firm of Ross & Co. in the continuance of their business, the said L. H. Fenske should assume, and that he did assume, and did agree with Ross & Co. and the bank and the said Ramsey to pay, the aforesaid debts of Ross & Co. to the said respective parties, and that pursuant to said agreement L. H. Fenske did from time to time make payments on the said debts of Ross & Co. to the bank, and paid all the money due to the bank, excepting the sum of \$750, which remained unpaid at the time of the filing of the answer; and that L. H. Fenske had entirely discharged the debt due by the said firm to Ramsey. It was also alleged that when the mortgage was given there were some bills for goods that had been ordered by the firm of Ross & Co., amounting to about \$298, which the said L. H. Fenske agreed to pay, and that said sum was included in, and was part of, the consideration of the \$4,500 note described in the mortgage, and which said bills L. H. Fenske paid in full before the commencement of this suit. It was further alleged that the mortgage was made in good faith, and for the better security of the payment of the debts of said A. E. Ross and A. A. Fenske to the bank, and to indemnify the said L. H. Fenske against loss by reason of his having assumed and agreed to pay the various sums of money as heretofore described, and which he had paid in good faith, and for the further purpose of enabling the said Ross & Co. to continue their business. It was then set forth that Ross & Co. continued the drug business according to the terms of the mortgage until June 24, 1895, when the defendant L. H. Fenske, the mortgagee, feeling and deeming himself insecure, and that the possession of the property was essential to his security, took possession of the property described in the mortgage, under the terms thereof, and retained the said property in his hands, selling therefrom at private sale in the usual course of business, but in his name as mortgagee, until November 20, 1895, when, as mortgagee, after having given due notice pursuant to the provisions of the chattel mortgage, he sold the property remaining at public auction, and that he, the said L. H. Fenske, bought the same in for \$1,600, that being the best and highest bid made; that the said sum of \$1,600, together with \$55, the sum bid for the book accounts, was the reasonable value of said property; that after he took possession under the mortgage, and after paying the actual expenses of conducting the business, all the receipts were applied towards the liquidation of the debt secured by the mortgage; that after properly applying the receipts of all kinds to the payment of the mortgage debt, less the expenses

47 L. R. A.

of foreclosure, sale, and retention, and after applying the proceeds of the sales turned over by Ross & Co. between the time of the giving of the mortgage and the time that the mortgagee took possession, there was a balance still due on the mortgage of \$2,506, no part of which had been paid when the answer was filed; and that thereafter, on December 10, 1895, the said L. H. Fenske sold all the property that had been bought in by him for \$1,600, which sum, he alleged, was the reasonable value thereof.

The questions of fact involved were tried by a jury, who returned a general verdict and special issues for the plaintiffs. The special issues submitted directly involved the question of the good faith of Ross & Co. at the time of the execution of the chattel mortgage. The jury found that they intended to hinder, delay, and defraud their creditors. Thereafter the defendants moved to set aside the findings of the jury. The court sustained this motion, for the reason that the findings and the verdict were contrary to the law and the evidence, and found the issues generally in favor of the defendants and against the plaintiffs, and gave the defendants judgment for costs. From this judgment, plaintiffs appeal.

Messrs. Cullen, Day, & Cullen, and J. A. Savage, for appellants:

The mortgage was void as a matter of law, for the reason that it provides for a sale by the mortgagors on credit.

Rochelleau v. Boyle, 11 Mont. 457, 28 Pac. 872; *Rosenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081.

If it appears that the essential characteristics of an assignment are present, it is immaterial what the parties may term the instrument.

Marshall v. Livingston Nat. Bank, 11 Mont. 351, 28 Pac. 312.

The existence of fraud is an inference to be drawn by the jury whenever there is a controversy about the facts, and by the court when there is none.

Merchants' Nat. Bank v. Greenwood, 16 Mont. 395, 41 Pac. 250, 851.

Selling in the ordinary course of business, paying operating expenses, replenishing stock, and treating the stock of goods and the store in all respects as if it were defendant's own, amount to a conversion, and render him liable to these plaintiffs for the value of the property at the time he took it.

Harder v. Hosp., 69 Wis. 288. 34 N. W. 145; *Lininger v. Herron*, 23 Neb. 197, 36 N. W. 481; *Loeb v. Milner*, 21 Neb. 392, 32 N. W. 205; *Lomas v. Walk*, 33 Or. 385, 54 Pac. 199.

Mr. O. F. Goddard, for respondents:

The stipulation in the mortgage allowing the mortgagor Ross to retain his living expenses out of the proceeds of sales did not *per se* render the mortgage void on its face.

Cobbey, Chat. Mortg. §§ 226 *et seq.*; *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679; *Etheridge v. Sperry*, 139 U. S. 275, 35 L. ed. 176, 11 Sup. Ct. Rep. 565; *Jewell v. Knight*, 123

U. S. 433, 31 L. ed. 193, 8 Sup. Ct. Rep. 193; *Magniac v. Thompson*, 7 Pet. 348, 8 L. ed. 709; *Bean v. Patterson*, 122 U. S. 496, 30 L. ed. 1126, 7 Sup. Ct. Rep. 1298.

A chattel mortgage upon a stock of merchandise to secure a bona fide debt, which allows possession to remain in the mortgagor under an agreement that he shall sell and apply the proceeds to payment of the debt, is prima facie valid and binding upon all parties.

Benham v. Ham, 5 Wash. 128, 31 Pac. 459; *Etheridge v. Sperry*, 139 U. S. 276, 35 L. ed. 176, 11 Sup. Ct. Rep. 565; *Rocheleau v. Boyle*, 11 Mont. 451, 28 Pac. 872; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848; *Hixon v. Hubbell*, 4 Okla. 224, 44 Pac. 222.

This being an equity case, the verdict of the jury was only advisory, and the court could set it aside if contrary to law and evidence; and the action of the court in setting aside the verdict of the jury was a matter of sound judicial discretion, and will not be disturbed by this court unless there appears to have been an abuse of such discretion by the court below.

Mitchell v. Campbell, 14 Or. 454, 13 Pac. 190; *Pittman v. Pittman*, 3 Or. 553; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *Sandborn v. Centralia Furniture Mfg. Co.* 5 Wash. 150, 31 Pac. 466; *State v. Lee Ping Bow*, 10 Or. 27; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625; *Spottiswood v. Weir*, 66 Cal. 526, 6 Pac. 381; *Haggin v. Raymond*, 67 Cal. 302, 7 Pac. 721; *Barker v. Gould*, 122 Cal. 240, 54 Pac. 845; *Kline v. Graff*, 8 Kan. App. —, 54 Pac. 328; *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

It is not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure, but it shall stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards upon the faith of the mortgage and notice of the defendant's equity.

Shirras v. Caig, 7 Cranch, 34, 3 L. ed. 260; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 448, 7 L. ed. 189, 216.

A chattel mortgage is not invalid because the amount it promises to pay exceeds the indebtedness which it was given to secure, in the absence of fraud or usury, but it is a valid collateral security for the amount actually owing.

Kiser v. Carrollton Dry-Goods Co. 96 Ga. 760, 22 S. E. 303; *Goodheart v. Johnson*, 88 Ill. 58; *Speer v. Skinner*, 35 Ill. 282; *Bodley v. Anderson*, 2 Ill. App. 450; *Monnot v. Ibert*, 33 Barb. 24.

A contingent liability is a good consideration for a mortgage of chattels.

Warren v. His Creditors, 3 Wash. 48, 28 Pac. 257; *Cobbey, Chat. Mortg.* 138; *Wood v. Franks*, 67 Cal. 32, 7 Pac. 50; *Tully v. Harloe*, 35 Cal. 309; *Lawrence v. Tucker*, 23 How. 14, 16 L. ed. 474; *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260.

Possession by the mortgagee of mortgaged property cures all defects in the mortgage.

Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801; 47 L. R. A.

Leach v. Arkansas City Mfg. Co. 8 Kan. App. —, 56 Pac. 135; *Jones, Chat. Mortg.* 178; *Cobbey, Chat. Mortg.* 498; *Durham v. Hadley*, 47 Kan. 73, 27 Pac. 105; *Frost v. Citizens' Nat. Bank*, 68 Wis. 234, 32 N. W. 110; *Farmers' & M. Bank v. Orme* (Ariz.) 52 Pac. 473; *Dolan v. Van Demark*, 35 Kan. 304, 10 Pac. 848; *Morrow v. Reed*, 30 Wis. 81.

The mortgagee had a right, and it was his duty, to foreclose the mortgage and sell the property, where the property was liable to fluctuate in the market, within a reasonable time after taking possession.

Lomas v. Walk, 33 Or. 385, 54 Pac. 199.

Hunt, J., delivered the opinion of the court:

The contention of appellants is that the mortgage was void because it contained a provision for the use and benefit of the mortgagors, by providing that out of the proceeds of the sales of the property covered by the mortgage the mortgagors were permitted to retain the necessary living expenses of one of them, and because it was provided that the mortgagors might sell the mortgaged property at retail, in the usual and general way of business, for cash, or on not to exceed thirty days' credit to responsible parties. We glean from the record the following facts, which should be considered in the determination of the questions presented by the appellants: A. E. Ross and A. A. Fenske formed their partnership to enter into the drug business in June, 1894. At the time they started they borrowed some money from the Yellowstone National Bank, and bought a stock of drugs from one H. T. Ramsey, paying him \$1,500 in money, and giving him notes for the balance due him. They afterwards added to the stock of goods bought from Ramsey by purchases from wholesale drug houses. On February 16, 1895, an inventory was taken, and the chattel mortgage referred to in the statement of facts preceding this opinion was given to L. H. Fenske for the purpose of securing what they owed to Fenske, the bank, to Ramsey, and other parties. The firm ran the business until June 24, 1895, purchasing goods from time to time with money taken in by them in their store. The mortgagor Ross drew out from the proceeds of the sales of goods about \$100 a month for his living expenses. A. A. Fenske, the other partner and mortgagor, took no part in the conduct of the business, which never seems to have been profitable, owing to heavy expenses. On June 24, 1895, the mortgagee took possession, which was voluntarily surrendered to him by the mortgagors. At the time the mortgagee took possession the mortgagors were being pressed for payment by certain of their creditors, but the evidence is that the mortgage was executed to secure the notes which were assumed by the mortgagee, L. H. Fenske. The mortgagee testified that he saw that the business was not paying anything, and he asked the mortgagors for a chattel mortgage, and took the mortgage to indemnify himself for moneys which he agreed to pay to the bank, and which were

due by the firm, and for money due to Ramsey, and for the sum of \$1,100 due by one of the partners to himself. He said that he understood that an attachment was about to be served upon the property of the mortgagors, and in pursuance of advice by counsel he immediately took possession under the terms of his mortgage, put one Hill in charge of the store, and continued to run the business for a time. The expenses were so heavy, however, that he concluded to sell it all off. While he was running the business he sold in the usual course of trade, and finally closed the whole stock out at auction on November 24, 1895, and bought it in himself for \$1,600. This sale was at public auction, and numerous persons were present, including a representative of these plaintiffs. Some sales on credit had been made while the mortgagee was in charge, and before the mortgagee took charge, but about 90 per cent of the sums charged had been collected before this suit was commenced. At the time of the execution of the mortgage, in February, 1895, an inventory was taken, and the goods and fixtures valued at \$6,620.92, the stock itself being put at a little over \$5,000. From the time of the execution of the mortgage, in February, and up to the time of taking possession by the mortgagee, in June, 1895, the firm's receipts were \$3,054.90. Of this sum \$1,144.05 was deposited in bank. The firm also purchased \$1,635.33 worth of merchandise during that time. The total credit sales for that time were \$860.05. The mortgagor Ross drew out \$385.35. The expenses (rent, clerk hire, etc.) amounted to \$1,525.50. When the mortgagee took possession another inventory was taken, whereat the stock was valued at \$3,872.52, and the fixtures at \$900. From the time of the execution of the mortgage until the mortgagee took possession monthly reports of the business were made to the mortgagee, and the \$1,144.05 deposited in the bank by the firm was put to the credit of L. H. Fenske, the mortgagee under the terms of the mortgage; and from such deposits there were paid considerable sums due for goods, by checks drawn by the mortgagee. When the inventory was made at the time the mortgagee took possession, it was computed upon the basis that if a man could be found who desired to go into the drug business in Billings, and invest in a drug store, and keep up the business, and was willing to pay for the goodwill and other appurtenances of such a business, the prices were fair and reasonable. The values were with relation to the wholesale price list plus the freight. It is shown by a statement in the record that the mortgagee, from the time he took possession of the property, deposited in bank the sum of \$1,518.55; and a recapitulation showing cash receipts since the execution of the mortgage disclosed that \$7,125.01 had been received in that time, out of which there had been paid for merchandise and expenses the sum of \$6,353.75, which with the sum of \$27.78, representing a loan and cash balance in bank, left a balance of \$743.48 to be applied to the mortgage debt. We notice

47 L. R. A.

that included in the expenses from the time the mortgagee took possession, in June, to November, 1895, he paid to Ross, the mortgagor, the sum of \$515.35 for living expenses. The management of the store was in Mr. Hill, who had been a clerk in the employ of the mortgagors, Ross & Co. The purchaser, after the auction sale, testified that at the time he purchased the goods he thought they were worth about 50 cents on the dollar of the invoice, and that he believed he paid a fair market price for them in November, when he bought.

We believe that, upon consideration of all this evidence, the court was justified in finding no actual and intentional fraud on the part of the mortgagors and the mortgagee. The fact that a relationship existed between one of the mortgagors and the mortgagee cannot invalidate the mortgage. If the debt was one honestly due, the mortgagors had a right to secure it, whether due to a relation or anyone else, even though their action left nothing for their other creditors, provided, always, the transaction was in good faith, and entered into with honest intention. As evidence of fraud, and of an intent to hinder and delay creditors, plaintiffs also mention the fact that part of the amount included in the partner's note to Fenske was an individual indebtedness of \$1,100 due by one of the partners. This statement is correct, as the testimony shows that \$1,100 was loaned by the mortgagee to one of the mortgagors, who used the money borrowed to buy an interest in the new drug firm of Ross & Co. at the time that the partnership between Ross and Fenske was formed. But the mortgagee took the note of the copartners and the mortgage by the firm in good faith and for value. When the partners executed the mortgage, they had full possession of the property,—no lien had attached to it; and, both partners consenting, their right to mortgage the stock in good faith could not be denied. The principle that the assets of a partnership are for distribution to their creditors does not obtain, without regard to rights already existing. Again, the right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners; and, if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors. These rules rest upon the principle that the right of creditors of a partnership to have partnership debts paid out of partnership property before the debts of an individual partner is not a lien or trust, but is a derivative equity from the partner, and can be made effective only through the equity of an individual partner, to which the creditor is subrogated. It follows that, if such partner is in no position to enforce it, a firm creditor cannot. "So, if, before the interposition of the court is asked, the property has ceased to belong to the partnership,—if by a bona fide transfer it has become the several property either of one partner or of a third person,—the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore

always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced." *Case v. Beauregard*, 90 U. S. 119, 25 L. ed. 370. See also *Reynolds v. Johnson*, 54 Ark. 449, 16 S. W. 124; *Purple v. Farrington*, 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543; *Smith v. Smith Bros.* 87 Iowa, 93, 54 N. W. 73; *Re Edwards*, 122 Mo. 426, 29 L. R. A. 681, 25 S. W. 904.

The additional fact that the mortgagor was allowed to draw \$100 per month from the date of the mortgage until the sale of the property by the mortgagee at auction is not of itself, or in connection with the other facts in evidence, conclusive of fraud. If the mortgagor was employed by the mortgagee after the latter took possession, he was entitled to compensation. If he was not, but was allowed to receive money, it was evidence tending to establish a fraudulent intent on the part of the parties to the mortgage. But, as the district court has found the issues generally in favor of defendants, and there is evidence sufficient to justify the action of the court, this court cannot now set aside the conclusions of the district court, as unwarranted by the evidence. The finding by the judge that the whole transaction was entered into in good faith, and for the purpose of securing defendant L. H. Fenske and certain creditors whose debts were evidenced by the note for \$4,500 made by the mortgagors at the time of the execution of the mortgage, is supported (*Haggin v. Saile*, 23 Mont. —, 59 Pac. 154); and we shall therefore pass to the question of whether or not, as a matter of law, the mortgage was invalid, and operated as a fraud against the creditors of the mortgagors. To that we briefly address ourselves. Involved in this inquiry is the assertion of appellants that the instrument under consideration is, in effect, an assignment for the benefit of the creditors of Ross & Co., and should be so regarded. The facts, however, will not bear out this statement; for they go to prove that Ross & Co. intended to keep up their business, if they could, and that they merely gave the mortgage to secure Fenske for a debt due to him, and to indemnify him for coming to their relief when other creditors were demanding immediate payment, and threatening to attach their property. As far as we can gather from the evidence in support of the court's finding, they had no intent to divest themselves of title and all control of their stock of goods by conveying the same to a trustee for the purpose of securing a distribution of its proceeds among a portion of their creditors, which would have made the instrument, in legal effect, an assignment for the benefit of their creditors, as was held in *Marshall v. Livingston Nat. Bank*, 11 Mont. 351, 28 Pac. 312. Here we find the mortgagors retained possession, and intended to only give a lien on their property, preserving their equity of redemption, while in that case the mortgagor intended to make an absolute appropriation of property to his creditors by authorizing immediate possession,

passing both the legal and equitable title absolutely beyond his control to the mortgagee, which was to sell, collect the proceeds, pay expenses, pay certain notes, and then account for any balance to the debtor. The fact that a mortgage upon all of a debtor's property operates to secure certain creditors does not of itself make the security an assignment, where the written contract and the acts thereunder show an intention to give a security only, although it becomes the duty of courts to examine into the circumstances of such transfers very carefully, lest a transaction be given an effect in express contradiction of the intention of the parties to it. Tested by these principles, we conclude that Ross & Co. mortgaged their stock to Fenske, and that the law of chattel mortgages and that of assignments for the benefit of creditors must be applied to the contract in question.

A mortgage which authorizes the mortgagor to retain possession, with the right to sell a stock of goods mortgaged, in the ordinary and usual course of trade, if otherwise good, is on its face a valid instrument, provided it appears therein that such sales are to be for the benefit of the mortgagee, and he is to account to the mortgagee for the proceeds of the sales. To this extent the courts and text writers have advanced in later years. We must remember that, as a substitute for possession in the mortgage, the mortgage must be filed in the office of the county clerk. Secrecy is thus obviated, and opportunity to perpetrate fraud is greatly lessened. The records are public, and creditors are thereby constructively advised of the nature and provisions of the mortgage. They have a knowledge that the mortgagor has given a lien upon his stock of goods, and of the provisions of the contract granting the lien. It is the policy of the recording acts that has outweighed the policy of an older rule, under which, upon the theory of constructive fraud, mortgages with power to sell the mortgaged goods in the usual course of trade were so often held void. Mortgages of stocks in trade, with right to sell, cannot be said by judges to be the result of fraudulent intentions on the part of the parties to them, unless such intentions existed in fact. On the contrary, as Justice Brewer said of such transactions in *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565, the Supreme Court could not "be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith." In our opinion, where the law requires the filing of a chattel mortgage with the county clerk, as it does in Montana, in cases where the mortgage provides that the property may remain in the possession of the mortgagor (Comp. Stat. 1887, div. 5, § 1540; Civil Code, § 3864), and where "any interest in personal property which is capable of being transferred may be mortgaged," which was the law generally before the Codes were adopted, as well as now (Civil Code, § 3860), the records give the requisite information to

persons dealing with the mortgagors; and contracts by way of security upon a stock of goods, with power to sell, under an agreement to apply the avails of sales to the payment of the mortgage debt, should be upheld, as promoting, rather than retarding, business arrangements, for they are not only compatible with perfect honesty, but suffer many a business to be kept up which would otherwise fail, and afford many a debtor an opportunity to gain a solid foothold in a community where he might otherwise go to the wall. "It is to be observed," say the supreme court of Vermont in *Peabody v. Landon*, 61 Vt. 318, 17 Atl. 781," that the mortgagee in such a case places the avails of the sale wholly within the power of the mortgagor, and must trust him, to a greater or less extent, to pay them over on the debt secured. Yet, with the general power of sale, the parties, when the mortgage is made honestly, intend the property conditionally conveyed as security for the payment of the debt, and use it for that purpose. There is no question in regard to the validity of such mortgages between the parties. It is contended that they should not be held fraudulent *per se* and void, because such mortgages furnish a convenient opportunity to cover the property away from the other creditors for the benefit of the mortgagor, when they may be honestly intended and used to secure the payment of the mortgagee's debt in the most economical, and in such an inexpensive, manner as to save something for the other creditors, or at least for the mortgagor. It seems to us that, so far as controlled by public policy, the question is for the legislature, rather than for the court, and that the fundamental error of Mr. Pierce, and the authorities which hold such mortgages fraudulent *per se* and void, lies in assuming that the question is to be determined by the principles of the common law as propounded in *Twyne's Case* [3 Coke, 80b], rather than by a fair construction of the provisions of the statute, and of public policy as indicated by the provisions of the statute." Jones, Chatt. Mortg. § 381, regards such mortgages as valid, and rests his text upon the principle that the statutes authorizing chattel mortgages where the mortgagor retains possession would fail of their purpose in respect to an important class of property,—merchandise held in stock and for sale,—if the doctrine of constructive fraud must obtain, and render such instruments void on their face. The authorities for the more modern rule impress us as sound in their reasoning, and we hold that the question of the good faith of a mortgage transaction like the one before us is, on principle, not to be decided as one entirely of law, but is largely one of fact, and must be ruled upon accordingly. *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580, decided by the territorial supreme court, followed the supposed doctrine of *Robinson v. Elliott*, 22 Wall. 513, 22 L. ed. 758; but since those two decisions in *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754, 47 L. R. A.

7 Sup. Ct. Rep. 679, and *Etheridge v. Sperry*, already cited, the Supreme Court of the United States has declined to accede to the doctrine of the case of *Robinson v. Elliott*, 22 Wall. 513, 22 L. ed. 758, as interpreted in *Leopold v. Silverman*, *supra*, while this court has likewise modified, if it has not drawn away from, the views expressed in *Leopold v. Silverman*, by already putting it self in accord with the better rule. *Rocheleau v. Boyle*, 11 Mont. 451, 28 Pac. 872; *Heilbronner v. Lloyd*, 17 Mont. 299, 42 Pac. 853.

Nor is the mortgage on its face invalid because it authorized one of the mortgagors to retain his necessary living expenses; for if there be no fraud in law by necessary implication from the mortgage of the stock in trade with power to sell to pay the debt due the mortgagee, and account for the sales to him, or generally from a chattel mortgage of all the goods of a merchant, with such powers and agreements contained within it, it is difficult to see how an agreement which allows the mortgagor to draw out enough for his subsistence necessarily has the effect to hinder, delay, or defraud creditors, and is a fraud upon them. It certainly is competent evidence to be considered in the determination of the question of the good faith of the parties to the mortgage, but if the whole transaction is honest, and has been entered into in good faith by all parties to the mortgage, the only way by which, in most instances, the provisions agreed upon can be effectually carried out, and by which the stock can be sold, and the mortgagee paid, and the mortgagor's business still allowed to continue, is to permit the mortgagor to manage the stock with regard to the rights of the mortgagee, and to draw a living from the proceeds while he is doing so. Indeed, if he has no other property or independent means,—and a merchant who executes such a mortgage in good faith is usually wholly without means of living, outside of the proceeds of current sales from his stock,—yet it is a fraud for him to draw out enough for him to live upon, and such a mortgage is of no benefit to the mortgagor; for he simply cannot remain in possession to carry out the agreement, because he cannot get anything to live upon while carrying out the contract. Carried to its conclusion, it will readily be seen that, if such mortgages are to be held fraudulent on their faces because of such agreements, none may make them, except men of independent means or credit; but as we all know that such persons do not, as a rule, have to resort to these means to protect their creditors, it is more just to establish principles which will give effect to the mortgage, by consideration of that common knowledge which tells us that those who mortgage their stocks are too often without any other means at all, but yet who by the law have the power to mortgage whatever they have, in an honest effort to pay their debts without resort to assignment for the benefit of creditors. All such agreements, however, whether in parol or included in the mortgage itself, should be closely scrutinized, for they carry

the transaction involved close to the line where the law will say the parties have adopted a means whereby creditors are hindered and delayed; yet, notwithstanding all this, such mortgages are not necessarily of such a character that the law will conclusively imply fraud, if none actually exists, but will leave the question of good faith to be tried as one of fact. *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171. In *Oliver v. Eaton*, 7 Mich. 108, a provision whereby the mortgagor was to apply the proceeds of sales in the purchase of other goods, keeping up the stock, "and in the support of his family," and to pay a certain indebtedness, was held by Campbell, J., not to render the mortgage null and void, but that the intent was for the jury. See also *Gay v. Bidwell*, 7 Mich. 519, and *Sperry v. Etheridge*, 63 Iowa, 543, 19 N. W. 657. In the very recent case of *Williams v. Mitchell* (Kan. App.) 58 Pac. 1025, the cases of *Frankhouser v. Ellett*, 22 Kan. 128, 31 Am. Rep. 171, *supra*, and *Whitson v. Griffin*, 39 Kan. 211, 17 Pac. 801, are affirmed in the following language: "It is further contended that the mortgage is void upon its face by reason of the following provision: 'It is agreed that said R. Allen Hall shall remain in possession of store, subject to the prior provisions of this mortgage, and, after expense of store and living are deducted, the balance of money shall apply on debts secured.' A chattel mortgage will not be declared void upon its face for the reason that the mortgagor retains possession of the stock, and is permitted to deduct his living expenses from the proceeds of the sales, 'but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.'" We think, therefore, that on the face of the instrument this provision does not require the court to treat it as fraudulent and void.

We disagree, too, with the contention that the authority "to sell at retail to regular and other customers in the usual and general way of business for cash, or on not to exceed thirty days' credit to responsible parties," *per se* renders the mortgage void. We should always advise against a provision in a chattel mortgage allowing sales on credit, as its apparent tendency is to vest in the mortgagor a discretion in respect to his sales which may afford him an opportunity to collusively dispose of his stock with intent to delay and defraud unsecured creditors: but, although such a provision invites a challenge of the transaction involving it, on the other hand we are not prepared to say that a right to sell at retail only to customers in the usual and general way of business, for cash, or on credit of no more than thirty days, gives so great a latitude to the mortgagor that, as a matter of law, it destroys the security of the mortgage lien, and conclusively negatives all presumptions of good faith, and forbids any inferences other than those of a fraudulent intent. Having shown that mortgages upon stocks of goods, with power to sell therefrom in the usual course of business, are valid, it would seem to follow, where the mortgage may run for a year, that

sales at retail (if the business is a retail one generally), for cash, or to responsible parties on a limited credit for thirty days, are not incompatible with the best of faith and perfect honesty, where the mortgage provides for accurate accounts of all sales, and that collections and deposits be applied towards the payment of the debt, less necessary and actual current expenses of conducting and maintaining the business. The usual and general way of conducting a drug business in a small town is probably to sell in part on a thirty-day credit to responsible people, so that authority to extend such a credit may be but an agreement that sales can be made in the usual and general way of business. Sales and application of proceeds of sales are strictly within the intended purposes of chattel mortgages of the kind before us, and, so long as the parties to them keep within the bounds of the lawful operations of such mortgages, they have a right to insert any reasonable provisions consistent with the intention of applying the stock mortgaged to the liquidation of the debt secured by it. Now, under the stipulation of the mortgage by Ross & Co. to Fenske, the accounts of all sales were to be made monthly, and at the accounting the proceeds of all sales and collections, less expenses, etc., as hereinbefore considered, were to be applied to the payment of the note to Fenske. This stipulation imputes no fraud to either party for, so long as it was complied with, the mortgage was having its desired and lawful effect, and Noyes Bros. & Cutler were not injured; nor were they hurt by an extension of a credit for thirty days, because, as against them, or any unsecured creditor in like position, all sales, whether cash or for credits, were to be accounted for; and we are of opinion credit sales should, as between mortgagors and mortgagee, all be deemed cash payments paid over to apply on the note of Ross & Co., although, as between Ross & Co. and Fenske, the credit may not have been collected, and may in fact have been unpaid at the time of the accounting. In *Brackett v. Harvey*, 91 N. Y. 214, an agreement was entered into between a mortgagor and mortgagee, wherein the mortgagee agreed, among other things, to "take business notes running sixty or ninety days, to be indorsed by said Frank E. Darrow, and apply the same in payment of Darrow's said notes as they fall due." Thereafter a mortgage was executed pursuant to said contract, and, upon the question of the validity of the mortgage because of such an agreement, the court held that, under a stipulation allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds, and applying them to the mortgage debt, "the proceeds realized by the agent are to be deemed realized by the principal, and, as against an adverse lien, are to be applied on the mortgage debt, even though not actually paid over," and that under that doctrine it is impossible to impute fraud or injury to others in the agreement. The reasoning of the New York court appears to recognize an agency in the mortgagor who sells

goods, whereby his act in selling for credit binds the mortgagee to treat the credit as if it were cash; and this way of looking at it finds support in *Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348; *Miller v. Pancoast*, 29 N. J. L. 250, and *Frankhouser v. Ellett*, 22 Kan. 128, 31 Am. Rep. 171, and other cases referred to hereafter. In the last case Judge Brewer, for the court, said that a mortgagor in possession, with authority to sell and apply the proceeds, acts in respect to the sales "as a quasi agent, at least, of the mortgagee." We do not regard him as an agent in fact, inasmuch as the mortgagor is the owner of the stock mortgaged, at least until steps are taken to foreclose his rights, yet he is an owner under an agreement to sell for the benefit of the mortgagee, and to account, and to reserve nothing beyond what is actually necessary to be reserved to carry on the business and live upon; and in carrying out this agreement, so far as the rights of third persons who are creditors are concerned, he occupies a relationship towards the mortgagee which should be deemed to bind the mortgagee to the extent of requiring that all credit sales made pursuant to the authority of the mortgage should be treated as cash, and applied on the debt secured by the mortgage. To this extent we concur with Jones, Chatt. Mortg. § 422, who says the mortgagor in such cases "may well enough be regarded as the agent of the mortgagee in making the sales and in receiving the purchase money." In *People v. Bristol*, 35 Mich. 29, decided before the last Kansas case cited, the court decided that a chattel mortgagor is an owner, and could not be the agent of the mortgagee; but notwithstanding this reasoning, which we think is exact, in a sense, the case is cited to support the text of Mr. Jones, that the mortgagor may "well enough be regarded as the agent;" and, moreover, it was before the supreme court of Kansas in *Frankhouser v. Ellett*, 22 Kan. 128, 31 Am. Rep. 171, where the mortgagor was characterized as a quasi agent, for Judge Brewer cited the opinion as an authority on another point, but referred to it as sustaining the doctrine of agency, as he applied it. It can be said, therefore, that, while the mortgagor is the owner, yet by virtue of the mortgage he has contracted in good faith to conduct his business and sell his stock to liquidate his mortgage debt: and in order to do this, and still avoid suspension, he has agreed to turn over all moneys to the mortgagee, only reserving necessary expenses, and that in executing this agreement he will act for the interests of the mortgagee, and, in a measure, in his direct behalf. A mortgagor intrusted with this authority must possess the confidence of the mortgagee, and it is because of this confidence that he is permitted to sell under agreement to turn over and account. His position is, therefore, in this sense, that of an agent of the mortgagee, while as to third persons, in respect to credits, he is to be held an agent. *Gleason v. Wilson*, 48 Kan. 500, 29 Pac. 698; *Wilson v. Sullivan*, 58 N. H. 260; *Allen v. Goodnow*, 71 Me. 420; *Sawyer v. Long*, 86 47 L. R. A.

Me. 541, 30 Atl. 111. *Lane v. Starr*, 1 S. D. 107, 45 N. W. 212, is an interesting case upon the point just considered. The sheriff there levied upon a stock of drugs and other goods under attachments and executions against one C. J. Lane, then personally in possession. Starr claimed ownership by virtue of a chattel mortgage executed by C. J. Lane to him, and brought action. The question considered was the validity of Starr's mortgage as against the creditors of Lane. The mortgage contained a clause authorizing C. J. Lane to remain in possession until the mortgage debt was paid, "as agent of W. A. Lane," and required him to account to W. A. Lane, or his assigns, monthly, for all sales, until the debt was fully paid. There was a further clause in the mortgage whereby the parties stated their intention to be that "the sale of the property . . . be absolute to William A. Lane until said indebtedness shall be fully paid; . . . said Charles J. Lane acting only as the agent of said William A. Lane in disposing of the goods, . . . and accounting . . . until said indebtedness is paid." The court held that the provision was a valid one, and that the means employed and consented to were consistent with the trust created to effect a direct and convenient conversion of the mortgaged property into money to be applied on the debt. The court said this, also: "In this treatment of this case, we have not forgotten the theory of our statute, that the title to mortgaged property remains in the mortgagor, nor have we overlooked the apparent difficulty of making the mortgagor, who still owns the goods, the agent of the mortgagee, who does not own them; but this relation of the parties to the title to the property cannot affect the principle involved in this discussion, nor require nor justify the application of a different rule for the discovery of the true character or effect of the agreement. The quality of the transaction, as fraudulent or otherwise, is determined from its effect, possible or probable, upon the interests of other creditors; and the effect of this agreement upon those interests would be precisely the same whether the title passed to the mortgagee, or whether it remained in the mortgagor. The presence or absence of vice in this agreement is tested by the inquiry whether the sales were to be made in the interest of the mortgagor, and the proceeds controlled by him, so that they might or might not be applied upon the mortgage debt, or whether they were to be made in strict and faithful execution of a real trust, so that every decrease of the security should work a corresponding reduction of the debt." See also *Felner v. Wilson*, 55 Ark. 77, 17 S. W. 587; *Crow v. Red River County Bank*, 52 Tex. 362; *Fink v. Ehrman Bros.* 44 Ark. 310; and *Adler v. Claffin*, 17 Iowa. 89.

Appellants next argue that the court's decision in favor of the respondents is erroneous, because the mortgagee, after he took possession, sold the mortgaged property in the ordinary course of business, and disposed of the same at auction, prior to the maturity

of the debt, and without authority contained in the mortgage to make any sale at such time. Let us grant that this is all true, and, even so, the plaintiffs are not in a position to complain. The mortgage being a valid security, and possession thereunder having been legally taken, and plaintiffs, as we have shown, having had no lien upon the stock of goods, and the mortgagors having acquiesced in the acts of the mortgagee, as firm creditors plaintiffs have not shown that they were injured by any acts of the mortgagee done to make his lien effective. The property turned out to be inadequate security for the debt due Fenske, but there having been no fraud or illegality in his acts by which plaintiffs were injured, and plaintiffs having shown no title or right of possession to the property, they are without cause of complaint against the defendants.

Finding no error in the record, *the judgment must be affirmed.*

Brantly, Ch. J., concurs.

Figott, J., concurring:

I am not entirely satisfied, upon the facts as they appear in this case, that the provision of the mortgage permitting the actual and necessary living expenses of one of the mortgagors to be paid out of the proceeds of the mortgaged personalty does not, of itself, invalidate the mortgage, as to the plaintiffs. I am inclined to think, however, that the better reasoning supports the conclusion of the opinion, that such provision does not, *per se*, necessarily avoid the mortgage, as to creditors, and I therefore concur. Upon the other points decided I concur, also.

OREGON SUPREME COURT.

Sam H. BROWN, *Appt.*,
v.
SOUTHERN PACIFIC COMPANY, *Respt.*

(.....Or.....)

1. A covenant in a deed to a railroad company, by which the grantors agree to build a fence along the railroad, "or not hold such railroad responsible for any damage done to stock belonging to us," without any mention of assigns, is personal to the grantors, binding them only, and does not run with the land.
2. A notice to a railroad company of a claim by two persons for the value of certain live stock killed on the railroad is not insufficient to authorize a recovery by one of those persons for a part of the stock owned by him individually, under Laws 1893, p. 28, requiring notice by the owner.

(November 20, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's live stock. *Reversed.*

Statement by Moore, J.:

This is an action to recover damages resulting from the killing of four of plaintiff's cows by defendant's locomotive. The negligence alleged as constituting the cause of action is defendant's failure to place gates or bars at the intersection of its right of way with a private road crossing a farm cultivated by plaintiff, in consequence of which said cows got upon the track, and were killed. The answer, after denying the material allegations of the complaint, avers that on November 10, 1870, Samuel Brown and Elizabeth Brown, his wife, executed a

deed to the Oregon & California Railroad Company, a corporation, conveying a strip of land 60 feet in width across said farm, and therein covenanted with said corporation, its successors and assigns, to build and maintain a fence on each side of the railroad to be built through said premises; that said deed was duly recorded in the records of Marion county on November 11, 1870, and plaintiff had full notice and knowledge thereof; that defendant is the lessee of said corporation, and successor in interest of its right of way and of said covenant; that plaintiff is the son and successor in interest of Samuel Brown, and as such used and occupied said farm, and the private crossing thereon, subject to said covenant; that said cows got upon defendant's track at said crossing by reason of plaintiff's failure to place gates or bars thereat, and were killed without any fault upon defendant's part. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, in which the jury, in pursuance of the court's instructions, returned a verdict for the defendant, and, a judgment having been rendered thereon, plaintiff appeals.

Mr. John A. Carson, for appellant:

The covenant to build the fence is a personal one, and does not run with the land.

Parish v. Whitney, 3 Gray, 516; *Kennedy v. Owen*, 136 Mass. 199; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

To constitute a real covenant, its capacity to run with the land must be manifested either by the fact that it concerns a thing in *esse*, parcel of the real estate granted or demised, or by the fact that the assignees are expressly referred to in the covenant.

19 Am. & Eng. Enc. Law, p. 997.

NOTE.—On the question whether a covenant in a deed for the maintenance of a fence runs with the land, see also *Gulf, C. & S. F. R. Co. v. Smith* (Tex.) 2 L. R. A. 281; *Pittsburg, C. & 47 L. R. A.*

St. L. R. Co. v. Bosworth (Ohio) 2 L. R. A. 199; and *Hickey v. Lake Shore & M. S. R. Co.* (Ohio) 23 L. R. A. 396 (with note on liability of grantee upon a condition of deed poll).

Appellant had no lease of the land or any interest or estate therein. He was simply working on the farm for a salary, and kept his cattle there.

A tenant would not be bound by such a covenant.

Corry v. Great Western R. Co. L. R. 7 Q. B. Div. 322.

When appellant served the notice in question he certainly complied with the statute of 1893, and respondent could have paid within thirty days thereafter, if it had chosen to do so.

Manwell v. Burlington, C. R. & N. R. Co. 80 Iowa, 662, 45 N. W. 568; *Van Slyke v. Chicago, St. P. & K. C. R. Co.* 80 Iowa, 620, 43 N. W. 396; *Illinois C. R. Co. v. Orider*, 91 Tenn. 489, 19 S. W. 618.

An estoppel must be especially pleaded, or otherwise the benefit of it will be lost.

Rugh v. Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; *Remillard v. Prescott*, 8 Or. 37; *Bruce v. Phoenix Ins. Co.* 24 Or. 490, 34 Pac. 16; *Boys v. Trulson*, 25 Or. 113, 35 Pac. 26.

Mr. A. H. Tanner, for respondent:

The covenant in the deed in question, granting the right of way, that the grantors were to build and maintain a fence on each side of the railroad through the premises, ran with the land, and was binding, not only upon the grantors, but their successors in interest and possession.

Pittsburg, O. & St. L. R. Co. v. Smith, 26 Ohio St. 124; *Pittsburg, O. & St. L. R. Co. v. Heiskell*, 38 Ohio St. 666; *Easter v. Little Miami R. Co.* 14 Ohio St. 48; *Huston v. Cincinnati & Z. R. Co.* 21 Ohio St. 235; *Pittsburg, O. & St. L. R. Co. v. Bosworth*, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. 533; *St. Louis, V. & T. H. R. Co. v. Washburn*, 97 Ill. 253; *Wabash R. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814; *Terre Haute R. Co. v. Smith*, 16 Ind. 102; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Duffy v. New York & H. R. Co.* 2 Hilt. 496; *Indianapolis, P. & O. R. Co. v. Petty*, 25 Ind. 413; *Talmadge v. Rensselaer & S. R. Co.* 13 Barb. 493; *Busby v. St. Louis, K. C. & N. R. Co.* 81 Mo. 43; *Cook v. Milwaukee & St. P. R. Co.* 36 Wis. 45; *Countryman v. Deck*, 13 Abb. N. C. 110; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Hickey v. Lake Shore & M. S. R. Co.* 51 Ohio St. 40, 23 L. R. A. 396, 36 N. E. 672; *Masury v. Southworth*, 9 Ohio St. 341; *Blain v. Taylor*, 19 Abb. Pr. 228.

The use of the words "heirs or assigns" is not necessary to constitute a covenant binding upon grantees or assigns, where such intention can be gathered from the instrument or the nature of the transaction.

Masury v. Southworth, 9 Ohio St. 341; *Pittsburg, O. & St. L. R. Co. v. Bosworth*, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. 533; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

It is evident from the covenant in the deed that the word "such" as there used, was intended for "each," and the court will construe this clause as though the word was 47 L. R. A.

"each," instead of "such," in order to give effect to the intention of the parties, as shown by the instrument and the subject-matter.

Hill's Code (Or.) § 696; 2 Parsons, Contr. 7th ed. *500-517.

Moore, J., delivered the opinion of the court:

The question presented for consideration is as to whether the covenant in the deed of Samuel Brown and wife to the Oregon & California Railroad Company created a charge upon their estate running with the land, and binding upon plaintiff. The said covenant is as follows: "And we further agree to build and maintain a fence on such side of said railroad through the premises herein, north of the town of Gervais, or not hold such railroad responsible for any damage done to stock belonging to us." The right to have a division fence built or repaired by an adjoining proprietor is a benefit to the dominant and a detriment to the servient estate, which is in the nature of a distinct easement, affecting the lands of the proprietor upon whom the burden is imposed. *Tyler, Boundaries*, 343; *Washb. Easem.* 2d ed. 601; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335. It has been held that a covenant to build or maintain a division fence creates an encumbrance upon the covenantor's estate, which runs with the land, if so intended by the parties to the deed. 12 Am. & Eng. Enc. Law, 2d ed. p. 1049; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633. In order to determine whether a clause in a deed conveying real property is to be construed as a covenant running with the land, or a condition personal to the parties, it is necessary to consider two subordinate questions: First, whether the right granted or the burden imposed is connected with the land affected by the conveyance, or collateral to it; and, second, if found to be the former, whether the situation of the parties and the condition of the subject-matter enable the court to say, from an inspection of the language of the deed, that it was the intention of the parties thereto that the covenant should run with the land. *Masury v. Southworth*, 9 Ohio St. 340. In *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550, Mr. Justice Phelps, after speaking of those covenants which necessarily run with the land, says: "There is another class of covenants of a doubtful or equivocal character, and which may be treated either as merely personal, or as annexed to and running with the land. With respect to these, it is doubtless competent for the contracting parties to make them either the one or the other, as they think expedient. When, therefore, the party covenants for himself, and his assigns, it evinces an intent to bind the land, and the obligation becomes connected with and qualifies his estate." An examination of the covenant in the deed of Samuel Brown and wife shows that it does not include their "assigns" in express words, and, inasmuch as the fence along the right of way was not ~~in~~

esse at the time the deed was executed, it is contended that the omission in this particular manifests an intention that the covenant should be personal only. "When the covenant," says Lord Coke, in *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. *23 p. 137, "extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being, as, if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodam modo* annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant; but in the case at bar the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." In *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550, which was an action upon a covenant against encumbrances, it was alleged in the declaration that in a certain deed the grantee had covenanted to make and maintain the partition fences, and at the trial it was contended that, as it was not averred that the assignees of the grantee were to be bound by the covenant, and as the fence was not *in esse* at the time the conveyance was executed, the covenant never became effective; but, it appearing that the fence had afterwards been built by the grantee, it was held that the first clause of the covenant was thereby satisfied, and the latter clause became operative, as concerning a thing *in esse*. In *Maury v. Southworth*, 9 Ohio St. 340, the court held that the omission of the word "assigns" in a lease containing a covenant on the part of the lessee to insure a building on the demised premises did not exempt the assignee of the lease from the performance of its conditions, when it was apparent from an inspection of the instrument that it was the intention of the original parties thereto to make the covenant run with the land. Mr. Justice Gholson, commenting upon the rule announced in *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. 137, says: "When any effect, such as to pass an estate or create an obligation, is dependent upon the intent of parties as expressed in a writing, it is an important inquiry whether the law has prescribed certain words or expressions as essential to be used to indicate that intent. If it be so, those words must be used, and none others will suffice. The word 'heirs' in the case of a conveyance to create an estate in fee simple is an instance. But, where the law has prescribed no such words, then the intent of the parties must be ascertained from the whole instrument, interpreted and construed

by just and proper rules." In *Duffy v. New York & H. R. Co.* 2 Hilt. 496, the plaintiff, having hired a pasture belonging to one Mrs. Bassford, turned his horse therein, which escaped through a defective fence, and, getting upon the railroad track, was killed. In an action to recover the damage thus sustained, it appeared that Bassford and his wife had executed a deed to defendant of a strip of land adjoining said pasture lot, containing a covenant on the part of the grantors for themselves, their heirs, executors, and administrators, to erect a fence and maintain the same in good repair for eighteen years, and it was held that, notwithstanding the word "assigns" was not used in the deed, the covenant was intended to run with the land, and was binding upon all persons claiming or occupying the premises under the party making the covenant. The court, in rendering the decision, alludes to *Spencer's Case*, and says: "But this nice distinction, originating at a time when it was necessary to use the word 'heirs,' or other words of inheritance, in a conveyance, in order to grant or convey an estate in fee, cannot be now said to exist, as in *Norman v. Wells*, 17 Wend. 148, it was determined that those covenants run with the land, which are made touching or concerning it, and affect its value, and are not confined to those which relate to same physical act or omission upon it." The word "heirs" is not now necessary to create or convey an estate in fee simple. All of the grantor's estate passes by his deed, unless the intent to convey a less estate appears by express terms, or is necessarily implied from the language of the deed. Hill's (Or.) Anno. Laws, § 3005. The statute not having prescribed that the word "assigns," or other words of like import, shall be necessary to make a covenant run with the land, the omission of such words from a deed by which a right is connected with the dominant estate, or an obligation inheres in the servient estate, does not necessarily evidence an intention that the clause conferring the right or imposing the burden is a condition personal to the party charged with its performance. An examination of the language of the deed for the purpose of ascertaining the intention of the parties, shows that the grantors stipulated, in effect, that, if they neglected to build or maintain the fence agreed upon, the grantee should not be held responsible for any damage resulting from such neglect to stock belonging to them. This exemption from liability is the legal result of the grantor's failure to comply with the terms of their deed, and necessarily follows their neglect to build and maintain the fence, without being recited in the deed; for the rule is well settled that, if an adjoining landowner agree with a railroad company to build and maintain a fence along its right of way, the company is not liable to such proprietor, or to his assigns, who take his estate with notice thereof, for injury resulting from neglect to perform or keep such agreement. 12 Am. & Eng. Enc. Law, 2d ed. p. 1071; *St. Louis, V. & T. H. R. Co. v. Washburn*, 97 Ill. 253; *Duffy v. New York & H. R.*

Co. 2 Hilt. 496. No agreement, however, entered into between a railroad company and an adjoining proprietor, whereby he stipulates to build and maintain division fences, will absolve the company from liability to persons not parties to the contract, or in privity with them, for injury resulting from the landowner's failure to keep his engagement in this respect. 12 Am. & Eng. Enc. Law, 2d ed. p. 1072; *Wabash R. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814; *Warren v. Keokuk & D. M. R. Co.* 41 Iowa, 484; *Thomas v. Hannibal & St. J. R. Co.* 82 Mo. 538; *Gilman v. European & N. A. R. Co.* 60 Me. 235. A tenant who enters upon land with notice of his landlord's covenant with a railroad company to build and maintain a division fence along the right of way, can acquire by the demise no greater estate in the premises than his landlord possessed therein, and hence he has no remedy against the company for injury to his stock resulting from the landlord's failure to build or repair such fence. *Easter v. Little Miami R. Co.* 14 Ohio St. 48; *Duffy v. New York & H. R. Co.* 2 Hilt. 496; *Indianapolis, P. & O. R. Co. v. Petty*, 25 Ind. 413; *St. Louis, V. & T. H. R. Co. v. Washburn*, 97 Ill. 253. If Samuel Brown and his wife had leased their land, their tenant's stock could not, in any sense, be regarded as their own. The right conferred by their deed upon the railroad company was, so far as they were concerned, to permit it to operate its trains without fencing its right of way, and by exempting it from liability for injury to stock belonging to them they would, in such case, thereby impliedly reserve the right to their tenant, which he could enforce, of compelling it to fence its track across their premises, or be responsible to him for any injury to his stock in consequence of a failure to do so; for by exempting the company from liability for stock belonging to them only they restricted its right to use the track without fencing to the time in which they had possession of the premises, and made it responsible to their tenant for damage done by it to his stock in consequence of its failure to fence the track through said premises; and what is true of their tenant's stock must apply with equal force and reason to the stock of their successor in interest. The failure to include the word "assigns" in the deed is not controlling if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land; but the absence of such word, or other words of like import, may be considered in connection with the context of the deed in arriving at the intent of the parties in this respect. Giving to the deed such construction, we think the parties thereto never intended that the stipulation to build and maintain the fence should be regarded as a covenant running with the land, but that such clause was meant to be a condition personal to the grantors, and binding upon them only.

It is alleged in the answer, and denied in the reply, that plaintiff is the successor in interest of Samuel Brown. The bill of ex-

ceptions, however, shows that plaintiff, in answer to the question, "In what way were you occupying this land at the time these cattle were killed respectively?" said: "I was employed by my mother. She had a life lease on the place, but she died since I began this suit against the company. I was working for a salary, and kept my stock on the place." The pasturing of this stock necessarily created a privity of estate, but whether he was the tenant of his mother or the successor in interest of his father can be of little consequence, for, in either event, he was not bound by their agreement.

Giving to the deed such an interpretation, we think the court erred in instructing the jury to find for the defendant.

In view of a new trial it becomes important to consider another error alleged to have been committed by the trial court. The action is founded upon the statute which requires certain railroad companies in Oregon to fence their tracks, and provides that for any neglect in this respect they shall be liable to the owners of stock for any damages which may result thereto in consequence of such neglect, and also for reasonable attorney's fees: provided, however, that no action shall be maintained until after such owner has given at least thirty days' notice in writing to such railroad company. Or. Laws 1893, p. 28. Plaintiff, more than thirty days prior to the commencement of the action, served upon W. W. Skinner, a station agent of the defendant at Salem, a notice of which the following is a copy:

To the Southern Pacific Company:

Notice is hereby given that Mrs. Elizabeth Brown, a widow, residing near Gervais, Marion county, Oregon, and Sam H. Brown, a farmer residing near Gervais aforesaid, claim of and from you the sum of two hundred and forty-five dollars, the reasonable value of four thoroughbred cows, one colt, and one calf, wrongfully and negligently killed by you upon your line of railroad near Gervais aforesaid on and between the 1st day of February, 1894, and the 5th day of November, 1895; and, unless the said sum be paid within thirty days from the date of service of this notice upon you, an action will be commenced against you in the circuit court of Oregon for Marion county, by said Elizabeth Brown and Sam H. Brown, to recover from you the said two hundred and forty-five dollars, and the costs and disbursements of said action, together with such further sum as the court may adjudge reasonable to be allowed as attorney's fees in said action.

Dated at Salem, Oregon, this 19th day of December, 1895.

Elizabeth Brown and Sam H. Brown.
by Carson & Flemming, Their Attorneys.

It was alleged in the complaint, in substance, that plaintiff gave the required notice, including therein a demand for a colt and a calf killed in July, 1895; but said colt and calf were owned jointly by plaintiff and Elizabeth Brown, and plaintiff is not

seeking to recover the value of said colt and calf in this action. The answer denies that said notice contained a demand for one colt or one calf, or that said colt or calf were jointly owned by plaintiff and Elizabeth Brown. The plaintiff, being called as a witness, testified that the cows mentioned in the complaint were the ones described in the notice, and were owned by him at the time they were killed, but that his mother, Elizabeth Brown, owned the colt and calf described in the notice. Said notice was then offered in evidence, and, the court having sustained an objection to its introduction on the ground that it was joint, plaintiff's counsel excepted to the ruling, and contends that the court erred in this respect. If the

allegation of the complaint with respect to the joint ownership of the stock had been established upon the trial, plaintiff would undoubtedly have been "such owner," within the meaning of the act. The object of the statute requiring notice to be served is to give to the railroad company an opportunity to settle the claim of damages resulting from its neglect, thereby avoiding the expense of an action; and this object was fully accomplished by the service of the notice offered in evidence. The notice is not jurisdictional, nor does the statute prescribe the form thereof, and, in our judgment, the court erred in not receiving it in evidence.

It follows that the judgment is reversed, and a new trial ordered.

SOUTH DAKOTA SUPREME COURT.

FIRST NATIONAL BANK of Rapid City,
Reapt.,
v.

Michael McGUIRE, *Appt.*

(.....S. D.....)

1. A petition for a transfer of a cause to another judge because of the disqualification of the judge before whom it is brought, and an order denying the petition, constitute part of the judgment roll under Comp. Laws, § 5013, as they are included in "all orders or papers in any way involving the merits and necessarily affecting the judgment," and they are therefore properly before the court for review on appeal without any bill of exceptions.
2. A judge is disqualified to sit in a cause in which the plaintiff is a corporation of which his wife is a stockholder, although there are no statutory provisions on the subject, and a husband in that state is not directly interested in the property of his wife during her lifetime, and she may encumber or dispose of it without his consent, if he is by law entitled to succeed to a portion of her estate upon her decease.
3. An objection to jurisdiction on account of the disqualification of the judge who tried the merits of the case is not waived by applying for an injunctive order to prevent some irreparable injury.

(November 22, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Pennington County in favor of plaintiff in an action brought

NOTE.—As to disqualification of judge for interest or relationship, see also *Ex parte Harris* (Fla.) 6 L. R. A. 713; *Ex parte Alabama State Bar Asso.* (Ala.) 12 L. R. A. 134; *State ex rel. Colcord v. Young* (Fla.) 19 L. R. A. 686; *Robinson v. Southern P. Co.* (Cal.) 28 L. R. A. 773; *Meyer v. San Diego* (Cal.) 41 L. R. A. 762.

As to disqualification of judge for professional relations with a party, see *Tampa Street R. & Power Co. v. Tampa Suburban R. Co.* (Fla.) 17 L. R. A. 681.

As to disqualification by prior connection with the same case, see *State ex rel. Ambler v. Hocker* (Fla.) 25 L. R. A. 114, and *note*.
 47 L. R. A.

to foreclose collateral pledged to secure payment of notes entered after defendant had objected to the jurisdiction of the judge on the ground of interest. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles W. Brown and James Boyd, for appellant:

When a judge is a stockholder of a corporation he is, both at common law and under our statute, disqualified, by pecuniary interest, to try or determine any cause to which the corporation is a party.

Cooley, Const. Lim. 411-413; *Washington Ins. Co. v. Price*, Hopk. Ch. 1; *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815; *Williams v. City Nat. Bank* (Tex. Civ. App.) 27 S. W. 147; *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Templeton v. Giddings* (Tex.) 12 S. W. 851; *Gregory v. Cleveland, C. & O. R. Co.* 4 Ohio St. 675; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Stockwell v. White Lake Twp. Board*, 22 Mich. 341; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Clark v. Lamb*, 2 Allen, 396; *Pearce v. Atwood*, 13 Mass. 324; *State ex rel. Colcord v. Young*, 31 Fla. 594, 19 L. R. A. 637, 12 So. 673; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Freeman*, Judgm. § 146; *Wells*, Jurisdiction of Courts, § 163; *S. D. Laws* 1890, p. 185.

Husband and wife are one in law, and her interest is his interest; and the fact that the judge's wife is a party is sufficient to recuse him on the ground of personal interest, whether she is separate from him in property or not.

Comp. Laws, §§ 2533, 2586, 2588, 2589; *Wells*, Jurisdiction of Courts, § 170; *Hyam's Succession*, 30 La. Ann. 460; *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; 1 Bishop, *Marr. & Div.* § 11; 12 Am. & Eng. Enc. Law, p. 41; *Dimes v. Grand Junction Canal Co.* 16 Eng. L. & Eq. 63.

He would also, for the same reason, have been disqualified as a juror at common law.

Proffatt, Jury Trial, §§ 168-174; 1 *Thomp. Trials*, §§ 59-65.

The judgment is absolutely void on account of the disqualification of the judge;

and the fact that the defendant was compelled to apply to the same judge, in another action, for a temporary injunction to prevent a threatened irreparable injury, would not waive or remove the disqualification.

Cooley, Const. Lim. 413; *Oakley v. Aspinwall*, 3 N. Y. 547; *Gregory v. Cleveland, O. & C. R. Co.* 4 Ohio St. 675; *Templeton v. Giddings* (Tex.) 12 S. W. 851; *People v. De la Guerra*, 24 Cal. 77; *Re White*, 37 Cal. 190; *Peninsular R. Co. v. Howard*, 20 Mich. 18; Wells, Jurisdiction of Courts, § 170.

Messrs. Fowler & Whitfield, for respondent:

All the evidence offered in the lower court must be preserved in the record, or a new trial cannot be granted.

Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87.

An appeal from the judgment below brings to the supreme court only the findings and only such evidence as may be included in the findings.

McMahon v. Polk, 10 S. D. 296, 73 N. W. 77; *Golden Terra Min. Co. v. Smith*, 2 Dak. 458, 11 N. W. 98; *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497; Comp. Laws 1887, § 5103.

The only record here for consideration, or which can be considered by the court, is the summons, pleadings, findings, and judgment.

Golden Terra Min. Co. v. Smith, 2 Dak. 378, 11 N. W. 98; *Wood v. Nissen*, 2 N. D. 26, 49 N. W. 103; *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497.

The law establishes a different rule for determining the qualification of a judge than that applied to a juror.

McCauley v. Weller, 12 Cal. 524; Hayne, New Trials, § 32, p. 112.

In a suit in equity to establish confused boundary lines, the appointment by a judge of his son as commissioner to run the lines does not disqualify the judge from acting further in the case.

The conclusion of bias or prejudice is to be drawn by the court, and not by the defendant or his witnesses.

State v. Chapman, 1 S. D. 418, 10 L. R. A. 432, 47 N. W. 411; *State v. Rodway*, 1 S. D. 575, 47 N. W. 1061; *Territory v. Egan*, 3 Dak. 125, 13 N. W. 568.

Corson, P. J., delivered the opinion of the court:

This was an action for the foreclosure of pledged collateral given by the defendant to secure the payment of two certain promissory notes, one for \$5,000 and the other for \$1,500, payable to the order of the plaintiff. The complaint is in the usual form. To this complaint defendant filed an answer admitting certain allegations in the complaint, denying certain others, and interposing a counterclaim. Before the trial of the case the defendant presented the following petition and application: "To the Above-Entitled Court: The petition of Michael McGuire, the above-named defendant respectfully shows that he is informed and believes, and therefore alleges, that the wife of the Hon. William Gardner, the presiding judge 47 L. R. A.

of this court, is the owner of 50 shares of the capital stock of the plaintiff corporation, and is also a director thereof, the total stock of the said corporation being 500 shares, each of the par value of \$100, and that your petitioner fears that the said judge might for that reason be unconsciously prejudiced or biased in the consideration of said cause. Wherefore your petitioner respectfully prays that the said judge will not proceed further herein, but will cause the said action to be placed upon the special calendar and be set down for trial before some other circuit judge of the said state." On the hearing of this petition the court made the following order: "... And upon said hearing it appearing to the satisfaction of the court that defendant has submitted to the jurisdiction of the court by applying for and obtaining an injunctive order regarding the same subject-matter, ... and the court having heard the arguments of counsel for and against said petition, and being fully advised in the premises, ... it is ordered that said petition be, and the same is, in all things denied. ... To which ruling and decision the defendant at the time duly excepted, and said exception is by the court allowed and settled."

The cause was tried by the court, and it made findings of fact and entered judgment in favor of the plaintiff, and from this judgment and an order denying a new trial the defendant has appealed to this court.

No bill of exceptions has been settled in the action. The respondents therefore make the point in this case that, there being no bill of exceptions, the petition and order of the circuit court are not properly before this court for review. Respondents are correct in their contention, unless the petition and order are properly part of the judgment roll. We are inclined to the opinion that they do constitute a part of such roll. Section 5013. Comp. Laws, defining what shall constitute the judgment roll, reads as follows: "Unless the party or his attorney shall furnish the judgment roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment roll: ... 2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment." It will be noticed that "all orders or papers in any way involving the merits and necessarily affecting the judgment" constitute a part of the judgment roll. In the case at bar it is contended by the appellant that the petition and order not only affected the merits of the case, but affected the jurisdiction of the court to such an extent that after the filing of such petition, assuming the facts therein stated to be true, it could not lawfully proceed further with the trial of the said cause. We think this is correct, and the petition and order necessarily affected the judgment, and properly constituted a part of the judgment roll. Our conclusion,

therefore, is that this petition, order, and exception taken thereto, are properly before us.

Assuming that the statement made in the petition, that the wife of the trial judge owned 50 shares of the capital stock of the plaintiff bank at the time the case came before the lower court for trial, is true, the question is fairly presented, Was the trial judge qualified to proceed with the trial of the said cause? It is well-settled law that a judge who is interested in an action is disqualified to try or determine the same. So firmly is this established that Cooley, in his work on Constitutional Limitations, lays it down as a rule that it is not competent for the legislature, even without the aid of some constitutional provision, to permit a judge who is interested to sit at the trial of the cause. Cooley, Const. Lim. 5th ed. 403-410; *Washington Ins. Co. v. Price*, Hopk. Ch. 1; *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815; *Williams v. City Nat. Bank* (Tex. Civ. App.) 27 S. W. 147; *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668; *Templeton v. Giddings* (Tex.) 12 S. W. 851; *Gregory v. Cleveland, C. & O. R. Co.* 4 Ohio St. 675; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Stockwell v. White Lake Twp. Board*, 22 Mich. 341; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Clark v. Lamb*, 2 Allen, 396; *Pearce v. Atwood*, 13 Mass. 324; *State ex rel. Colcord v. Young*, 31 Fla. 594, 19 L. R. A. 637, 12 So. 673; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; Freeman, Judgm. § 146. In *Washington Ins. Co. v. Price*, Hopk. Ch. 1, the court says: "It is a maxim of every Code, in every country, that no man should be judge of his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point; and, wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. The reasons which render this principle just and necessary are obvious; and, whatever may be the exceptions to the general infirmities of human nature, this rule has no exception in its terms or its policy, and it should accordingly be universal and inflexible in its operation. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own cause is always a tacit exception to the authority of his office. Finch, Common Law, 19; 4 Coke, 118; Wingate, Maxims, 170. Such, I conceive, is also the law of this state. Though the principle that a party can never act as judge is not declared by our Constitution or statutes yet, as it is a maxim of universal justice, and is undoubted law in England, it exists here as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and when his own rights are in question he has no authority to determine the cause."

Neither the Constitution nor the statutes
47 L. R. A.

of this state have prescribed what shall constitute a disqualification of a supreme or circuit judge, other than that provided in article 5, § 31, of the Constitution, which reads as follows: "No judge of the supreme court or circuit court shall act as attorney or counselor at law, nor shall any county judge act as an attorney or counselor at law in any case which is or may be brought into his court, or which may be appealed therefrom." Neither counsel has cited any case bearing directly upon the question before us, and this court, in its researches, has not been able to find one. The question must therefore be treated as one of first impression. The wife of the judge of the circuit court, being the owner of one tenth of the capital stock of the said bank, was, though not a party named in the record, directly interested in the result of the action; and it would seem to be an anomaly for her husband to sit as judge in a case where she was so directly interested. While it is true that the husband, in this state, is not directly interested in the property of his wife during her lifetime, and that she may encumber or dispose of it without his consent, yet he is by law entitled to succeed to a portion of his wife's estate upon her decease, and will be, in law, presumptively an heir to her estate. Section 3401, Comp. Laws. The husband is therefore indirectly, if not directly, interested in the property of his wife. And it is certain that no suitor in an action would feel entire confidence that he could obtain justice, in which the wife of the judge presiding was interested adversely to him. If a judge, therefore, would not be qualified to sit, as being an interested party, it would seem that the same reason should disqualify him from sitting in a case where his wife is interested as a party. There may be cases in which the trial judge would not be influenced in the slightest by the fact that his wife was interested in the action, but, as stated in the petition in this case, such judge might be unconsciously prejudiced or biased in the consideration of said cause; and it is to avert this danger, and to preserve the purity of the courts and the confidence of the community in their fairness and integrity, that the judge so situated should be held disqualified. It is the safer rule to hold that the fact that the judge's wife is interested in the action absolutely disqualifies him from sitting in the case. We think it, therefore, our duty to apply the same rule to this case that we would have applied had the judge himself been the owner of the fifty shares of stock, instead of his wife.

The contention is made on the part of the respondent that the appellant waived his right to object to the judge taking jurisdiction of and trying the cause by applying to the said court for an injunctive order relating to the same subject-matter. It is doubtful if the proceeding referred to is before this court on this appeal. It is true, the learned circuit court, in making the order, refers to the fact that such an application had been made to the court, and seems to base its order denying the petition on that

ground. But, assuming that the appellant did find it necessary to apply to the circuit court or judge for an injunctive order, to prevent some irreparable injury to himself, it cannot be said that he thereby conferred jurisdiction upon the court to try the merits of the cause now before us. If the view we take of the case, that the judge of the circuit court was indirectly interested, and was therefore disqualified from sitting in the case, is correct, then it follows that the judgment entered in the case was entered without jurisdiction on the part of the court. Judge Cooley states the rule thus: "Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court, and the suit may be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction."

Cooley, Const. Lim. 5th ed. 510; Freeman, Judgm. *supra*. We are of the opinion, therefore, that the learned circuit court was in error in holding that the fact that appellant had applied for an injunctive order regarding the same subject-matter constituted a waiver of his right to object to the judge proceeding with the trial of the said cause.

Without, therefore, imputing to the learned circuit judge, in the slightest, any improper motive for proceeding with the trial of the said cause, or believing for a moment that the fact that his wife was interested could or did influence his decision in the case, still we must hold that he was absolutely disqualified from sitting in the case, and that the judgment entered therein must be reversed.

The judgment of the Circuit Court is reversed.

TENNESSEE SUPREME COURT.

G. E. SMITH, Appt.,

v.

S. T. JACKSON.

(.....Tenn.....)

An agent of a laundry in another state, who collects garments and sends them out of the state to be washed and laundered, and afterwards redelivers them to their owners, is not engaged in commerce so as to be protected against the privilege tax imposed on his occupation by Acts 1899, chap. 432, § 4.

(December 20, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Robertson County in favor of plaintiff in an action brought to recover back a tax upon plaintiff's business as laundryman, which he had paid under protest. *Reversed.*

The facts are stated in the opinion.

Mr. A. E. Garner for appellant.

Messrs. Louis T. Cobbs and A. P. Crockett, for appellee:

The act taxing agents for laundries, located outside of the state, was in conflict with, and in violation of, the commercial clause of the Federal Constitution.

State v. Scott, 98 Tenn. 245, 36 L. R. A. 461, 39 S. W. 1; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Brown v. Maryland*, 12 Wheat. 444, 6 L. ed. 687; *Leloup v. Port of Mobile*, 127 U. S. 645, 32 L. ed. 312, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10

Sup. Ct. Rep. 881; *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Leisy v. Hardin*, 135 U. S. 125, 34 L. ed. 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Orutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Stoutenburgh v. Henrick*, 129 U. S. 149, 32 L. ed. 639, 8 Sup. Ct. Rep. 256.

Beard, J., delivered the opinion of the court:

The defendant in error is a citizen of this state, residing in the town of Springfield. He was for some time prior to the institution of this suit the agent in that place of a laundry located in Kentucky. His business, as well as habit, was to collect the soiled linen of his neighbors, and express it to his principal, in Kentucky, to be washed and laundered. When this was done it was sent back to him, and he then delivered it to its owner or owners, receiving from them the price of the entire service, which he divided equally with his principal. The question presented in this record is, Was this agent engaged in commerce, so as to be protected by the interstate clause of the Federal Constitution from the payment of the privilege tax imposed on his occupation by § 4 of chapter 432 of the legislative act of 1899? This circuit court held that he was, and hence this appeal by the county clerk.

The word "commerce" found in this clause, cannot be held to embrace a transaction such as is here presented. It implies, when used by business men, as it is defined by Mr. Web-

NOTE.—For business of agent of nonresident as interstate commerce, see *Re Spain* (U. S. C. C. E. D. N. C.) 14 L. R. A. 97, and note on peddlers and drummers as related to interstate commerce; also *Gunn v. White Sewing Mach. Co.* (Ark.) 18 L. R. A. 206; *State v. Philipps* 47 L. R. A.

(Kan.) 18 L. R. A. 657; *State v. Gorham* (N. C.) 25 L. R. A. 810; *Milan Mill & Mfg. Co. v. Gorton* (Tenn.) 26 L. R. A. 135; *State v. Scott* (Tenn.) 36 L. R. A. 461; and *Macnaughtan Co. v. McGirl* (Mont.) 38 L. R. A. 867.

ster, the lexicographer, trade or traffic, as in the exchange of specific articles or commodities, or else of these for money or its representative. In a case like the present, nothing, in the true commercial sense, is sold or exchanged. The agent takes the articles committed to his care, and agrees with the owner that he will send them across the state line, and have certain labor bestowed on them, and, when returned, then he is to receive compensation equal to this labor. There is no commodity created, of which the ownership is changed. It is simply a personal contract based on a valuable consideration, having no element of a commercial transaction falling within the protection of this clause of the Constitution. In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, a resident of Virginia, representing insurance companies located in another state, delivered a policy to a citizen of Virginia, in violation of a law of the state requiring, as preliminary to the exercise of such an agency, that a license should be obtained; and, when prosecuted, he undertook to avail himself of the commerce clause of the Federal Constitution. But the Supreme Court of the United States said the weakness of this defense was "in the character of the business. Issuing a policy of insurance is not a transaction of commerce. The policies

are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between the parties, which are completed by . . . the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in other states." This is decisive of the contention of defendant in error. It is proper to say that this case is clearly distinguishable from that of *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1. There the enlarged picture, made by, and the property of, the Chicago artist, sent into this state, to be paid for by one of its citizens, was a valuable article, and the transaction between the parties by which the ownership was changed was one of interstate commerce.

The judgment of the lower court is reversed.

WISCONSIN SUPREME COURT.

D. H. GALUSHA *et al.*, *Respts.*,

v.

Bradley B. SHERMAN *et al.*, *Appts.*

(.....Wis.....)

- *1. The proper practice in an equity case is for the trial court to make findings covering specifically and separately each material fact in issue.
2. A controversy between two persons, actual and in good faith, is a proper subject for a binding contract of settlement, no matter what may be the real merits of the claim upon either side.
3. In the circumstances stated in the foregoing proposition, a settlement, free from mutual mistake of fact or mistake upon one side and fraud upon the other, is binding between the parties thereto without regard to which gets the best of the bargain, or whether all the gain be in fact on one side and all the sacrifice on the other.

*Headnotes by MARSHALL, J.

NOTE.—On the question, What constitutes duress?—see *Shattuck v. Watson* (Ark.) 7 L. R. A. 551; *De La Cuesta v. Insurance Co. of North America* (Pa.) 9 L. R. A. 631, and note; *Flack v. National Bank of Commerce* (Utah) 17 L. R. A. 583; and *Thompson v. Niggley* (Kan.) 26 L. R. A. 803.

For duress by threats of prosecution of relative, see *City Nat. Bank v. Kusworm* (Wis.) 26 L. R. A. 48, and note; also *Loud v. Hamilton* (Tenn.) 45 L. R. A. 400; and *Mack v. Prang* (Wis.) 45 L. R. A. 407.

47 L. R. A.

4. If, in making a contract, one party to the transaction be incapable of exercising his free will by reason of threats made by the other for the purpose of producing such condition, to the end that he may obtain such contract, such party may, at his option, repudiate such contract on the ground of duress.
5. What constitutes duress is matter of law; whether duress existed in a particular transaction is matter of fact. There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained?
6. The doctrine, that in order to produce duress by threats there must be such threats as are reasonably necessary to control by fear the free-will power of a person of ordinary firmness and courage, is not the true doctrine or the law of this state.
7. While it is true that findings of fact requisite to avoid a contract on the ground of fraud must be based on clear and satisfactory evidence establishing such facts, where the trial court decides in favor of the existence of such facts on the evidence, such decision cannot be disturbed on appeal unless clearly wrong.
8. One who takes title to a promissory note payable to the order of a person therein named, merely by a transfer of the indebted-

edness contained in the assignment of the mortgage securing such note, is not entitled to the benefits of the law merchant as to such note, but holds it subject to the equities that would affect it in the hands of his assignor.

(January 9, 1900.)

APPEAL by defendants from a judgment of the Circuit Court for Eau Claire County in favor of plaintiffs in an action brought to set aside a note and mortgage on the ground of duress. *Affirmed.*

Statement by Marshall, J.:

Action in equity to set aside a note and mortgage on the ground of duress. The issues made by the pleadings sufficiently appear from the facts found by the trial court, which are in substance as follows: October 29, 1894, Bradley B. Sherman, claiming to have been injured by eating impure meat, believing it to be wholesome, which was furnished to him for food by D. H. Galusha with knowledge, or reasonable means of knowledge, of its character, commenced an action against Galusha to recover compensation for such injury to the amount of \$5,000. A. J. Sutherland was Sherman's attorney. He employed J. H. Langdon to serve the summons and complaint, which service he performed and then advised Galusha to settle the claim, accompanying such advice by an assertion that if he did not do so he would be prosecuted criminally and sent to state's prison for from three to fourteen years. Langdon induced Galusha to accompany him to Sutherland's office, where he was induced to mortgage his farm for \$1,000 to secure a note for that amount payable in three years, with interest thereon at the rate of 8 per cent per annum, in settlement of the controversy. Sherman assigned the note and mortgage to Sutherland and the latter assigned the same to H. V. Scallon, both assignments being recorded November 5, 1894. Galusha was a man of little education and experience, of a nervous temperament and easily frightened. The fact that a claim was made against him for more than he was worth, accompanied by threats of imprisonment for a long term of years if he did not settle it, deprived him of his freedom of will, and while he was in that condition the note and mortgage were procured. Such note and mortgage were given without consideration. The plaintiff Henrietta Galusha signed the note and mortgage in the absence of her husband, and in such a state of fear and excitement, caused by threats made to her, that it was not her voluntary act. The mortgaged property was worth \$3,000. Defendant Scallon is not the bona fide purchaser of the note and mortgage. On such facts judgment was awarded to plaintiffs, declaring the note and mortgage null and void, and requiring them to be surrendered for cancellation, and for costs against defendants. There was evidence tending to prove that at Sutherland's office Galusha was locked in a room with Sutherland, and there again threatened with arrest and imprisonment for from three to fourteen years if he

did not settle, and that such threats were accompanied with such demonstrations on the part of Sutherland as to greatly distract Galusha and put him in fear of personal violence.

Messrs. Wickham & Farr and L. A. Doolittle, for appellants:

The bringing of a civil action is not and cannot be duress.

Buck v. Awt, 85 Ind. 512.

The statement that he could be arrested and imprisoned from three to fourteen years was insufficient, as a matter of law, to deprive Galusha of his freedom of will.

Roth v. S. E. Barrett Mfg. Co. 96 Wis. 615, 71 N. W. 1034; Klauber v. Wright, 52 Wis. 303, 8 N. W. 893; 6 Am. & Eng. Enc. Law, 1st ed. p. 65; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

A party will not be heard to allege that his mind was so overcome that he was deprived of his freedom of will by acts which are insufficient to have such an effect upon a person of ordinary courage and firmness.

2 Greenl. Ev. 4th ed. § 301; Bosley v. Shanner, 26 Ark. 280; Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Wilkerson v. Hood, 65 Mo. App. 491; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73.

Where no warrant has been issued, no arrest made, and the person making the threat to imprison is not apparently possessed of both the means and intention of immediately executing his threat, such a threat is not sufficient to enable the party threatened to avoid the effect of his contract.

Cahaba v. Burnett, 34 Ala. 400; Youngs v. Shimm, 41 Ill. App. 28; Rendleman v. Rendleman, 156 Ill. 568, 41 N. E. 223; Hilborn v. Bucknam, 78 Me. 483, 57 Am. Rep. 816, 7 Atl. 272; Knapp v. Hyde, 60 Barb. 80; Phillips v. Henry, 160 Pa. 24, 28 Atl. 477; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73.

It is never duress to threaten to arrest a man for an offense of which he is not guilty, because such a threat could not induce a man of ordinary firmness to fear immediate imprisonment.

Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321; Buchanan v. Sahlein, 9 Mo. App. 552.

A threat to arrest a person on a criminal charge for some act which does not constitute a criminal offense does not constitute duress.

Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

The finding of duress must be specific. If it is not it is insufficient, even if it may lead to a very strong inference.

Feller v. Green, 26 Mich. 70.

If the action was settled without fraud or duress, no question can exist as to the sufficiency of the consideration.

Kercheval v. Doty, 31 Wis. 476; Mosher v. Post, 89 Wis. 602, 62 N. W. 516; Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Brooks v. Wage, 85 Wis. 12, 54 N. W. 997.

The sale was for an adequate consideration, and was not made under circumstances upon which the slightest criticism could be made.

Bange v. Flint, 25 Wis. 544; *Citizens' Bank v. Ryman*, 12 Neb. 541, 11 N. W. 850; *Lay v. Wiseman*, 36 Iowa, 305; *Richmond v. Diefendorf*, 51 Hun, 537, 4 N. Y. Supp. 375.

Evidence of facts and circumstances sufficient to put him on inquiry is not sufficient.

Atlas Nat. Bank v. Holm, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697.

The defendant Scallon is a bona fide purchaser of this note and mortgage, not only under the law applicable to negotiable instruments, but also under the recording act.

Fisher v. Otis, 3 Pinney, 78; *Bange v. Flint*, 25 Wis. 544; *Heath v. Silverthorn*, 39 Wis. 149; *Maxwell v. Hartman*, 50 Wis. 660, 8 N. W. 103.

Galusha cannot escape from his contract on account of anything done by Langdon.

Threats made by a third person, although such threats influenced a party to make a contract, constitute no defense to the contract.

Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; *Rogers v. Adams*, 66 Ala. 600; *Gardner v. Cass*, 111 Ind. 494, 13 N. E. 36; *Line v. Blizard*, 70 Ind. 23; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180; *Green v. Scranage*, 19 Iowa, 461, 87 Am. Dec. 447; *Talley v. Robinson*, 22 Gratt. 888; *Spurgin v. Traub*, 65 Ill. 170; *Marston v. Brittenham*, 76 Ill. 611.

A settlement once deliberately made is not to be opened except upon the clearest and most positive proof of fraud or mistake therein.

Klauber v. Wright, 52 Wis. 303, 8 N. W. 893; *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361; *Northwestern Mut. L. Ins. Co. v. Nelson*, 103 U. S. 544, 26 L. ed. 436; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Smith v. Allis*, 52 Wis. 345, 8 N. W. 155; *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73; *Knapp v. Hyde*, 60 Barb. 80; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

Mr. W. P. Bartlett, for respondents:

Where the party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another or to cheat him or obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the term.

Story, Eq. Jur. 5th ed. 192.

Every legal contract must be the act of the understanding, which they are incapable of using who are under restraint and terrors; and therefore the law requires the free assent of the parties as essential to every contract, and that they be not under any force or violence.

Brown v. Peck, 2 Wis. 262; *McCormick Harvesting Mach. Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632; *Kuelkamp v. Hidding*, 31 Wis. 503.
47 L. R. A.

Equity does not limit itself to strict rules and strict definitions in matters of fraud. It leaves the way open to redress wrongs committed by means of fraud in whatsoever form it may appear.

Kuelkamp v. Hidding, 31 Wis. 503.

Express notice of infirmity in a note is not indispensable, but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry.

Story, Prom. Notes, 4th ed. § 197; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632.

In order that the innocent purchaser for value before maturity of a negotiable note secured by a mortgage be protected as a bona fide holder of negotiable paper, he must receive it in the usual course of business, and not by assignment.

Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876; *Spinning v. Sullivan*, 48 Mich. 5, 11 N. W. 758; *Howard v. Boorman*, 17 Wis. 460.

An indorsement of a negotiable promissory note is absolutely necessary to cut off equities existing between the original parties.

Story, Prom. Notes, 4th ed. § 119; *Beard v. Dedolph*, 20 Wis. 137; *Howard v. Boorman*, 17 Wis. 459; *Terry v. Allis*, 16 Wis. 479; 2 Randolph, Com. Paper, §§ 788, 789; *Osgood v. Artt*, 17 Fed. Rep. 575; *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68, 25 L. ed. 876.

Marshall, J., delivered the opinion of the court:

The cause does not seem to have been properly determined by the trial court by a finding on each material fact in issue. Presumably the practice was followed of deciding the issues in a general way and then signing findings prepared and presented by the successful party, without a sufficient examination of them to see whether all the material issues are properly and specifically determined. It is proper to permit the attorney for a prevailing party to prepare the findings, but his duty in that regard should be strictly confined to the drafting and submitting of a paper which, when signed and filed in the cause, will comply with the statute by containing an express adjudication as to the truth regarding each material issue and the legal results; and the judicial duty should always be performed of testing the paper by the decision made, before making it an official document. True, errors in that regard are not necessarily prejudicial, so as to call for a reversal, but it is the law, which should be followed just the same, that the successful party is entitled to have each material issue decided and to have such determination specifically and separately stated in the findings. While a trial court may neglect or refuse to perform the judicial duty in that regard, and without effect upon the final judgment, it is a matter of which the party so deprived of his legal rights may justly complain, and which this court may properly take notice of and condemn, in the interest of a careful administration of jus-

tice, whether the wrong affects substantial rights, so as to call for relief by a reversal of the judgment, or not.

The findings of fact as originally signed in this case contained, as one of the adjudications, a decision that all the material allegations of the complaint were true, while there were several such allegations upon which there was no evidence whatever, and some that were disproved by the uncontroverted evidence. That finding was stricken out by the circuit judge when his attention was called to it by the appellant's attorneys; but there was a refusal to find specifically upon some of the most material issues, either in the findings as prepared and signed, or when duly requested to do so by appellants' attorneys. For instance, there was no dispute but that Sherman ate meat at Galusha's table, which he believed, in good faith, caused him serious illness; that he commenced an action against Galusha to recover the damages caused to him by such illness, and that he and his attorney, and all persons concerned on his side of the controversy, down to and inclusive of the time the note and mortgage were given, honestly believed that Galusha knowingly, or with reasonable means of knowledge, furnished him dangerously impure meat to eat, thereby causing the injury of which he complained; that he was legally entitled to have Galusha make good the damages resulting from such injuries; that the note and mortgage were taken in satisfaction of such claim; and that the claim, in consideration thereof, was duly released. Notwithstanding that, the court refused to find, though requested so to do, that Sherman and Sutherland, in commencing and prosecuting the action, honestly believed that Sherman had a good cause of action against Galusha as set forth in the complaint; but on the contrary, found that the note and mortgage were given without consideration. Plain error was thereby committed. The evidence being undisputed that the claim made by Sherman was an honest claim, the court should have so found. That was the vital question on the subject of whether there was any consideration for the note and mortgage. It being undisputed that the supposed cause of action was released in consideration of the note and mortgage, the finding that they were given without consideration was directly contrary to the fact. The learned court, in another part of the findings, seems to have determined that Sherman did not have a cause of action in fact, and to have come to that conclusion because of the result of another action for damages brought against Galusha by a person circumstanced the same as Sherman, in regard to having eaten some of the alleged impure meat,—an action to which Sherman was not a party, and, obviously, by which he was not in any way legally affected. Under what theory the verdict in that case was evidence against Sherman on the fact, if it were a fact, that Sherman would not have been able, upon a trial of his case, to have recovered against Galusha, and that it turned the scale against him on the question

of whether the note and mortgage were given without consideration, is not understood.

The settlement of an honest controversy between two parties is a good and sufficient consideration to support a contract of settlement. The release of the claim on the one side, and the payment or agreement to pay upon the other, are, as between the parties, an exchange of equivalents which is irrevocable except upon the ground of mutual mistake, or fraud of one party and mistake of the other. That is elementary. Inequality of consideration, of itself, is not sufficient to avoid a settlement. It is enough if the controversy be an actual one, in regard to which the issue may fairly be considered by both parties as doubtful. *Parsons, Contr. 8th ed. 439; Kercheval v. Doty, 31 Wis. 476; Van Trott v. Wiese, 36 Wis. 439; Turner v. Burnell, 48 Wis. 221, 4 N. W. 30; Harris v. Kennedy, 48 Wis. 500, 4 N. W. 651; Zimmer v. Becker, 66 Wis. 527, 29 N. W. 228; Continental Nat. Bank v. McGook, 92 Wis. 286, 66 N. W. 606.* The law favors the right of parties to settle their matters of difference in their own way, and encourages efforts in that regard by holding such settlements conclusive, as above indicated, without regard to which party obtains the best of the bargain. So it is held that, where a claim is asserted on the one side in good faith and denied upon the other, presenting for consideration and determination a question involving a degree of certainty as to where the truth lies calling for a judicial determination to effect a settlement in the absence of an amicable arrangement between the parties, and such parties make such an arrangement settling their matter of difference, such matter is thereby as effectually closed and the result made as binding on them as if it were reached by the solemn and formal judgment of a court having jurisdiction of the parties and of the subject-matter. "Mistake," as the term is here used, does not refer to the validity of the claim on either side, but to some fact or facts material to the settlement. Courts exist to remedy wrongs where they cannot be otherwise remedied by peaceable means. The whole policy of the law is rather to discourage than encourage a resort to them as a means to that end by promoting efforts to compromise and settle differences by contracts *inter partes*. If a controversy be actual and in good faith, it is a proper subject for a binding contract of settlement, no matter what the real merits of a claim may be upon either side; and if a settlement be made in regard to such subject, free from fraud or mistake, as before indicated, whereby there is a surrender or satisfaction, in whole or in part, of a claim upon one side in exchange for or in consideration of a surrender or satisfaction of a claim in whole or in part, or of something of value, upon the other, however baseless may be the claim upon either side or harsh the terms as to either of the parties, the other cannot successfully impeach the agreement in a court of justice. Such contracts are as binding as any that parties competent to contract can make. Said this

court in *Kerckeval v. Doty*, 31 Wis. 476, quoting from a standard text writer with approval: "If it were necessary, in order to sustain an adjustment of conflicting claims, to determine their relative validity and value, no compromise would be possible, and the uncertainty, delay, and scandal would be incurred, which such arrangements are usually designed to avoid." "It is held in general in this country, that compromises are to be favored, irrespectively of the nature of the controversy compromised; and that they cannot be set aside because the event shows all the gain to have been on one side, and all the sacrifice on the other, if the parties have acted in good faith, and with a belief of the actual existence of the rights which they have respectively waived or abandoned." "A compromise of doubtful rights will not, therefore, be opened or rescinded by chancery, even when unequal or harsh in its operation; nor where the only consideration for the relinquishment of a valid claim on the one side is the abandonment of an invalid one on the other."

From the foregoing it will be seen that on the question of whether there was a consideration for the note and mortgage, the primary question was whether a claim was honestly asserted on the one side and denied on the other; not whether the claim was actually valid or invalid. The trial court erroneously refused to find on that material question. Further, it appears that the subject, of whether the claim asserted by Sherman was one upon which he could have recovered against respondents, was not a subject for consideration in this case at all, except as bearing on the question of his good faith; and the finding on that subject, as a basis for a finding of want of consideration for the settlement, was error. Further, the finding that the settlement and the note and mortgage were without consideration, in face of the undisputed evidence that such note and mortgage were given to settle a claim honestly made by Sherman, was erroneous.

Notwithstanding what has been said, it does not follow that the judgment must be reversed, if the finding on the subject of duress is sustained by the law and the evidence.

The trial court found that when the note and mortgage were executed, Galusha was not in the exercise of his free will, but was under the control of the will of Langdon and Sutherland, and that he was deprived of his own will power by the wrongful acts of the two persons named. That finding was, in the main, based on the circumstance that a complaint had been served upon Galusha, claiming damages to an amount sufficiently large, if established to its full extent, to absorb his entire property, and, upon disputed evidence that Langdon, who served the papers, urged him to visit Sutherland, the attorney for Sherman, and settle the controversy, stating that if he did not do so he would be arrested on a criminal warrant and sent to state's prison; that through Langdon's influence, and accompanied by him, respondent went to Sutherland's office; that he

was there locked in a room with Sutherland, or with Sutherland and Langdon, and then threatened again with arrest and imprisonment for from three to fourteen years unless he immediately settled the suit by paying \$1,000 or securing the payment of such sum; that such threats were accompanied by profanity on the part of Sutherland and by such demonstrations as to produce a belief in the mind of respondent that he was in danger of personal violence; that under such circumstances respondent submitted to Sutherland's demand and executed the papers in controversy, and also signed a communication to his wife directing her to sign, and gave such communication to Sutherland to enable him to secure her signature in the absence of her husband.

Appellants' attorneys contend that, assuming that the evidence on the part of respondent proves all that it tends to prove, the wrongful acts were not sufficient to constitute duress, hence not sufficient to warrant the finding that respondent was deprived of the free exercise of his will. In support of that, many suggestions are made and authorities cited which seem to call for a brief consideration of the law of duress as understood by this court. It is a branch of the law that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law, and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications based on citations of authorities not in themselves harmonious, and many statements in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers, but by judges in legal opinions. Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself. Co. Litt. 253. Said Sir William Blackstone (vol. 1, p. 130): "Whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem, is prevailed upon to execute a deed or do any other legal act, these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case

of his noncompliance." "The constraint a man is under in these circumstances is called in law 'duress.'" "A fear of battery or being beaten, though never so well grounded, is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb." P. 131. Duress of imprisonment existed, by the old rule, only where there was actual, illegal restraint of liberty. The doctrine was, "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment; for this is not by duress of imprisonment, because he was in prison by course of law, for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered in prison, or at large, is tortious and unlawful." 3 Bacon, Abr. *Duress*, (A). Thus it will be seen that, in the early days of the common law, duress, strictly so called, was matter of law. It was pleadable as a defense or as material to a cause of action, by alleging the existence of specific circumstances legally sufficient to constitute duress, and was established *prima facie* by proving the truth of such allegations. The effect of the facts so established was determinable as an inference of law, not of fact. Oppression of one person by another, causing such person to surrender something of value or some advantage to such other, not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise of his free will, was remediless except by an appeal to a court of equity, where a remedy was obtainable on the ground of unlawful compulsion. *Id.* 772.

It is interesting to follow the development of the law from the early period mentioned. To do so in this opinion would draw it out to a far greater length than is advisable; but we will proceed sufficiently to show the conflict in authorities on the subject, what has led to it, the correct doctrine at the present time, and the unsoundness of the contentions of appellants' counsel as to the law applicable to this case when tested by such doctrine. That seems to be necessary in order to show that the theories, advanced by appellants' counsel, to support the claim that the finding as regards respondent suffering from wrongful deprivation of his will power at the time he made the papers in controversy is not warranted by the evidence, are unsound. Those theories are: (1) Oppression does not constitute duress unless sufficient to overcome the will of a person of ordinary courage; (2) a threat to arrest a person for an offense of which he is not guilty does not constitute duress; (3) a threat to arrest a person on a charge that does not constitute a criminal offense does not constitute duress. All of such theories have some support in, but all are out of harmony

with, the real foundation principle of duress, which is that it is the condition of the mind of the wronged person at the time of the act sought to be avoided, not the means by which such condition was produced. Such theories are also out of harmony with the theory upon which duress of a contracting party renders the contract voidable as to him, which is that the free meeting and blending of the minds of contracting parties are requisite to a binding contract.

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chitty, Contr. 11th ed. p. 272; 2 Greenl. Ev. 301. But the ancient theory that duress was a matter of law to be determined *prima facie* by the existence or nonexistence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. The learned counsel for appellants have referred to some such authorities to support their claim that the finding under discussion is contrary to law, in that the threats made to respondent, assuming his evidence to be true, were not sufficient to deprive a person of ordinary firmness of his free-will power. From that it is argued that the finding is unwarranted.

That one should be led astray on the question of there being a legal standard of resisting power, by which the sufficiency of the oppressive conduct claimed to have produced duress in a given case must be tested, is most natural in view of the number and character of the authorities to that effect. As we have seen, the text of Chitty and of Greenleaf both so clearly indicate. In *United States v. Huckabee*, 16 Wall. 414, 21 L. ed. 457, a case generally cited as giving a very clear definition of duress according to the modern doctrine on the subject, Mr. Justice Clifford said: "Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." On the same line, Mr. Justice Colerick, in *Hines v. Hamilton County Comrs.* 93 Ind. 266, said, citing from 4 Wait, Act. &

Def. p. 490: "Mere threats of violence, or of prosecution, are not enough [to constitute duress]. There must be a reasonable ground for creating an apprehension that threats will be carried into execution, in the mind of a man of ordinary firmness and courage, and must operate upon him directly, so as to overcome his will." Similar language is used in legal opinions of courts of many of the states, as will be shown by reference to the following: *Youngs v. Simm*, 41 Ill. App. 28; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Wolfe v. Marshal*, 52 Mo. 167; *Burr v. Burton*, 18 Ark. 214; *Flanigan v. Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Horton v. Bloodorn*, 37 Neb. 666, 56 N. W. 321. In the last case cited the following instruction to the jury was approved: "The threats, so made, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness, and deprive him, for the time being, of the power of mind and will to resist the demand by the person making such threats." Those authorities indicate adherence to the doctrine of a legal standard of resistance by which to test the alleged wrongful acts; also adherence, generally, to the old doctrine of the legal sufficiency of particular threats or acts to produce duress, the only change in the former element, from the ancient common law, being the substitution of resisting power of a person of ordinary firmness for that of a prudent and constant man; and the only change in the latter element being the addition of elements of less severity than actual imprisonment or danger of loss of life or limb, as being sufficient to deprive a person, of the legal standard of resisting power, of his free will, leaving the only question of fact to be determined by the jury, whether the will power of the oppressed person was in fact overcome in the particular case, the presumption, in the absence of evidence to the contrary, being in the affirmative.

It will be noted in an examination of the cases that the means used to overcome the person threatened are uniformly referred to as the duress, instead of the condition of mind produced, thereby. In *United States v. Huckabee*, 16 Wall. 414, 21 L. ed. 457, it is said: "Decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts." In *Harmon v. Harmon*, 61 Me. 227, it is said that mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. Similar language is found in *Hilborn v. Bucknam*, 78 Me. 485, 57 Am. Rep. 816, 7 Atl. 272, and *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718. In *Knapp v. Hyde*, 60 Barb. 80, it was held, following the old common-law doctrine, that in order to avoid an act on the ground of menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment; 47 L. R. A.

while in *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651, it is said that the guilt or innocence of the alleged wronged party, or the lawfulness or unlawfulness of the threats, are immaterial, the material and only material question being, Was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?

Sufficient has been said to show the conflict that exists on the subject under discussion. The more advanced doctrine is that stated in the Alabama case cited. Under it, advantages obtained by what was considered duress by old common-law rules, or such rules as changed, in respect to the standard of resisting power which the threatened person is legally bound to exercise for his own protection or be remediless at law for the consequences, and in respect to the nature of the threats deemed legally sufficient to overcome a person of the legal standard of resisting power, and also advantages wrongfully obtained, though not by duress, in law, and remediable as such, but remediable in equity upon the ground of unjust compulsion, are now practically in one class. Duress in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free-will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law, and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of

him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or child than in case of a man of ordinary firmness. As said in *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be.

In *Bishop on Contracts* (719) it is said, in substance, that the proposition found in many of the cases that the threat must be such as would excite the reasonable apprehension of a person of ordinary courage, is certainly incorrect; that it originated in the failure of the old writers (referring to Coke on Littleton) to distinguish between the mind acted upon and the thing menaced; that the law of contracts considers the quality of the contracting mind, and therefore holds the apparent, not real, consent of the subject or timid person, or person of inferior intellect, as invalid as that of the strongest and most independent understanding, though the latter would not have been enthralled where the former was. In the last revisions of Chitty on Contracts, brought out in 1890 and 1896 (page 199 of the latter), the old text on the subject under discussion was changed to conform to the doctrine as stated in *Bishop on Contracts*. A comparison of it with the early text is one of the best demonstrations that can be given of the great change that has taken place in the law under discussion from the early rules on the subject. The following is the new text: "It has been sometimes said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage to yield to it. I do not think this an accurate statement of the law. Whenever from natural weakness of intellect, or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetency to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists, not in an uncertainty of the law on the subject, but in its application to the facts of each individual case."

47 L. R. A.

In Chitty's work on Commercial Law, printed in 1824, it is said that "fear which is sufficient to avoid a contract must be a present fear, occasioned by some present or future danger, not a mere suspicion of the approach of danger, nor such an apprehension as would arise in the mind of a weak or timorous man, but such as would alarm a firm man, such as the fear of death or of bodily torment; that the fear of battery, which may be slight, will not amount to duress as will the fear of mayhem or loss of life." In support of the later text of *Bishop* and Chitty, Jr., see 10 Am. & Eng. Enc. Law, 2d ed. p. 341; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Parmentier v. Pater*, 13 Or. 121, 9 Pac. 59; *Earle v. Norfolk & N. B. Hosiery Co.* 36 N. J. Eq. 192; *Jordan v. Elliott*, 12 W. N. C. 56; *Williams v. Bayley*, L. R. 1 H. L. 200; *Scott v. Sobright*, L. R. 12 Prob. Div. 21.

From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetency to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him.

The law as indicated, though not discussed at any great length in previous adjudications of this court, has always been the ruling principle of its decisions. In *Brown v. Peck*, 2 Wis. 261, it was said that if menaces are used, or equivalent acts of violence, such as to have an undue influence upon the party and to prevent the exercise of his own free will in executing the contract, it is voidable. True, the court was there speaking of the power of a court of equity to remedy a wrong, but the situation calling for such remedy was, as the court said, that there was no contract existing between the parties for want of assent by one party on account of the oppression to which he was subjected on behalf of the other.

In *City Nat. Bank v. Kuswurm*, 91 Wis. 166, 64 N. W. 843, and *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, the doctrine was stated in effect thus: Where one, by the

wrongful act of another, is put in fear and thereby induced to make a contract or to forego some act under circumstances which deprive him of the exercise of his free will, duress exists; the wrongful act does not constitute the duress, but the condition of mind produced thereby. The act must be of such a nature and made under such circumstances as to constitute a reasonable, adequate cause to control the mind of the threatened person, and must have that effect; and the act sought to be avoided must have been performed by such person while in such condition. It will be noted that it was said, the cause producing incompetency to contract through fear need only be reasonably sufficient to overcome the will power of the particular person acted upon. That it may be more or less than that required to overcome the mind of a person of ordinary firmness, according as the person acted upon is above or below the average in mental ability to protect himself against the influence of fear, is obvious. There was unnecessarily added to a correct statement of the law, in *Wolff v. Bluhm*, a reference to the doctrine of the supreme court of Maine, as to the sufficiency of certain circumstances to constitute duress, not in harmony with the law as stated in this opinion. An arbitrary rule, that a threatened lawful arrest and imprisonment implying harsh or unreasonable use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, is not sufficient to produce duress, seems unreasonable. Such, however, is the doctrine of the supreme court of Maine, and the cases supporting it will be found very generally cited by text writers and judges. That rule goes naturally with the doctrine that every person, without regard to actual mental power, is bound to come up to the standard of average men in that regard or suffer the consequences.

We have now reached a point where it clearly appears that the contention of counsel for appellants, that the testimony of the plaintiff, undisputed, is legally insufficient to produce duress, cannot be sustained, and it remains to be seen whether the finding that duress was in fact produced by the conduct of Sutherland and his confederate, Langdon, is contrary to the clear preponderance of the evidence.

Looking at the testimony of the several witnesses, as printed in the record, it is by no means certain but that the evidence preponderates to the side of the appellants, and that no clear case is made out such as is required to impeach a transaction for fraud. But when the circumstances disclosed are taken into consideration, the interest which the different witnesses had in the result, the opportunity that each had for knowing the facts in respect to which he testified, and everything appearing that aids in weighing the evidence and determining where the truth lies, doubt is produced as to the correctness of the findings which is reasonably resolved in their favor by giving due weight to those things which were available to the trial judge, and presumably were considered

by him, that could not be made a part of the record. This is peculiarly a case where opportunity to see the witnesses and observe their manner while testifying is of great importance in judicial search after truth. That the learned judge who made the findings studied the situation with the light that such opportunity cast upon it cannot be doubted, and the result is embodied in the findings which we are asked to reverse. There is a finding that respondent is a very nervous man and easily subject to be imposed upon in the manner in which it is claimed he was wronged. That circumstance was of importance in the case. There is very little evidence in the record in regard to it, but it is obvious that a personal study of the man during the trial, by one skilled in such matters, could hardly have failed to reveal the truth, without any direct evidence of the fact. Considering respondent as a man of average firmness, intelligence, and experience, it would be unreasonable to say that the preposterous assertions of Langdon and Sutherland, as to what they could and would do with him in the event of his not settling the Sherman claim, emphasized even by loud and vehement expressions, by profanity and gesticulations, would have affected him otherwise than by producing anger, amusement, or disgust; but a view of respondent and study of him in court may easily have satisfied the trial court that he was a man liable, under the circumstances in which he was placed, to be deluded, and to regard falsehood as truth and mere shamming as serious reality.

The record shows that a hardworking, middle-aged farmer, not of sufficient intelligence to know his legal rights, was, without previous negotiations for a settlement of an existing doubtful claim, sued upon it for a sum perhaps in excess of his entire fortune, the papers being served by a shrewd person specially employed for that purpose, instead of by an officer; that on the same day such person accompanied the defendant to the presence of the plaintiff's lawyer, and that an agreement was there obtained from such defendant to pay, in settlement of the controversy, an amount representing a large portion of his entire property,—probably the accumulation of many years of labor,—and to secure such agreement by a mortgage upon his home. The transaction, of itself, is unnatural and unexplainable upon any reasonable theory other than that respondent was a weak man, easily influenced, and that considerable pressure was put upon him to produce the result accomplished. The probabilities point that way in the absence of evidence explaining how the thing was brought about. The explanation on the part of appellants is that respondent went to Sutherland's office of his own free will and out of a desire for an immediate settlement of the claim on the best terms possible, and that he desired the presence and assistance of Langdon. That explanation does not strike one as reasonable. Why should respondent desire, expect, or rely on help from the agent of the attorney for the adverse

party in making a settlement? Why did he not go to some neighbor, acquaintance, or friend or some lawyer for counsel instead of relying on Langdon? Those questions are not answerable from the record except by respondent's own evidence that he was induced, by Langdon's threats, to believe that it was best for him to visit Sutherland and settle immediately in order to avoid arrest and imprisonment. Why did he finally settle with the attorney for the adverse party and agree to surrender, in satisfaction of the claim made upon him, such a large proportion of his property, without taking time for reflection or making an effort to obtain counsel, when he could not have been prejudiced by waiting at least till near the expiration of the twenty days allowed in which to answer the complaint, before making a settlement? Nothing in the record furnishes an answer to that, except the evidence of respondent that he was threatened with arrest and imprisonment if he did not submit to the demand for a speedy settlement. The very fact that respondent went to the office of Sutherland and settled a claim of such a serious nature in the manner in which the settlement was made, without an effort to take counsel in respect to it, is a very strong circumstance tending to show that he was of that mental make-up liable to be controlled and moved to action, to his disadvantage, by fear.

Looking to the direct evidence of what occurred, that of respondent and Langdon in regard to the threats made when the papers were served is in direct conflict. The probabilities, however, are in favor of the latter. That of Langdon and Sutherland as to what occurred at Sutherland's office is in direct conflict with that of respondent; but the probabilities are rather in favor of the truth of the material part of the respondent's story, to the effect that he was actually threatened with arrest and imprisonment unless he made the settlement demanded, and was told and made to believe that the offense alleged against him was one that might subject him to arrest and punishment by a long term of confinement in state's prison.

We have not overlooked any of the evidence bearing on the question under consideration. It has all been read with care. Respondent may be mistaken as to having been locked in a room with Sutherland, but there is no dispute but that he was taken into Sutherland's private room where what was said between the two could not readily be heard by persons in the general office if the door between the two rooms was closed; and there is evidence independent of respondent's testimony, showing that such was its condition at least part of the time. It may be that Sutherland did not use profane language in threatening respondent, and that when the former went into the main office after the settlement agreed upon the persons there did not observe in him any appearance of excitement, yet it may be true that he threatened the respondent with arrest and imprisonment, and produced in his mind a conviction that such would be the result of

a refusal to speedily settle the claim, and that he was thereby rendered incapable of exercising his judgment in respect to complying, or refusing to comply, with the demand made upon him; and that in taking the latter course he merely carried out Sutherland's will instead of his own. As we view the record, the issue as to whether the threats were made as claimed turns on the evidence of respondent on the one side, and Sutherland and Langdon, considered practically as one person, on the other, and the circumstances characterizing the whole transaction. The unnaturalness of the occurrence of giving the note and mortgage, under all the circumstances except as explained by mental weakness on the part of respondent and fear of punishment as a criminal if he did not settle the claim made upon him, is such that in view of the corroborating evidence we cannot say but that the trial court's determination, that respondent's story is in the main true, is correct. There is evidence to the effect that the attorney declared, to persons who partook of the alleged impure meat with Sherman, that he had scared respondent into a settlement of the Sherman claim for the purpose of inducing them to make a like claim. That evidence is disputed, it is true, but it cannot be ignored. There is also the circumstance of the attorney and his alleged confederate arming themselves with a written direction from respondent for his wife to sign the papers, and their going to his farm immediately after he executed such papers to obtain her signature thereto in the absence of her husband. It undoubtedly appeared to the trial court that if respondent had been anxious to make the settlement, as appellants claim, and acted of his own free will, he would have taken the attorney to his home to obtain her signature to the papers in his presence, or would have procured her presence at the attorney's office; and that no unusual or hasty method would have been resorted to for the purpose of obtaining such signature. There are many other circumstances to which special reference has not been made, that throw some light on the transaction under consideration, but further discussion of the evidence is unnecessary. We are unable to say that the trial court was not justified in saying that the charge of duress was established by clear and satisfactory evidence. True, in a case of this kind the facts essential to the cause of action must be established by a greater degree of certainty than in a case where fraud is not the foundation of the cause of action; but when a trial court says that the requisite certainty is established by the evidence, that decision must prevail on appeal unless clearly wrong.

The finding of fact to the effect that appellant Scallon and his assignee are each chargeable with notice of the manner in which the note and mortgage were obtained from respondent cannot be disturbed. It is not deemed necessary or advisable to discuss the evidence in regard to it. There are many circumstances shown tending to prove that the transfer of the securities was made,

first to Sutherland and then to Scallon in order to avoid the very attack made upon them by the bringing of this action. Moreover, as respondent's counsel contends, since the note was payable to Sherman's order and was not indorsed by him to Sutherland or by Sutherland to Scallon, the latter cannot claim the protection of the law merchant. He stands in precisely the same position as Sherman did, the note being subject to all the equities of the respondent the same as if no transfer of it had taken place. *Terry v. Allis*, 16 Wis. 478; *Howard v. Boorman*, 17 Wis. 459; *Dan. Neg. Inst.* § 741, and cases cited.

The judgment of the Circuit Court is affirmed.

Willibald HOFFMAN, Doing Business as
Waukesha Stone & Quarry Company,
Respt.,

v.

G. MAFFIOLI, Appt.

(.....Wis.....)

1. A shortage in three loads of stone furnished under a contract is insufficient of itself to establish a shortage in any other loads delivered under the same contract.
2. An agreement to furnish crushed stone "in such quantities as may be desired," to be "delivered on street" in a certain city, without making any more definite provision as to the quantity to be furnished, though it is made with one who has a contract for paving a street in that city, does not bind the other party to furnish him at his option all the stone needed for paving such street, since it does not bind him to take such quantity.

(*Marshall and Bardeen, JJ., dissent.*)

(November 24, 1899.)

APPEAL by defendant from a judgment of the Waukesha County Court in favor of plaintiff in an action brought to recover the contract price of certain articles sold by plaintiff to defendant, in which defendant attempted to set up a counterclaim for breach of contract to deliver all the material contracted for. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clasen & Walsh, for appellant:

If one makes to another an offer, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, there is then constituted a mutual consent which is equivalent to a valid and binding contract.

Bishop, Contr. § 322; *Wells v. Milwaukee & St. P. R. Co.* 30 Wis. 805; *Abbott v. Shepard*, 48 N. H. 14; *Smith v. Colby*, 136 Mass. 562; *Cheney v. Eastern Transp. Line*, 59 Md. 657.

The intention and meaning of parties to a written contract must be ascertained from

NOTE.—As to validity of purchase of indefinite quantity, see *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218, and *note*; *Hayes v. O'Brien* (Ill.) 23 L. R. A. 555; and *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 81 L. R. A. 529.
47 L. R. A.

the terms of the writing, the nature of the transaction, and surrounding circumstances.

Story, Contr. § 380; 3 Am. & Eng. Enc. Law, p. 867.

It is not allowable to presume, or to concede when avoidable, that the parties in a solemn transaction have employed language idly.

Heywood v. Heywood, 42 Me. 229, 66 Am. Dec. 277; *Metcalf v. Taylor*, 36 Me. 28; *Churchill v. Reamer*, 8 Bush, 256; *Orbin v. Healy*, 20 Pick. 514; *Fowle v. Korchner*, 87 N. C. 49.

Parol evidence can be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement, and in explanation thereof.

2 Jones, Ev. § 444.

This agreement is in its terms an entire contract.

West Republic Min. Co. v. Jones, 108 Pa. 55; *Clark v. Baker*, 5 Met. 452; *Mansfield v. Trigg*, 113 Mass. 350.

Messrs. Ryan & Merton, for respondent:

The language of the proposition is plain and unambiguous. The apparent import of the words used therein must govern.

Story, Contr. § 780.

Words should not be constructively put into a contract that are not there.

Chitty, Contr. 11th Am. ed. 106; 2 Parsons, Contr. 494; *Mississippi River Logging Co. v. Wheelihan*, 94 Wis. 96, 68 N. W. 878.

If it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.

Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; *Evins v. Gordon*, 49 N. H. 444; *Utica & S. R. Co. v. Brinkerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Lester v. Jewett*, 12 Barb. 502; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Thayer v. Burchard*, 99 Mass. 508; *Rafoloviz v. American Tobacco Co.* 73 Hun. 87, 25 N. Y. Supp. 1036; *Keep v. Goodrich*, 12 Johns. 397.

The fact that the defendant accepted plaintiff's proposition in this case would not bind him, the defendant, to take any particular quantity of material.

Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; *Cliver v. Heil*, 95 Wis. 364, 70 N. W. 346.

Where a contract has been reduced to writing which purports to contain the whole contract, and it is not apparent from the writing itself that anything is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible.

Hei v. Heller, 53 Wis. 415, 10 N. W. 620; *Case v. Phoenix Bridge Co.* 134 N. Y. 78, 31 N. E. 254.

Cassoday, Ch. J., delivered the opinion of the court:

This action was commenced June 28, 1898, to recover \$2,888, with interest from June 16, 1898, on account for goods, wares, and

merchandise sold and delivered by the plaintiff, doing business under the name of The Waukesha Stone & Quarry Company, to the defendant, between April 23, 1898, and June 16, 1898, at the agreed price, and which were reasonably worth the sum stated, all of which became due and payable June 16, 1898. The defendant answered by way of admissions and denials, and also alleged by way of counterclaim, in effect: That the defendant was a principal contractor engaged in macadamizing and paving streets, April 15, 1898, and as such principal contractor he entered into a contract with the city of Waukesha for the concreting and paving of the whole of East Main street in that city. That April 21, 1898, he, in the name of the Waukesha Stone & Quarry Company, submitted a written proposal to the defendant in the words and figures following, to wit:

Waukesha, Wis., April 21, 1898.

To Mr. G. Maffioli—

Dear Sir: We propose to furnish crushed stone at 85c. per yard of 2,500 lbs., 30 in. x 4 in. curbing, including corners at 34c. per lineal foot, protection curb 15 in. x 4 in. at 10c. per lineal foot, all as per specifications. Delivered on street in the city of Waukesha in such quantities as may be desired. Respectfully submitted.

The Waukesha Stone and Quarry Co.,
Per Ph. Kiehl, Mngr.

That such proposal was duly accepted in writing, written thereunder by the defendant, May 4, 1898, as follows: "Accepted May 4, 1898. G. Maffioli." That the plaintiff had neglected and failed to perform such agreement on his part, in that he misrepresented the actual measurement and weight of stone delivered to the defendant. That it was ascertained by accurate tests made May 30, 1898, that of three or four loads of crushed stone so delivered by the plaintiff to the defendant, and at different times, were less in weight by 50, 300, and 500 pounds, respectively, than was represented by tickets or scale receipts delivered by the plaintiff to the defendant. That the defendant had reason to believe, and did believe, that every load of crushed stone delivered to the defendant by the plaintiff was far less in weight and measurement than represented and charged by him. That the plaintiff absolutely refused to examine or correct the shortage mentioned, and refused to furnish and deliver any further crushed stone or curbing to the defendant, and continued to so refuse. That by reason of such failure, fault, and neglect on the part of the plaintiff the defendant was actually and necessarily hindered and delayed in executing and completing his paving contract, and suffered and sustained great loss of time and damage with his hired men and otherwise to the amount of \$1,500. And the answer contained a further counterclaim to the effect that on account of the plaintiff's failure and neglect to furnish crushed stone and curbing as stated the defendant necessarily incurred other and further expenses in order to complete his paving contract, in that he was

compelled to, and actually did, procure and purchase such crushed stone and curbing elsewhere, at greatly enhanced prices to his damage in the sum of \$1,000. The plaintiff, by way of reply, admitted the written contract, but denied all other allegations in the respective counterclaims. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at \$2,957.58. From the judgment entered thereon the defendant brings this appeal.

There is no dispute but what the plaintiff actually delivered the amount of curbing which he claims to have delivered, nor that he furnished three car loads of crushed stone, which the defendant shipped to Rockford, Illinois; nor that the stone so delivered at the contract price amounted to \$1,836.22. There is, however, a considerable dispute as to the amount of crushed stone delivered by the plaintiff to the defendant on the street in Waukesha. It appears that with each load of crushed stone so delivered, the plaintiff furnished to the defendant, or to his superintendent, a ticket or memorandum of the weight of the load by the plaintiff's scales. The defendant gave evidence tending to prove that by actual tests on other scales the aggregate weight of three of the loads so delivered was several hundred pounds less than the weight represented by such tickets or memoranda. The defendant only made such tests as to three loads. On the other hand, there is evidence on the part of the plaintiff tending to prove that his weight of each and every load, as represented by such tickets or memoranda, and charged to the defendant, were substantially correct. The question as to the alleged shortage in the several loads of crushed stone seems to have been fairly submitted to the jury. The contract left each party to ascertain the weight of each load of the stone as he might be advised. In case of a dispute about the weight, the only way to determine the same was by submitting the question of weight to the jury. That was done as to the only loads upon which there was any conflict in the evidence. There was no error in charging the jury to the effect that, even if there was a shortage in the three loads mentioned, yet that fact of itself was insufficient to establish a shortage in any of the other 592 loads.

The principal ground urged for the reversal of the judgment is the ruling of the trial court in excluding all evidence as to damages sustained by the defendant by reason of the plaintiff's refusal to furnish any more stone to the defendant under the contract after June 16, 1898. The defendant claims that under that contract the plaintiff was bound to furnish sufficient stone to enable the defendant to complete a contract he had previously made with the city of Waukesha for "concreting and paving" the "whole of West Main street" in that city. The defendant's answer alleges, in effect, that April 21, 1898, the plaintiff submitted to the defendant the written proposal to furnish stone as mentioned, and that such proposal was accepted by the defendant May 4, 1898; that at the date of such acceptance it was further agreed

and understood that the plaintiff should furnish and deliver, whenever requested by the defendant, and without delay, all the crushed stone and curbing necessary for the purpose of concreting and paving the whole of Main street in accordance with the defendant's contract with the city, and that nothing should become due to the plaintiff thereon until the defendant completed its contract with the city, and the work should be accepted by the city, and that such agreement included all stone shipped by the plaintiff to the defendant at Rockford; but there is no allegation that such written contract was ever changed or modified in any way. The trial court expressly held that the defendant was at liberty to prove, if he could, that after his written acceptance of the plaintiff's written proposal there was a modification of such contract, or a subsequent contract. The defendant gave evidence tending to prove that the parties had a long conversation, immediately after such written acceptance, as to the capacity of the plaintiff to furnish such stone, but, as held by the trial court, there is no evidence to justify a finding that the written contract was modified in any respect. It follows that the rights of the parties must be determined by the written contract. The writing so submitted by the plaintiff was a mere proposal to furnish the stone described, at the prices named, and deliver the same on the street in the city of Waukesha in such quantities as might be desired. The defendant's acceptance was absolute, and in no way qualified the proposal. It was conceded on the argument that the defendant was not bound to receive from the plaintiff a sufficient amount of such stone to complete his contract with the city. The question recurs whether the plaintiff was bound, at the option of the defendant, to so furnish and deliver stone sufficient to complete the defendant's contract with the city. Of course, in so far as the stone was actually delivered and accepted by the defendant, the parties became bound; but the question is whether the plaintiff is liable in damages for failure to furnish enough more to enable the defendant to complete his contract with the city.

In making the ruling complained of, the trial court manifestly followed the decision of this court in *Wells v. Milwaukee & St. P. Railway Co.* 30 Wis. 605. In that case it appears that the defendant company telegraphed to the plaintiff that it wanted ballasting done from Brookfield to Milwaukee, for which it would pay at a certain rate per cubic yard, and the plaintiff telegraphed back, accepting the proposition: that the plaintiff also submitted to the defendant a written proposition to do all the train work required by the company for the grading of the depot, side track, etc., in the city of Milwaukee, at a certain price per cubic yard, which was also accepted by the company, and it was held that the contracts were unambiguous, and were for so much ballasting and grading, respectively, at the places named, as the company should wish to have done, and that the parol evidence offered by the

plaintiff that a specific amount of such ballasting or grading was required at either place to complete the work or render the road serviceable, and that the plaintiff was prevented by the company from doing such work, to his damage, was properly rejected. So it has been held in New York that where the defendant offered by letter to receive from the plaintiff, and transport from New York to Chicago, railroad iron, not to exceed a certain number of tons, during certain specified months, at a specified rate per ton, and the plaintiff answered merely assenting to the proposal, but did not agree on his part to deliver any iron for such transportation, there was no valid contract binding on either party. *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240. Such ruling has been expressly sanctioned in late cases in that state. *Barrow S. S. Co. v. Mexican C. R. Co.* 134 N. Y. 24, 17 L. R. A. 359, 31 N. E. 261; *Rafolovitz v. American Tobacco Co.* 73 Hun, 87; 25 N. Y. Supp. 1036. So, in Massachusetts, where A. wrote to B., a common carrier over one of two routes from the West, that he was about to buy grain in the West, and wished to hear soon if B. was disposed to contract for its transportation, as he should buy in a different market for B.'s route than for the other; that B., in reply, stated his rates for carrying flour from the end of a canal to several towns, and A. then wrote, asking whether the rates applied to grain as well as flour, and whether B. would abate a discrimination in them against A.'s town, and B. answered that he would carry A.'s flour and grain from the canal to that town at a given rate, to continue in force till close of navigation, unless notice to the contrary, and A. replied the same day, accepting the proposal,—it was held that by the terms so ascertained the relation of the parties was in the nature of an open proposition by B. to which A. might, from time to time, give effect as a contract by delivering the flour and grain, and calling for its transportation, but that B.'s right to end the contract by notice was unqualified. *Thayer v. Burchard*, 99 Mass. 508. So it has been held in Louisiana that a contract by which one engages to deliver to the other such quantities of coal as he might require during the year, up to a specified limit, at a specified price, but containing no engagement on the part of the buyer to take or pay for any of the coal, was not enforceable against the promisor. *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1. So, in Minnesota, where the defendant promised to supply the plaintiffs, who were engaged in a general foundry business, with all the Lake Superior pig iron wanted by them in their business from September 2d until December 31st next ensuing the making of the contract, at specified prices, and the plaintiffs simultaneously promised to purchase of the defendant all of such iron which they might want in their business during the time mentioned at the price named, it was held that such facts did not establish a valid contract, since it did not establish an absolute mutuality of engagement, giving each party the right to

hold the other to a positive agreement. *Bailey v. Austrian*, 19 Minn. 535, Gil. 465. See also *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669; *Dayton, W. Valley & X. Turnp. Co. v. Coy*, 13 Ohio St. 84; *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220. The general rule is that, unless both parties are bound, so that an action could be maintained by either against the other for a breach, neither will be bound. Bishop, Contr. Enlarged ed. § 78; Lawson, Contr. § 97. But such general rule has some well-recognized exceptions, as illustrated by the following cases: *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 4 L. R. A. 202, 42 N. W. 356; *Jones v. Binford*, 74 Me. 439; *Cooper v. Lansing Wheel Co.* 94 Mich. 272, 54 N. W. 39; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Robson v. Mississippi River Logging Co.* 43 Fed. Rep. 364. As indicated in these cases, whenever the accepted proposition or contract is for the sale or delivery of a specific article or number of articles, or a specific amount of service or materials, or where, by the terms of the contract, the number of such articles, or the amount of such service or materials, are ascertainable, a promise of the other party may be implied, though not expressed in the contract, and hence the engagements are mutual. In the case at bar the defendant confessedly was not obliged to take from the plaintiff, under the contract, all the stone required to complete his contract with the city, but only "such quantities as" he might desire. The accepted proposition makes no reference to his contract with the city. According to the evidence in his behalf the defendant had, at the same time, two other similar contracts,—one at Morgan Park and another at Champaign, Illinois. The answer alleges, in effect, that the three car loads shipped to Rockford, Illinois, were under the same contract. The contract leaves the amount of stone to be delivered unfixed and unascertainable. There is nothing in the contract which implies that it was measured by or limited to the defendant's contract with the city. Of course, parol evidence was inadmissible to enlarge or modify the terms of that contract.

The judgment of the Circuit Court is affirmed.

Marshall, J., dissenting:

If I understand the grounds of the court's decision it is that a mere proposition, not supported by a consideration, or accepted, so as to bind each party to do some definite or ascertainable thing, does not constitute a binding contract. The authorities cited in the opinion of the Chief Justice all point that way, and with the law in that regard we have no contention to make. The trouble is, as it seems, the principles of law relied on do not fit the facts of this case. A brief reference to the cases mentioned in the opinion of the court will bear out that view. In *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, there was a proposition by the plaintiff to

receive and transport for the defendant, from New York to Chicago, such iron as it might offer for that purpose during the succeeding six months, which offer was accepted. It was held that the offer of the plaintiff was a mere option, with no consideration to support it, therefore, till accepted with sufficient definiteness to constitute a binding promise on the part of the defendant to furnish some definite or ascertainable quantity of iron for shipment there was no contract between the parties. The case recognizes that if the proposition upon the one side were accepted on the other, so as to have the necessary elements of certainty to constitute a binding promise, all the necessary calls of a binding contract would be satisfied. *Barrow S. S. Co. v. Mexican C. R. Co.* 134 N. Y. 15, 17 L. R. A. 359, 31 N. E. 261, was ruled by the same principle. The difficulty was that there was an accepted offer to carry passengers, no particular number being agreed upon. On the one side it was claimed that the acceptance was made with reference to a suggestion that the number of passengers would be at least 250; on the other, that the acceptance was of rates merely, and that the conversations as to numbers did not become a binding part of the contract, as no definite number was stated on the one side and accepted on the other as a basis for such contract. The court was nearly equally divided in rendering the decision. The difference of opinion was in regard to the construction of the contract, it being conceded that all the circumstances characterizing it were to be considered in determining what the parties intended by their language. In *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, there was a mere authorization, without consideration, by one person to another to sell the former's real estate. It was held revocable because there was neither a consideration nor mutuality in the contract to support it.

We might go on through all the cases cited, and numerous others of the same nature, which are ruled by these elementary principles: There must either be a present consideration given by one person for the promise of performance by the other, or there must be mutual promises, the one being made in consideration of the other, and the thing promised by each must be definite or ascertainable with reasonable certainty, else there will be no binding contract.

Now before the principles referred to should be applied to this case so as to lead to the result reached by the court, the facts should clearly appear calling for such application, and before it should be determined that such facts exist, resort should be had to the well-known rules of construction in order to determine just what the parties intended.

My brethren cite, as conclusive, *Wells v. Milwaukee & St. P. R. Co.* 30 Wis. 605, but it will easily be found that the only point determined there was that a plain, unambiguous written contract cannot be varied by parol. The written contract was that plaintiff should do such ballasting from Brook-

field to Milwaukee at a specified price as defendant should wish to have done, and such grading of the depot grounds in Milwaukee, at a certain price, as defendant might desire. The plaintiff attempted to prove by parol that the ballasting and grading to which the contract referred included all such work required at the points designated. No question was raised but that if the court were permitted to go outside of the language used by the parties to determine the meaning of the contract by reason of ambiguity, and it were properly made to appear that the parties contracted with reference to a particular amount of work, their intention in that regard would be as effectually a part of the contract as if plainly written into it. The difficulty was that neither in the language of the contract, nor in its application, did there appear to be any obscurity calling for the application of rules of construction. That does not apply, in our judgment, to this case, as will be shown later. It will also be seen that want of mutuality was not the turning point in *Wells v. Milwaukee & St. P. R. Co.* It was not questioned but that Wells, having entered upon his work, was bound to proceed so long as the railroad company desired his services. *Boden v. Maher*, 95 Wis. 65, 69 N. W. 980, was a similar case.

Now to determine whether there was an enforceable contract between the parties we must first see what the precise nature of the agreement was. The suggestion made in *Wells v. Milwaukee & St. P. R. Co.*, that plain language does not admit of construction, does not apply here. The written proposition was to furnish stone, delivered on the street in the city of Waukesha in such quantities as defendant might desire. If we look at the language and say because there is no uncertainty of expression there is no use for construction, we fail to apply the rule that obscurity calling for construction may spring from the consequences of a literal application of the plain, ordinary meaning of words, as well as from the meaning of words themselves. *State ex rel. Heiden v. Ryan*, 99 Wis. 123, 74 N. W. 544. We must assume that when parties attempt to contract they purpose making a binding agreement. So, when the literal sense of their language leads to a contrary result there is at once presented a situation which requires the court to look at such language from the standpoint the parties occupied at the time of using it, and if it thereby appear that the real intent was to make a binding contract, and that the language used to effect that purpose will reasonably admit of a construction which will effectuate it, that intent will be considered a part of the contract just the same as if within the literal meaning of its language. That rule is so elementary that we hesitate to spend time in support of it. Its application to this case frees it from all difficulty. In *Sigerson v. Cushing*, 14 Wis. 527, Mr. Justice Paine said: "It is often absolutely essential that the court should know the facts surrounding the parties, and the situation in which they are placed, in

order to interpret the meaning of what they say in their contracts. In *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1, quoting from the opinion of Ryan, Ch. J., in *Lyman v. Babcock*, 40 Wis. 333, which, however, merely stated with approval an elementary rule laid down in *Greenleaf on Evidence*, it was said: "As it is a leading rule in regard to written instruments that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract." It will be easily seen that the rule indicated is as well established as that other rule that a written contract cannot be varied by parol, which was the one applied in *Wells v. Milwaukee & St. P. R. Co.* 30 Wis. 605, and properly so.

The rule under discussion has been freely applied by the courts when the language, though free from any ambiguity of expression, if given its literal sense, without regard to the particular circumstances in the minds of the contracting parties when it was used, would result in failing to make a reasonable, binding contract. A good illustration of this is *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527, where there was a sale of flour without anything in the bill of sale as to time, place, or manner of delivery, and the court held that evidence was proper regarding all the circumstances of the transaction, including a letter which the vendor sent to the vendee with the bill of sale, stating that the flour was sold free on board the steamer at Neenah, and was stored safely and insured. In view of the season a steamer to transport the flour was not obtainable till the opening of navigation the following spring, and the court therefore interpreted the words "free on board steamer at Neenah" and the words indicating that the flour was safely stored and insured, to mean that the real engagement of the vendor was that he would safely keep the flour till the opening of navigation and then engage a steamer to transport it, and deliver the flour on board such steamer free of charge. The court said that, the contract being made in winter, and for transportation by water, it was unreasonable to suppose an immediate delivery was contemplated; and that, the flour being safely stored in the warehouse and insured, it was unreasonable to suppose that the parties contemplated that the property would be removed therefrom till the proper time for shipment in the manner contemplated, and that the words "free on board" meant that the vendor would employ a steamer and place the flour thereon free of charge. The

general principle applied in reaching the conclusion was stated by Mr. Justice Clifford thus: "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described." To the same effect are, *Merriam v. United States*, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774; *Wells v. Alexandre*, 130 N. Y. 642, 15 L. R. A. 218, 20 N. E. 142; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 4 L. R. A. 202, 42 N. W. 356; *Cooper v. Lansing Wheel Co.* 94 Mich. 272, 54 N. W. 39; *Robson v. Mississippi River Logging Co.* 43 Fed. Rep. 364, 61 Fed. Rep. 893; *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 21 L. ed. 64.

In some of the cases cited all the elements are present that exist in the contract before us. The suggestion made in the opinion of the court, that they differ from the instant case and from *Wells v. Milwaukee & St. P. R. Co.* 30 Wis. 605, in that they refer to the sale and delivery of a specific article or a number of articles, or specific amount of services or material, or at the time of the contract the number of such articles or the amount of such services or materials were ascertainable, is viewed with some surprise, since the question was not suggested in the *Wells Case*, the only question being whether the term of a written contract can be varied by parol, and since the court failed to note that such suggested necessary element was discovered in the numerous cases referred to, by the application of the rule of construction for which we contend, and which, if applied here, will make the contract in question as definite as any involved in such cases. For instance, in *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 31 L. R. A. 529, 43 N. E. 774, the contract was for all the coal the vendee desired for the use of his boats for the season. The court said, in substance, that viewing the language of the contract in the light of the circumstances under which it was made, and the object of it, giving effect rather to the clear intent of the parties than to the literal sense of their words, it called for all the coal necessary to operate the boats for the season, and was binding. The other cases cited are along the same line.

It follows, in our judgment, very clearly, that it is the duty of the court to view the contract in question from the precise standpoint that the parties to it occupied when making it. The very fact that the literal sense of the words would not make a binding contract is enough in itself, as has been seen, to call for the course indicated. It 47 L. R. A.

cannot be assumed that the parties intended to do such an unbusinesslike thing as to reduce their agreement to writing, and yet have it of no effect except so far as actually executed. The parties were practical business men. We must assume that they had a well-defined, reasonable purpose in view, and intended to bind themselves accordingly. If that purpose can be clearly discovered, and is within the reasonable meaning of the language they used, looking at it from the standpoint they occupied in making the agreement, that meaning should be deemed to be a part of it. Defendant had a contract for paving and concreting Main street in the city of Waukesha. The unmistakable object of the contract with plaintiff was to obtain the stone required for that work, delivered on the particular street to be improved, when and where needed. The language of the contract does not specify a particular street. For aught that appears, delivery on any street of the city was sufficient. Placing ourselves, however, in the situation of the parties, it is easily seen that "delivery on the street" meant when and where required for use on the particular street under contract. The term "in such quantities as may be desired" is an indefinite term when viewed apart from the obvious purpose of the contract; but in the light of all the circumstances it is clear that it was used to express the purpose of the parties that the plaintiff should furnish all the stone that might be needed from time to time for the work on the street to be improved. With that construction, the contract is free from all difficulties which by brethren found in it. It has the essential of mutuality, the essential of a consideration of each party to support the promise of the other, and the element of definiteness, so far as necessary within the rule that all agree is elementary. Supplying the words necessarily implied, because of the obvious intent of the parties, the accepted offer is substantially as follows:

To Mr. G. Maffoli—

Dear Sir: We propose to furnish all the crushed stone at 85c. per yard of 2,500 lbs., 30 in. x 4 in. curbing including corners, at 34c. per lineal foot, protection curb 15 in. x 4 in. at 10c. per lineal foot all as per specifications; the stone to be delivered on the street in the city of Waukesha you now have under contract to pave and concrete, which may be required to carry out such contract. The stone to be delivered as aforesaid in such quantities from time to time as may be needed for such work.

So viewing the contract, the defendant was unquestionably entitled to counterclaim in this action for the damages sustained by him because of the refusal of the plaintiff to carry out its provisions, and the judgment should be reversed for that reason.

Bardeen, J., dissenting:

I fully concur in the foregoing opinion of Mr. Justice Marshall.

WISCONSIN SUPREME COURT.

Marshall FIELD *et al.*, *Respts.*,
v.

Elias SIEGEL *et al.*, *Appts.*

(99 Wis. 605.)

A general creditor cannot maintain an action on the case for conspiracy of the debtor and other persons to dispose of the debtor's property fraudulently and defeat his claim, if there was no fraud in the creation of the debt.

(May 24, 1898.)

APPEAL by defendants from an order of the Superior Court for Douglas County overruling a demurrer to the complaint in a proceeding to hold defendants liable for dis-

posing of a stock of goods in fraud of complainant's rights. *Reversed.*

The facts are stated in the opinion.

Messrs. Hughes, Whitford, & Gosnell, for appellants:

In actions on the case in the nature of conspiracy (and this action is of that character), the gist of the action is the damage suffered by the plaintiff; and the allegation of a conspiracy between the defendants for the purpose and with the intent of doing the wrong complained of is of no importance so far as respects the cause of action.

Hutchins v. Hutchins, 7 Hill, 104.

The conspiracy is nothing so far as sustaining the action goes, the foundation of it being the actual damage done to the party. 2 Addison, Torts, § 850; *Hutchins v.*

NOTE.—Action by general creditor for damages against third party on account of fraud in disposing of debtor's property, or preventing plaintiff from collecting his claim.

In *FIELD v. SIEGEL* it is held that a general creditor cannot maintain an action on the case against third persons conspiring with the debtor to dispose of the debtor's property by a fraudulent confession of judgment, thereby defeating plaintiff's claim, where there is no fraud in the creation of the debt. This decision is in accord with the weight of authority.

It seems that a general creditor cannot maintain an action for damages against third parties for fraudulently enabling the debtor to dispose of his property to defeat plaintiff's claim. This is on the ground that no damages to the plaintiff are shown that differ from the damages to all the creditors; that if one creditor could recover, another could also, and the co-operating party might be liable several times over. Some cases dispose of the question by holding that the damages are only a chance of recovering the debt, and are too remote and speculative.

The cases in Pennsylvania hold the converse of the proposition stated above, and in that state it seems that it makes no difference whether or not plaintiff is a general creditor, or has a lien by judgment or otherwise, as he may recover from anyone fraudulently assisting in disposing of the debtor's property.

So, a general creditor cannot maintain an action on the case for damages against his debtor and others combining and conspiring with him to make fraudulent disposition of the debtor's property, or where such third party takes a fraudulent conveyance whereby the plaintiff is hindered, delayed, or defeated in the collection of his debt. *Lamb v. Stone*, 11 Pick. 527; *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696; *Gardiner v. Sherrod*, 9 N. C. (2 Hawks) 173; *Le Gierse v. Kellum*, 66 Tex. 242; *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 722; *Austin v. Barrows*, 41 Conn. 287; *Matthews v. Pass*, 19 Ga. 141; *Mowry v. Schroder*, 4 Strobb. L. 69; *Green v. Kimble*, 6 Blackf. 552; *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612; *Tasker v. Moss*, 82 Ind. 62; *Klous v. Hennessey*, 13 R. I. 332; *Smith v. Blake*, 1 Day, 258; *Bradley v. Fuller*, 118 Mass. 239; *Blum v. Goldman*, 66 Tex. 621; *Hall v. Eaton*, 25 Vt. 458.

Lamb v. Stone, 11 Pick. 527, is a leading case on the question. The grounds of this decision are that if the plaintiff could maintain this action all the other creditors could; that it was not shown that plaintiff had been damaged, as no attachment had ever been made; the debtor never

acquired any interest in the property, and the tort of the defendant was too remote, indefinite, and contingent to be the ground of an action.

In *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696, the plaintiff's debt was not due at the time of the alleged fraudulent transfer.

In *Findlay v. McAllister*, 113 U. S. 104, 28 L. ed. 930, 5 Sup. Ct. Rep. 401, the case of *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696, was distinguished, saying that case held that an action would not lie by a creditor whose debt was not yet due against his debtors, and two others, for a conspiracy carried into effect to enable the debtors fraudulently to dispose of their property so as to hinder and defeat the creditor in the collection of his debt. "Mr. Justice Campbell, who delivered the opinion, put the decision of the court on the ground that to sustain the action it must be shown, not only that there was a conspiracy, but that there were tortious acts in furtherance of it, and consequent damage."

In *Gardiner v. Sherrod*, 9 N. C. (2 Hawks) 173, it was said that an action might have been maintained if the complaint had been framed under N. C. act 1820, providing that if any person shall remove, or shall assist in removing, any debtor out of the county in which he shall have resided six months, with an intent by such removing to hinder, delay, or defraud the creditors of such debtor, the person so removing, aiding, or assisting shall be liable to pay all debts which the removed person justly owes in the county from which he removed, to be recovered by an action on the case.

In *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 722, it was held that the averments of conspiracy, and that the debtor was insolvent when this action was commenced, and that the defendant concealed the property of the debtor, did not distinguish this from the case of *Lamb v. Stone*, 11 Pick. 527, on the ground that if an act is done that is no cause of action it is not rendered actionable by being done in pursuance of conspiracy, and that the gist of an action on the case in the nature of a conspiracy is the damage done to plaintiff. The case of *Penrod v. Morrison*, 2 Penn. & W. 126, *infra*, was disapproved, as no legal reasons were given for that decision.

In *Mowry v. Schroder*, 4 Strobb. L. 69, the declaration was in two counts. The first count alleged that the goods were bought by the parties as partners, and the fraud was alleged to be in subsequently holding themselves out not to be partners and transferring all the property to the second party. The second count alleged that the debtor and his brother had conspired

Hutchins, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; 6 Am. & Eng. Enc. Law, 2d ed. p. 873; *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846.

A creditor at large, without lien on property and without writ, cannot maintain an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud the creditor of such debtor.

Bump, Fraud. Conv. 2d ed. 515-517; 6 Am. & Eng. Enc. Law, 2d ed. p. 878; *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696; *Smith v. Blake*, 1 Day, 258; *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 719; *Bradley v. Fuller*, 118 Mass. 239; *Moody v. Burton*, 27 Me. 427, 46 Am.

Dec. 612; *Hall v. Eaton*, 25 Vt. 458; *Austin v. Barrows*, 41 Conn. 297; *Green v. Kimball*, 6 Blackf. 552; *Klous v. Hennessey*, 13 R. I. 332; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Gardiner v. Sherrod*, 9 N. C. (2 Hawks) 173; *Mowry v. Schröder*, 4 Strobb. L. 69; *Legierse v. Kellum*, 66 Tex. 242, 18 S. W. 509; *Hutchins v. Hutchins*, 7 Hill, 104.

The injury complained of is too remote, indefinite, and contingent.

Lamb v. Stone, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 719; *Hall v. Eaton*, 25 Vt. 458; *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612; *Austin v. Barrows*, 41 Conn. 287; *Klous v. Hennessey*, 13 R. I. 332.

The law does not hold the fraudulent grantee of a debtor liable to the creditors of that debtor in any sum in excess of the value

to defeat the plaintiff, and by fraudulent collusion the debtor had turned over to his brother all his property, more than sufficient to pay plaintiff's debt, and that the brother had removed the whole of the same from beyond the reach of the court, and asked judgment for the damages. It was held that the case laid was defective and the first count was a misconception, and the second count did not state a sufficient case. The reasons are not given in the opinion of the court.

A replevin-bill, who was required to pay a part of a judgment by reason of a third party fraudulently converting the goods of the execution debtor to his own use, could not maintain an action of tort against such third party, as the plaintiff had no legal interest in the goods. *Green v. Kimble*, 6 Blackf. 552.

In this case it was said that the plaintiff in the execution, having acquired a lien upon the property, might have maintained an action against a third party under *Yates v. Joyce*, 11 Johns. 136. But the rule is that an action for tort must be brought in the name of the person who was legally interested in the property at the time the tort was committed.

In *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612, it was held that the chief objection to the maintenance of this action is, that the plaintiff does not appear to have suffered any damages not common to all the creditors. The cases of *Penrod v. Mitchell*, 8 Serg. & R. 522, and *Penrod v. Morrison*, 2 Penn. & W. 126, *infra*, were disapproved, as in neither of the opinions delivered by eminent judges in those cases were the objections considered and obviated, which were stated in *Lamb v. Stone*, 11 Pick. 527, or which have here been noticed.

In *Tasker v. Moss*, 82 Ind. 62, it was held that a creditor who has no lien on the property of his debtor cannot maintain an action against a third party who accepts a conveyance of the debtor's property and conveys it to another party for the benefit of the debtor for the purpose of defrauding the plaintiff. The collusion of the debtor in transferring property that might have been subjected to the payment of plaintiff's debt creates no liability.

In *Bradley v. Fuller*, 118 Mass. 239, it was held that an action for damages would not lie for a conspiracy to obtain a prior attachment of the debtor's property where it was not alleged that the debtor company was insolvent, or that the plaintiff ever brought suit or attempted to collect his debt, or that he ever attempted to make an attachment, or was induced by the defendant to refrain from making such attachment.

An action on the case for the fraud of the 47 L. R. A.

defendant in combining with plaintiff's debtor by attaching all the personal property of the debtor, and concealing the same to prevent the plaintiff from enforcing his debt, cannot be sustained. *Blum v. Goldman*, 68 Tex. 621, 1 S. W. 899; *Hall v. Eaton*, 25 Vt. 458.

In the latter case it was said that if the plaintiff by an attachment had acquired a lien, or the right to have the application of his property made in payment of his debt to the exclusion of other creditors, a different question would arise, as it then would come within the cases of *Adams v. Paige*, 7 Pick. 542; *Yates v. Joyce*, 11 Johns. 136; and *Smith v. Tonstall*, Carth. 8.

And an action of trespass on the case cannot be maintained against parties charging them with conspiring to prevent the creditor from obtaining payment out of the estate of his debtor by taking from him fictitious mortgages and securing his property so that the creditor could not attach it, where plaintiff had no lien. *Klous v. Hennessey*, 13 R. I. 332.

This decision is on the ground that the damage which is the gist of the action is too remote, uncertain, and contingent, inasmuch as the creditor had not an assured right, but simply a chance, of securing his claim by attachment or levy, which he may or may not succeed in improving.

In *Whitman v. Spencer*, 2 R. I. 124, where a merchant in Rhode Island sold a branch store in New York, and the purchaser in debt for such goods transferred them by bill of sale to a third party who brought them to Rhode Island and sold the same, it was held, in an action on the case against both parties for fraudulently preventing the plaintiff from recovering his debt out of the goods of the debtor, that although the bill of sale was without consideration, if the goods were taken with a bona fide intent to pay the debts of the creditors, and not to defeat the plaintiff, the defendants are not liable on a charge of fraudulent conspiracy, but that if their motive was to secrete the property, or to compel the creditor to a compromise, they are legally guilty of a conspiracy. The jury failed to agree.

This case is not referred to in *Klous v. Hennessey*, 13 R. I. 332, which virtually overrules the same.

In *Chamberlin v. Jones*, 114 Ind. 458, 16 N. E. 178, it was said that in the absence of a lien on property an action is not maintainable as a suit at law for damages against a party who by collusion with an insolvent debtor accepts a transfer of chattels belonging to the latter, and with intent to place the property beyond the

of the property fraudulently conveyed, whatever be the form of the action brought by them to realize their claims.

Moody v. Burton, 27 Me. 427, 46 Am. Dec. 612.

The property while in the hands of the fraudulent grantee was held by him in trust for the creditor, and when he converts it into money or other property the fund is impressed with the same trust.

Bump, Fraud. Conv. 2d ed. p. 590, and cases cited in note 2; *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. 46; *Fullerton v. Viall*, 42 How. Pr. 294; *Ferguson v. Hillman*, 55 Wis. 181, 12 N. Y. 389.

Messrs. W. M. Steele and A. T. Rock for respondents.

Cassoday, Ch. J., delivered the opinion of the court:

This is an appeal from an order overrul-

reach of the debtor's creditors converts the same.

In *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, the general rule is laid down that no recovery can be had in an action on the case, even if there has been an unlawful combination among the defendants to injure the plaintiffs unless some damage is done to them.

An action on the case will not lie at the instance of a party who desired to recover a penalty, alleging that the defendant and a third party by conspiracy instituted an action prior to that of plaintiff for the penalty, intending to protect the defendant and defeat plaintiff from bringing such action, under N. C. Rev. Stat. chap. 16, providing a penalty of \$50 to the use of any person suing for the same, for unlawfully setting fire to a woods. *Burnet v. Davidson*, 32 N. C. (10 Ired. L.) 94.

And a creditor of a deceased person cannot maintain an action against a party who forged a note against the deceased, and procured the same to be allowed by the commissioners, the effect of which was to diminish the dividend which the plaintiff would otherwise have received upon his debt. *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140.

This was on the ground that it would be retrying and reversing the judgment wherein the allowance had been made, and trying the witnesses for perjury by instituting against them a civil suit. The court cited *Anonymous Case*, Windsor county, where the same question was decided in the same way.

An action for damages cannot be maintained against a party who caused the plaintiff to delay bringing his suit, and cannot be maintained for preventing the debtor from paying plaintiff, thereby compelling plaintiff to sue.

So, an action of tort for fraudulent representations and conspiracy cannot be maintained where the defendant orally represented to the plaintiff that a corporation of which he was treasurer, and whose overdue note the plaintiff then held, owed no other debts and had no other attachments upon its property, and that this representation was fraudulently and falsely made for the purpose of inducing the plaintiff not to commence suit upon his note, until the corporate property could be placed beyond the reach of attachment by the plaintiff, and that all the property was afterwards sold on execution upon another debt, and plaintiff by reason of such representations lost his debt. *Bradley v. Fuller*, 118 Mass. 289.

In *McHale v. Heman*, 28 Mo. App. 193, it was held that an action of conspiracy in compelling the plaintiff to sue to recover his just rights 47 L. R. A.

ing a demurrer to the complaint, which is very lengthy, and alleges numerous facts with unnecessary detail, but is to the effect that between September 2, 1895, and November 20, 1895, the plaintiffs as copartners and wholesale merchants at Chicago, sold and delivered to the defendants Cohen & Siegel, as partners, and at their request, goods, wares, and merchandise of the value of \$1,155.98, on a credit of sixty days from the date of each invoice, for which they promised and agreed to pay to the plaintiffs the amount of each invoice as the same matured, amounting in all to the sum stated; that no part thereof has been paid, except \$18 November 15, 1895; that the balance of \$1,137.98 was still due and unpaid; that Cohen & Siegel during the summer and fall of 1895 in like manner purchased goods, wares, and merchandise of divers other wholesale and jobbing merchants in Chicago and else-

could not be maintained. The court said: "If these facts may constitute the basis of an action, then every plaintiff who sues and recovers for a wrong done may follow up the proceeding with another suit to compensate him for the trouble and expense of maintaining the first. He may then begin another action for indemnity on account of the last effort to vindicate his rights, and so on, *ad infinitum*."

In *Schwab v. Mabley*, 47 Mich. 572, it was held that an action for damages for conspiracy to defeat the plaintiffs in prosecuting or enforcing legal proceedings could not be maintained. The court said: "But although a conspiracy may be punishable criminally where an illegal purpose is sufficiently shown, without proof of its further execution, this is not so in civil proceedings. No one can complain civilly of any action of another, unless he has been unlawfully damaged thereby. This is one of the first elements of the law. And in the present case the conspiracy does not create any liability even if it could be proved, without allegation and proof of damage."

In *McHale v. Heman*, 28 Mo. App. 193, it was said that the cases *infra*, of *Adams v. Paige*, 7 Pick. 542; *Kelsey v. Murphy*, 26 Pa. 73; *Aspinall v. Jones*, 17 Mo. 209; *Penrod v. Morrison*, 2 Penn. & W. 126; *Mott v. Danforth*, 6 Watts, 304, 31 Am. Dec. 468; and *Meredith v. Johns*, 1 Hen. & M. 585,—are distinguishable, as in all these cases the creditor plaintiff, by reason of the complete and effectual alienation of the debtor's property, or of the funds out of which he was entitled to have satisfaction of his claim, was wholly deprived of any access to such property or fund for the enforcement of his rights, so that his claim was sacrificed.

In *Halbert v. Grant*, 4 T. B. Mon. 581, it was said that whether a person entertaining a fraudulent grant and speedily placing the estate beyond the reach of creditors would or would not be liable to an action on the case at the suit of the creditor, we need not now determine.

In *Dunphy v. Kleinsmith*, 11 Wall. 610, 20 L. ed. 223, it was held that in an equitable action a decree in the nature of a judgment for damages cannot be rendered against a defendant who is alleged to have taken a fraudulent assignment of the debtor's property. In this case the court said that if the complainant wishes to make him answerable in damages, either for the waste of the property, or for its disposal by the original proprietor by the aid of the wrongful complicity of the defendant, he must sue for damages in an action at law.

The distinction between law and equity being

where on credit, and became and were indebted therefor in December, 1895; that between August 1, 1895, and December 29, 1895, and while Cohen & Siegel were possessed of a stock of merchandise of the value of about \$30,000, they, together with the other defendants, did wrongfully, maliciously, unlawfully, and fraudulently conspire, connive, and contrive together to defraud the creditors of Cohen & Siegel, including the plaintiffs, out of their just demands against Cohen & Siegel; that in pursuance of such conspiracy to defraud their creditors, and as a means to effect such fraud, Cohen & Siegel, conspiring with the other defendants, made and delivered a large number of notes to the other defendants, respectively, or firms, dated at different times, and payable at different dates, and at different rates of interest, in the aggregate of nearly \$10,000, and

upon which notes judgments were fraudulently taken by confession, and by the several defendants acting in concert December 30 and 31, 1895, and which judgments so fraudulently confessed and entered, with accumulated costs, amounted in the aggregate to the sum of \$10,145.84; that immediately upon the rendition and entry of such judgments the defendants caused executions to be issued thereon, in due form of law, directed and delivered to the sheriff, and directed and instructed him to levy the same upon all the personal property and assets of Cohen & Siegel, and to take the same into his possession, and to sell the same to satisfy said executions; that in pursuance of such instructions the sheriff on December 30, 1895, levied upon, seized, and took into his possession all the property of Cohen & Siegel, consisting of their stock of merchandise, and,

jurisdictional in the courts of the United States, that fact may be sufficient to explain the difference in the decision of this case and that made by the New York court in the case of *Murtha v. Curley*, 90 N. Y. 372, Reversing 15 Jones & S. 393, *infra*.

Confusion of New York cases.

In New York a general creditor cannot maintain an action against a third party for fraudulently conspiring with the debtor to defeat plaintiff.

So, an action for damages for conspiracy to defraud plaintiff out of purchase-money notes (the consideration of sale of a liquor business), by the debtor transferring the property to his brother two weeks after the debtor bought the property cannot be maintained, where it is not shown that the transferee did not pay a valuable consideration, and that he had knowledge that plaintiff's claim was unpaid. *Burbridge v. Kilgannon*, 14 Misc. 450, 35 N. Y. Supp. 1022.

There are some New York cases where the plaintiff was a judgment creditor and brought an action for damages against a third party, that seem to require notice in this connection, as some of them fail to distinguish between the rights of a general creditor, a judgment creditor, and a creditor having a lien. These cases are in some confusion and apparent conflict.

The cases holding that an action will not lie are *Hurwitz v. Hurwitz*, 10 Misc. 353, 31 N. Y. Supp. 25, Reversing 9 Misc. 201, 30 N. Y. Supp. 208; *Braem v. Merchants' Nat. Bank*, 2 Silv. Sup. Ct. 84, 6 N. Y. Supp. 846, Affirmed in 127 N. Y. 508, 28 N. E. 597.

The cases holding that an action will lie are: *Quinby v. Strauss*, 90 N. Y. 664; *Hoefler v. Hoefler*, 2 App. Div. 8, 27 N. Y. Supp. 436, 12 App. Div. 84, 42 N. Y. Supp. 1035, 21 App. Div. 633, 47 N. Y. Supp. 1138, 154 N. Y. 760, 49 N. E. 1098; *Murtha v. Curley*, 90 N. Y. 372, Reversing 15 Jones & S. 393; *Yates v. Joyce*, 11 Johns. 136. See also *Marsh v. White*, 3 Barb. 518, *infra*.

The confusion on this question seems to arise from the meagerness of the report in *Quinby v. Strauss*, 90 N. Y. 664, *infra* (where the plaintiff had a lien), and some expressions in *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508, 28 N. E. 597, *infra*. A careful consideration of the cases seems to indicate that the action cannot be maintained unless plaintiff has a lien, notwithstanding the latest decision to the contrary in *Hoefler v. Hoefler*, 21 App. Div. 633, 47 N. Y. Supp. 1138 (no opinion).

In *Hurwitz v. Hurwitz*, 10 Misc. 353, 31 N. Y. Supp. 25, Reversing 9 Misc. 201, 30 N. Y. 47 L. R. A.

Supp. 208, it was held that an action for tort charging that the debtor by conspiring with another party fraudulently disposed of his goods the second day after judgment but before execution issued, and defeating the satisfaction of plaintiff's debt, cannot be maintained. This was on the ground that "before acquisition of a lien on his debtor's goods by execution or otherwise a judgment creditor has no interest in those goods which a judgment debtor injures, in a legal sense, even by a fraudulent transfer of the goods."

In this case *Quinby v. Strauss*, 90 N. Y. 664, was distinguished, the court saying: "The decision of our own court of appeals, if an actual adjudication of the point in question, would, of course, be conclusive. But, upon reference to the full report of the case we find, first, that the point was not presented or considered at any stage of the action, and has, therefore, not been adjudged; and, secondly, that the plaintiff had acquired a lien by issue of execution prior to the mortgage by foreclosure of which the goods were fraudulently appropriated by the defendant Strauss. The execution was in April, 1877, and the mortgage in September, 1879. The apparent decision was disregarded by the general term in *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508, 28 N. E. 597, because of the unsatisfactory report of the case. We decline its authority because the point here in connection was not before the court, and so was not determined, and because the court of appeals in *Braem v. Merchants' Nat. Bank* [*infra*] expressly repudiated the principle supposed to have been propounded in *Quinby v. Strauss*."

Where the sheriff held an execution against a corporation, and plaintiff obtained a judgment against the same corporation, and the day following issued an execution to the sheriff, and in the interim the debtor confessed judgment to another party on a valid debt to defeat plaintiff, and execution was immediately issued, the property was sold, and the proceeds were applied to the first execution, the balance to defendant's execution and plaintiff's execution returned *nulla bona*, the plaintiff could not recover damages by reason of defendant's wrongful act in obtaining a judgment by collusion. The defendant's judgment in this case contravened 1 Rev. Stat. 603, § 4, prohibiting transfers in contemplation of insolvency by an incorporated company after its notes had been protested. The court said that the cause of action might have been supported if the defendant's execution had been without any judgment, and that a different question would have been presented if an existing lien of the plaintiffs had been impaired or divested by the act of the defendant.

after duly advertising the same for sale under said executions, sold the same at public auction February 11, 1896, to the defendant Isaac Rothstein, for an amount insufficient to satisfy the amounts claimed to be due on said executions. The complaint further alleges that at the time said stock of goods and merchandise was so levied upon and seized by the sheriff under said several executions the same was well and reasonably worth, and of the reasonable value of, \$25,000; that the same was all the property and assets the defendants Cohen & Siegel, or either of them, then owned, not exempt, and that they have not now, nor has either of them, any tangible assets or property out of which the plaintiffs can make satisfaction of their said claim against them, above specified; that Cohen & Siegel were not at any of said times indebted to any or either of

said other defendants in any sum or sums whatever, but that all of said notes, complaints, answers, confessions of judgments, and judgments were and are false and fictitious, and that all of the acts of said defendants done in the premises (the purchasing from the plaintiffs of the several invoices of goods mentioned, and contracting the indebtedness due to the plaintiffs from Cohen & Siegel aforesaid; the making of the notes, complaints, answers, and confessions of judgments; the issuing of executions thereon; the sale of the goods and chattels of Cohen & Siegel thereunder; and the purchase thereof by Rothstein) were all so made, done, or caused to be done, as parts of one common plan, design, and conspiracy on the part of, and participated in by, all of the defendants, to effectuate and accomplish by means thereof a fraudulent conveyance

Braem v. Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597.

In this case *Yates v. Joyce*, 11 Johns. 136, and *Van Pelt v. McGraw*, 4 N. Y. 110, were distinguished, as in this case plaintiff did not have an existing lien which was impaired by the act of defendant.

In *Hoefler v. Hoefler*, 2 App. Div. 8, 37 N. Y. Supp. 436, 12 App. Div. 84, 42 N. Y. Supp. 1085, 21 App. Div. 633, 47 N. Y. Supp. 1138, 154 N. Y. 760, 49 N. E. 1008, the plaintiff obtained a judgment for alimony, and then brought an action against the mother of the defendant for furnishing him means to leave the state and thus evade the judgment. The first trial resulted in a judgment for damages, that was reversed in 2 App. Div. 8, 37 N. Y. Supp. 436. *Follett, J.*, said: "If the defendant can be held liable in this action it is only on the ground that she induced and aided her son to leave the state with the intent to evade the order, which must be determined by what she did after the order for alimony was granted." In 12 App. Div. 84, 42 N. Y. Supp. 1035, a nonsuit in the trial court was reversed. Opinion by *Ward, J.*, holding that the action can be maintained, citing *Hurwitz v. Hurwitz*, 9 Misc. 201, 30 N. Y. Supp. 208 (but that case was reversed in 10 Misc. 353, 31 N. Y. Supp. 25); and *Michelson v. Ali*, 43 S. C. 459, 21 S. E. 323 (but in that case the plaintiff had a lien). In 21 App. Div. 633, 47 N. Y. Supp. 1138, a judgment for plaintiff was affirmed without opinion, and in 154 N. Y. 760, 49 N. E. 1008, a motion to dismiss the appeal from the last ruling was denied. (This case has been settled out of court.)

In *Quinby v. Strauss*, 90 N. Y. 664, the action was by a judgment creditor alleging that the debtor and his attorney conspired to keep the debtor's property out of the reach of his creditors by execution of chattel mortgages to secure fictitious debts, and the property was bid for by the attorney or in his interest, and exceeded the value of plaintiff's judgment. The court charged that if the jury were satisfied that defendants were guilty of the conspiracy as alleged, plaintiffs were entitled to a verdict for the amount on the judgments, and for such amount for the trouble and inconvenience as the jury should consider was proved to have been sustained by them. It was held that as the property had been fraudulently appropriated by the defendant to his own use, and exceeded the plaintiff's judgment, he should pay the creditor whose claim he sought to defeat.

The case of *Quinby v. Strauss* is very scant, but the appeal book and briefs show that there was a mortgage to C. & H. on the property when the plaintiffs obtained judgment, which mort-

gage was claimed to be fraudulent, and another mortgage was made to Strauss after plaintiff had obtained a judgment and after a return of no property on the execution. This latter mortgage evidently was the one referred to in the opinion in 90 N. Y. 664, and was held fraudulent. The plaintiff had a judgment lien at the time of the execution of this fraudulent mortgage, although this is not given as the ground of the decision.

The court of appeals in *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508, 28 N. E. 597, distinguishes *Quinby v. Strauss*, saying: "But this is in the nature of an action on the case, and its purpose was to recover damages which the plaintiffs claim to have suffered by the alleged tortious and wrongful act of the defendant in taking its judgment and issuing executions upon it, thus apparently defeating the lien of their execution and the benefits which they otherwise would have derived from it. The cause of action alleged may have had its support in this proposition if the defendant's execution had been without any judgment for its support. Then it may have come within the doctrine of *Quinby v. Strauss*, 90 N. Y. 664. This, however, was not the situation. . . . A different question would have been presented if an existing lien of the plaintiffs had been impaired or defeated by an act of the defendant."

In *Murtha v. Curley*, 15 Jones & S. 393, it was held that an action at law for damages cannot be maintained where plaintiff, after judgment, claimed that the debtor and a third party conspired to defeat plaintiff's claim by the debtor giving such third party chattel mortgages greatly in excess of the claim of such third party, and that such chattel mortgages were foreclosed, and thus defeated and prevented him from recovering on his judgment.

In this case the court said that at the time the alleged wrongful act was done the plaintiff had no lien upon the property mortgaged by execution issued, or any interest in the property which could be the subject of damages. .

But on appeal the case was reversed on the ground that the action was treated at general term as an action at law to recover damages for fraud. The court of appeals held that the complaint contained all the allegations requisite for a creditors' bill, and it was tried by the judge as equitable actions are tried, and no claim was made upon the trial that it was not an equitable action. *Murtha v. Curley*, 90 N. Y. 372. But see *Dunphy v. Kleinsmith*, 11 Wall. 610, 20 L. ed. 223.

Exceptional rule in Pennsylvania.

In Pennsylvania it seems that an action for

and transfer of all the property and assets of Cohen & Siegel to the defendant Rothstein, with the intent and for the purpose to place the same beyond the reach of their bona fide creditors, and with the intent and purpose to cheat and defraud the plaintiffs and other creditors out of their just demands against Cohen & Siegel, and prevent the plaintiffs from resorting to the property and assets to enforce payment of their said claim; that, prior to the sale of the goods and chattels aforesaid under the executions aforesaid, Cohen & Siegel had and possessed ample property and means to have paid all their bona fide indebtedness in full, and at all of said times were financially responsible and solvent. The complaint prayed judgment against the defendants, and each of them, for \$1,137.98, with interest from Jan-

uary 20, 1896, and costs and disbursements of this action.

The demurrer admits to be true the several allegations of fact contained in the complaint. If they are true, they are certainly disreputable to the several defendants, and such as to entitle the plaintiffs to a remedy in an appropriate proceeding against them. The only question we are here called upon to determine is whether, upon the facts alleged, they are entitled to recover in this action. The complaint is replete with allegations of fraud, conspiracy, and concert of action by and between, and on the part of, the defendants; but none of them relate to any overt act in contracting the debt or procuring the goods. Nevertheless, the complaint alleges, in effect, that during the time between August 1, 1895, and December 20,

damages may be maintained by a general creditor against a third party who assists the debtor in disposing of his property so as to defeat the debtor's creditors. It is not requisite in that state that plaintiff should have a lien that is defeated in order to recover.

So, in *Penrod v. Mitchell*, 8 Serg. & R. 522, it was held that an action on the case in the nature of a conspiracy for fraudulently withdrawing the goods of the defendant in an execution from the reach of the plaintiff could be maintained, and the measure of damages was the value of the goods withdrawn. The debtor surrendered himself to the jail, and was subsequently discharged under the insolvent debtor act. In this case the plaintiff obtained his judgment against his debtor after he had conveyed his property out of his hands.

In *Penrod v. Morrison*, as Administrator of Mitchell, 2 Penr. & W. 126, it was claimed that the suit could not be sustained because the creditor had not at the time of the transfer any specific lien. But the court held that there was at least a chance of satisfaction of which he ought not to be deprived by any fraudulent combination with his debtors, and it was also held that this was an action which did not abate by the death of the plaintiff, but survived to his administrator.

So, in that state an action on the case lies against two persons for conspiring with a third to defraud his creditors by taking assignments of his property and aiding him to leave the state, whereby the plaintiff was prevented from recovering his debt. The measure of damages is the value of the property withdrawn from the reach of the plaintiff. *Mott v. Danforth*, 6 Watts, 304, 31 Am. Dec. 468. In this case the transfer of property was made about eight days before plaintiff's debt became due, and it was held to be immaterial whether the defendants knew plaintiff was a creditor, provided the conspiracy was to defraud all of the debtor's creditors in Connecticut, and plaintiff was one of them. The theory of this case is that under 13 Eliz. chap. 5, providing that all fraudulent gifts, etc., of lands, etc., with the purpose and intent to delay, hinder, and defraud creditors are void. It is not necessary that the plaintiff should have proceeded to judgment, or even brought suit to bring the parties within the scope of the statute.

In *Kelsey v. Murphy*, 26 Pa. 84. It was held that an action on the case for conspiracy could be maintained where the debtor and a third party conspired to cheat and defraud the plaintiff by the debtor transferring to such third party all his property and then absconding. The court said that it cannot be doubted that under our decisions such a conspiracy is action-

able, and a creditor without judgment or execution, or even before his debt is due, may sue parties at law who conspire to defeat his right of collection by fraudulently concealing and converting the debtor's goods.

In *Merchants' & M. Nat. Bank v. Tinker*, 158 Pa. 17, 27 Atl. 838, which was an action by a creditor for conspiracy to defraud plaintiff by confessing and taking fraudulent judgments against his debtor so as to prevent him from collecting his debt, plaintiff failed to recover for lack of evidence to establish the fraud on the part of the person in whose favor the judgments were confessed.

Where an action of conspiracy was brought against two by a creditor alleging that fraudulent judgments were confessed by his debtor to his son to defeat plaintiff's rights, the rule was laid down "that fraud is never to be presumed, but must always be proved by evidence that is clear and satisfactory to the jury. And this action is founded upon the alleged fraud of the defendants. In order that the plaintiffs can recover in this action they must find that the evidence established by satisfactory proof the fact that the defendants were guilty of fraud, and this must be true of both defendants, as both John H. and Cornelius Cronin must have intended a fraudulent act in order to entitle the plaintiff to recover." Judgment was rendered for defendants. *Collins v. Cronin*, 20 W. N. C. 227.

In *Biever v. Herr*, 1 Pearson (Pa.) 510, only the instruction of the court to the jury appears in the case. This was an action by a creditor having a book account for \$70, \$1.31 of which was contracted before the 15th of April, at which time the debtor confessed a judgment to the defendant in this case for \$1,500, upon which execution was issued and all of the debtor's property sold. It was claimed that the judgment was in pursuance of a conspiracy to defraud the creditors of the debtor, and it was held that the criminal intent must be proved to exist in the minds of both parties, and that if credit was given after the judgment was entered, but not on the faith of the property so fraudulently encumbered, the measure of damages would be only the amount due plaintiff at the time the judgment was entered. (Affirmed by supreme court; not reported.)

Some exceptional cases in Pennsylvania where there was no conspiracy may be noticed.

As *Benford v. Sanner*, 40 Pa. 9, 80 Am. Dec. 545, where it is held that an action on the case cannot be maintained against one creditor for receiving money which his debtor had previously promised to give to another, as this is not a conspiracy, although he may have known

1895, Cohen & Siegel, as copartners, were possessed of a stock of merchandise of the value of about \$30,000; that when their stock of goods was levied upon and seized upon such executions, December 30, 1895, the same was of the value of \$25,000; that prior to the sale of such goods and chattels under the executions aforesaid, February 11, 1896, Cohen & Siegel "had and possessed ample property and means to have paid all their bona fide indebtedness in full, and at all said times were financially responsible and solvent." Their indebtedness to the plaintiffs was contracted between September 2, 1895, and November 20, 1895; and so it appears that Cohen & Siegel were perfectly solvent for more than a month prior to the time when any portion of the plaintiffs' debt was contracted, and remained perfectly solvent for nearly three months after the last

item of that indebtedness was contracted. It is not, therefore, the case of an insolvent debtor purchasing goods on credit,—much less, an insolvent debtor, knowing himself to be insolvent, so purchasing goods with the preconceived purpose of not paying for them. *Lee v. Simmons*, 65 Wis. 528, 27 N. W. 174. There is no allegation that the plaintiffs were induced to sell or part with the goods, or any of them, to Cohen & Siegel, on credit, by reason of any fraud, false statements, representation, or pretense whatever. Even when a vendor parts with his goods upon false representations, yet it is well settled that such representations are not actionable unless they were not only relied upon by the vendor, but related to some present or past state of facts; that the mere failure to perform a promise, or to make good subsequent conditions which had been assured, is in-

that it was promised to another when it was given to him.

And *Hopkins v. Beebe*, 26 Pa. 85, which holds that an action of assumpsit cannot be maintained by a creditor against a preferred creditor.

In this case the court said that no proof of fraudulent conspiracy would sustain assumpsit, but that if the transfer to the preferred creditor had been made for the fraudulent purpose of cheating the plaintiff the latter might have had an action on the case against the defendant.

Where creditor has a lien.

Attention is called to the following cases where an action was allowed by a creditor against a third party interfering with the debtor's property and thereby defeating plaintiff's claim; but in these cases the plaintiff had a lien by virtue of a judgment. *Yates v. Joyce*, 11 Johns. 136; *Adams v. Paige*, 7 Pick. 542; *Meredith v. Johns*, 1 Hen. & M. 585; *Tams v. Lewis*, 42 Pa. 402; *Gardner v. Heartt*, 3 Denio, 232; *Smith v. Tonstall*, Carth. 3.

See also *Quinby v. Strauss*, 90 N. Y. 664; *Hoefler v. Hoefler*, 2 App. Div. 8, 37 N. Y. Supp. 436, 12 App. Div. 84, 42 N. Y. Supp. 1035, 21 App. Div. 633, 47 N. Y. Supp. 1138, 154 N. Y. 760, 40 N. E. 1098; *Murtha v. Curley*, 90 N. Y. 872.

And in *Findlay v. McAllister*, 113 U. S. 104, 28 L. ed. 930, 5 Sup. Ct. Rep. 401, the same was said to be the rule.

And in such a case a recovery was denied for failure of pleading and proof. *Marsh v. White*, 3 Barb. 518.

In *Smith v. Tonstall*, Carth. 3, in a special action on the case the plaintiff declared as administrator *durante minore estate*, of R. S., executor of the last will and testament of R. S., his father, setting forth that the testator R. S. in his lifetime had obtained a judgment for £100 against W. S., who was likewise indebted to the testator in another £100 for rent; and that after the death of the said testator the plaintiff had judgment on a scire facias to have execution, etc., that, he intending to take out execution, and also to bring an action of debt for the rent in arrear (the said W. S. being then possessed of goods and chattels sufficient to discharge the whole), which being very well known to the defendant, he of his malice and covin with the said W. S. did conspire to defeat the plaintiff of his execution, and on recovering the money for rent arrear, procured the said W. S. to confess a judgment for £160 (of such a term) to one W. N. and

revera, the said W. S. did not owe anything to the said W. N., and that he sued out execution upon this feigned judgment, by virtue whereof he seized all the goods and chattels of the said W. S., which he eluded to places unknown and converted to his own use, by reason whereof the plaintiff lost his debt. The defendant demurred to this declaration for matter in law, supposing that this action would not lie; but it was adjudged that the action would lie, and thereupon the defendant Tonstall brought a writ of error in Parliament, where the judgment was affirmed.

In *Lamb v. Stone*, 11 Pick. 527, the case of *Smith v. Tonstall*, Carth. 3, was distinguished, as there, the plaintiff having obtained a judgment, the defendant procured the judgment debtor to confess a judgment to himself when nothing was due him, and this collusive judgment was satisfied by the sale of goods on which the plaintiff by his prior judgment had acquired a lien, thus placing in the defendant's hands the price of goods which were liable for the plaintiff's judgment.

In *Hurwitz v. Hurwitz*, 10 Misc. 353, 31 N. Y. Supp. 25, the case of *Smith v. Tonstall*, Carth. 3, was also distinguished. The court said: "The decision was in the reign of James II. before legal principles were as accurately ascertained and solidly established as at this day in this country, and before, in the evolution of equity jurisdiction, the creditor's bill had been developed into its present efficiency. At all events we have no hesitation in rejecting the authority."

In *Adams v. Paige*, 7 Pick. 542, where plaintiff had a claim against a partnership, and was about to enforce the same by attachment, and a member of the firm and a third party fraudulently and collusively and with the intent to deprive the plaintiffs of their claim had a note executed by a member of the firm in the firm name, in order that such third party might by attachment anticipate plaintiff's claim and absorb all the assets, it was held that an action on the case would lie against all the parties to the transaction.

This decision was on the ground that it was an attempt to lock up the effects from attachment, and to compel the creditors to a compromise, for misapplying considerable portions of the funds to an individual debt, by diverting partnership funds from their legal course. The court said that as the plaintiff took out an attachment, it was clear that but for the prior attachment the plaintiff's debt would have been secured.

In *Lamb v. Stone*, 11 Pick. 527, *Adams v. Paige*, 7 Pick. 542, was distinguished, as that

sufficient to maintain an action for deceit. *Morrison v. Koch*, 32 Wis. 254; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Sheldon v. Davidson*, 85 Wis. 141, 55 N. W. 161; *Warner v. Benjamin*, 89 Wis. 296, 62 N. W. 179; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 56, 69 N. W. 820. Whatever may have been the secret and ultimate purpose of the defendants, or any of them, yet the first action alleged to have taken place in regard to the transfer of Cohen & Siegel's stock of goods in fraud of the plaintiffs and their other creditors was on December 30, 1895, when the judgments were fraudulently confessed, and the property seized on executions. That was forty-one days after the last sale of goods from the plaintiffs to Cohen & Siegel. It is the case, therefore, of a firm of merchants, perfectly solvent, purchasing goods on short credit, without any fraud or false statement, representation, or pretense, and then, subsequently, and after the purchase, conspiring with the other defendants to dispose of their property, in the manner indicated, with the intent on the part of all such conspirators to defraud the plaintiffs and other creditors of such solvent firm. The question recurs whether an action on the case can be maintained for such an alleged conspiracy. The adjudications are not all in harmony. The Massachusetts cases are to the effect that no such action can be maintained. Thus, it was held many years ago that "an action on the case for the fraud of the defendant in purchasing personal property of the plaintiff's debtor, and aiding the debtor to abscond in order to prevent the plaintiff from enforcing payment of his debt by attaching the property or arresting the body of the debtor, cannot be sustained; but the proper remedy is either to attach specifically the property fraudulently transferred, or to attach it in the defendant's hands, by the trustee process." *Lamb v. Stone*, 11 Pick. 527. To the same effect, *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 719; *Bradley v. Fuller*, 118 Mass. 239; *Dudley v. Briggs*, 141 Mass. 582, 55 Am. Rep. 494, 6 N. E. 717; *Dawes v. Morris*, 149 Mass. 188, 4 L. R. A. 158, 21 N. E. 313. See also *Green v. Kimble*, 6 Blackf. 552; *Moody v. Burton*, 27 Me. 427-435, 46 Am. Dec. 612. In this last case, as well as some of the others cited, the learned judge writing the opinion clearly shows that "the loss or injury would be too uncertain and remote for

legal estimation." So it was held in Connecticut that "an action for fraudulent acts, intended to induce, and by which a creditor was induced, not to secure a debt by legal process, by which means he lost the debt, will not lie at common law; and it makes no difference if a conspiracy for the purpose is charged. The damages are too remote. They must be a clear and necessary consequence of the fraudulent act, and of a character to be clearly defined and ascertained." That was an action of trespass on the case at common law, and was brought against a debtor and two other defendants, charging conspiracy to defraud the plaintiff of his debt, and alleging that the defendants fraudulently removed the debtor's goods to prevent their being taken by legal process; but it was held that the plaintiff could not recover. *Austin v. Barrows*, 41 Conn. 287. So it has been held in Rhode Island that "A., being a creditor of B., brought trespass on the case against C. and others, charging them with conspiring to prevent A. from obtaining payment out of the estate of B., and with receiving from B. fictitious mortgages, by means of which they took B.'s personality, and secreted it, so that A. could not attach it, and thus lost his claim. It appearing that A. had no lien on B.'s estate by attachment, levy, or otherwise, and was only a creditor at large of B.,—held, that the action could not be maintained." *Klous v. Hennessey*, 13 R. I. 332. So it has been held in Maryland that "in an action on the case against several, founded on an alleged conspiracy to injure the plaintiffs, they are not entitled to recover, even if there were such unlawful conspiracy among the defendants, unless the plaintiffs can show that they have in fact been aggrieved, or have sustained actual legal damage, by some overt act done in pursuance and execution of the conspiracy. No action lies for simply conspiring to do an unlawful act. It is the doing the act itself and the resulting actual damage to the plaintiff, which furnish the ground of the action. An act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie." *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340. So

case was an action for conspiracy between two, to defraud the plaintiff by means of a fictitious debt and a collusive judgment, in which the unlawful confederacy was the gist of the action. A further distinction might have been made by the court, that in the Adams Case the plaintiff did take out an attachment which was defeated by the act of the defendant.

In *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612, the case of *Adams v. Paige*, 7 Pick. 542, was distinguished. The court said that in that case the plaintiffs had caused the goods of their debtor to be attached for the security of their debt, and had thereby acquired a right to have them by proper proceedings applied to the payment of their debt in preference to all other creditors, and of this valuable right they were deprived by the fraudulent conduct of the de-

fendants. That was a good cause of action, and one not common to all other creditors.

In *Browne v. London*, 1 Mod. 285, Twisden, J., said: "I remember an action upon the case was brought, for that the defendant had taken away his goods and hidden them in such secret places that the plaintiff could not come at them to take them in execution, and it was adjudged it would not lie."

Cases of damage for injuring a mortgage lien by interference or perjury; actions for damages to plaintiff by collusion or perjury defeating the plaintiff's amount of recovery,—are not intended to be included in this note.

See kindred note,—*Liability of a third person in damages for inducing a third party to break his contract*,—*Boysen v. Thorn* (Cal.) 21 L. R. A. 233. I. T.

it has been held in Vermont that "an action on the case for the fraud of the defendant in combining with plaintiff's debtor in attaching all the personal property of the debtor, for the benefit of the debtor, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, or charge the defendant as trustee, or seek aid in a court of equity, or pursue the defendant personally, under the statute, for being a party to a fraudulent judgment or fraudulent sale. Nor can an action on the case, where the gist of the action is the fraudulent combination and conspiracy of the defendant with the plaintiff's debtor to secrete the property, and prevent the plaintiff from obtaining payment and security for his debt, be sustained." *Hall v. Eaton*, 25 Vt. 458. In some of the cases relied upon by counsel for the plaintiffs in support of this action, the fraud and conspiracy were practised directly upon the plaintiff, and operated to destroy or impair his rights of property. *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Findlay v. McAllister*, 113 U. S. 104, 28 L. ed. 930, 5 Sup. Ct. Rep. 401; *Place v. Minster*, 65 N. Y. 89. This is not such a case. It has been held in New York that where the fraud or conspiracy is not actual and positive, but merely constructive, and where it did not concur in direct injury to the plaintiff, the action could not be maintained. *Ross v. Wood*, 70 N. Y. 8; *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508, 28 N. E. 597. The rule is elementary that an action on the case in favor of a general creditor will not lie against the fraudulent vendee or grantee of his debtor. *Bump, Fraud. Conv.* 4th ed. § 528. In 6 Am. & Eng. Enc. Law, 2d ed. pp. 878, 879, it is said, as the better reason, in effect, that a general creditor has no such present or vested interest in the goods of his debtor as will render liable to such creditor, in an action on the case for damages, those who enter into a conspiracy to remove or conceal such property so that it cannot be reached by legal process; and this is put upon the ground that such a loss and injury are too uncertain and remote for legal consideration. This view meets with our judgment. It follows that the complaint does not state a cause of action.

The order of the Superior Court for Douglas County is reversed, and the cause is remanded, with directions to sustain the demurrer, and for further proceedings according to law.

Ella D. ADAMS, Appt.,

v.

City of BELOIT et al., Respts.

(.....Wis.....)

1. The option to adopt the provisions of a general statute, given by Rev. Stat.

NOTE.—For option to adopt statute in a locality as special legislation, see also *State ex rel. Witter v. Forkner* (Iowa) 28 L. R. A. 206; *State ex rel. Childs v. Copeland* (Minn.) 34 L. R. A. 47 L. R. A.

1898, chap. 40b, § 926, to cities incorporated under special charters, does not bring that statute into conflict with Const. art. 4, §§ 31, 32, prohibiting any special or private law to amend municipal charters, and providing that laws for such purposes must be general and uniform in their operation throughout the state.

2. Paving a street at the expense of the adjoining property, which has been previously charged with an improvement of the street by graveling to grade, is not in violation of the general charter law, § 177, providing that the "expense of maintenance, relaying, keeping in repair, and cleaning of streets" which have once been "constructed to grade and graveled, planked, macadamized, or paved" shall be paid from the general city or ward fund, when this is construed with § 175, which authorizes the city to "level, relevel, grade, regrade, gravel, regravell, macadamize, pave, and repave, said streets" at the expense, in whole or in part, of the property benefited.

3. Separate bills of costs for different defendants represented by different attorneys, and having different interests, may be recovered, including such items as retaining fees, fees for attendance on the trial, and term fees, where separate services were necessary and proper for such defendants.

(Cassoday, Ch. J., dissents.)

(February 2, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Rock County in favor of defendants in an action brought to set aside certain paving assessments. Affirmed.

Statement by Winslow, J.:

This is an equitable action brought to set aside certain paving assessments against the plaintiff's property, in the city of Beloit, and also certain improvement bonds issued upon such assessments. The city of Beloit was a city organized under a special charter prior to the passage of the general city charter law. On the 2d of July, 1895, the common council of the city, by an ordinance which was passed with all due formality, attempted to adopt certain parts of chapter 326, Laws 1889, as amended by chapter 312, Laws 1893, and chapter 320, Laws 1895, being what is known as the "General City Charter Law." Said ordinance included, among other provisions, §§ 172, 173, and 175 to 200, inclusive, of said general city charter law; the sections so adopted being those sections relating to public improvements, and the levying of assessments therefor. By the terms of said ordinance, the sections so adopted were adopted in lieu of the provisions of the special charter of the city upon that subject. In the year 1896 the common council, acting under the provisions of the general charter law so formally adopted, caused to be graded, curbed, and paved certain streets in said city, including Bridge street, and made assessments

R. A. 777; *People ex rel. Akin v. Kiple* (Ill.) 41 L. R. A. 775; and *People ex rel. Deneen v. Simon* (Ill.) 44 L. R. A. 801.

therefor against the adjoining property, and issued improvement bonds therefor. Such proceedings were in all respects regular under the provisions of the general city charter law, but were not in accord with the special charter provisions, because no petition for such paving was ever made. It appeared that in 1868 and in 1883 said street had been constructed to conform to the grade then existing, and graveled, as required by the common council, and that special assessments had been made therefor against the plaintiff's property, and had been paid; the said property so assessed being the same property against which the assessments now complained of were made. The court found the assessments valid, and the plaintiff appealed.

Messrs. Ruger & Ruger, for appellant:

In determining as to the constitutionality of § 1, chap. 320, Laws 1895, the end accomplished, and not the means used, will be considered; and the restraints of the Constitution cannot be thus avoided by indirection.

State v. Cram, 16 Wis. 343; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603; *Burnham v. Milwaukee*, 98 Wis. 128, 73 N. W. 1018.

Such a statute violates the constitutional prohibition against special legislation to amend city charters.

State ex rel. Childs v. Copeland, 66 Minn. 315, 34 L. R. A. 777, 69 N. W. 27; *Larcom v. Olin*, 160 Mass. 102, 35 N. E. 113; *Dill. Mun. Corp.* 4th ed. §§ 45, 46.

Section 72, chap. 312, Laws 1893, and § 1, chap. 320, Laws 1895, are unconstitutional in this, that they attempt an unauthorized delegation of legislative power.

Laws which may be made to take effect upon the happening of contingencies must be complete, and, when in effect, must operate in accordance with the intent of the legislature. This cannot be if fragments of a law may be thus segregated from their modifying connections, and dovetailed into new connections affecting their construction and operation differently.

State ex rel. Childs v. Copeland, 66 Minn. 315, 34 L. R. A. 777, 69 N. W. 27; *Re North Milwaukee*, 93 Wis. 616, 33 L. R. A. 638, 67 N. W. 1033; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347.

It may be that embarrassment will result from holding that § 72, chap. 312, Laws 1893, and § 1, chap. 320, Laws 1895, are unconstitutional; but the mischief and embarrassment which would flow from a decision holding them valid would result in far greater evil.

State ex rel. Childs v. Copeland, 66 Minn. 315, 34 L. R. A. 777, 69 N. W. 27; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. See also the decisions of this court cited in notes to § 23, art. 4, Const., Rev. Stat. pp. 91, 92. 47 L. R. A.

Mr. John C. Rood, for respondents city of Beloit et al.:

The legislature could, and did, properly so frame the law that it should become operative only upon the happening of some certain act or event, and that its operation should be suspended until the happening of that act or event, as to cities operating under special charters.

The act being complete, and no discretion being vested in the common council, the legislature was warranted in making the operation of the law depend upon the action of the common council of the city adopting it, or any part of it.

State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; *Kumler v. San Bernardino County Supers.* 103 Cal. 393, 37 Pac. 383.

This law is a complete enactment in itself, contains an entire and perfect declaration of the legislative will, and requires nothing to perfect it as a law; and it is simply left to the common council whether they will avail themselves of it for and on behalf of the city.

Such a law has been held good when its operation was suspended until an affirmative vote of the people of the city to which it applied.

State ex rel. Atty. Gen. v. O'Neill, 24 Wis. 149.

A statute affecting the people of the whole state is not invalid because, by its terms, it is to take effect only after it shall be approved by a popular vote of the electors of the whole state.

Smith v. Janesville, 26 Wis. 291.

No legislative power was delegated or attempted to be delegated to common councils by this act; but if any such power was delegated thereby, then it was simply a delegation of legislative power to common councils for purposes of local self-government, and to that extent legislative power may be delegated to common councils.

Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347.

A law complete in itself may provide that its operation shall depend upon the popular will.

Bank of Chenango v. Brown, 26 N. Y. 467; *Blauvelt v. Nyack*, 9 Hun. 153; *Armstrong v. Traylor*, 87 Tex. 508, 30 S. W. 440; *Cain v. Davis County Comrs.* 86 N. C. 8; *Black, Intoxicating Liquors*, § 45; *Lum v. Vicksburg*, 72 Miss. 950, 18 So. 476; 6 Am. & Eng. Enc. Law, 2d ed. pp. 1024, 1025.

The operation of a law complete in itself may be made to depend upon the acceptance or adoption of it by the officers of a city.

Manly v. Raleigh, 57 N. C. (4 Jones Eq.) 370.

A construction of a constitutional amendment, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms absolutely require such preference.

Re Griffin, Chase, Dec. 364, Fed. Cas. No.

5,815; *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572.

"It seems clear that an act of the legislature which should confer a new power upon all the cities in the state which are in that class of cities which are acting under special laws, without any exception, would be a general law and uniform in its operation throughout the state, within the intention of the Constitution."

Johnson v. Milwaukee, 88 Wis. 383, 60 N. W. 270.

An act to take effect in all cities of the same class upon adoption or acceptance of it by popular vote, or by vote of the council, so that the same powers are bestowed upon all cities of the same class, is general.

State, Paul, Prosecutor, v. Gloucester County Circuit Court Judge, 50 N. J. L. 585, 1 L. R. A. 86, 15 Atl. 272; *State ex rel. Warner v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166; *Re Cleveland*, 52 N. J. L. 188, 7 L. R. A. 431, 19 Atl. 17, 20 Atl. 317; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603; *Black, Intoxicating Liquors*, §§ 45, 92, and cases cited; *Youngs v. Hall*, 9 Nev. 212; *Johnson v. McCabe*, 1 Okla. 204, 32 Pac. 336; 13 Am. & Eng. Enc. Law, 1st ed. p. 994, and cases cited.

This law, and every part of it, is uniform in its operation throughout the state, within the meaning of the Constitution.

Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; *People ex rel. Smith v. Twelfth Dist. Judge*, 17 Cal. 554; *Brooks v. Hyde*, 37 Cal. 375; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Black, Intoxicating Liquors*, §§ 45, 92; *Owen v. Sioux City*, 91 Iowa, 190, 59 N. W. 3; *Thomas v. State*, 92 Ga. 1, 18 S. E. 44; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Brown v. Holland*, 97 Ky. 249, 30 S. W. 629; *Welker v. Potter*, 18 Ohio St. 85.

Mr. William A. Jackson, for respondent Thorpe:

In the case at bar there is no question of grading, as independent work for the grading was done merely to prepare the surface for the paving, and was incidental to such paving.

Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205; *Blount v. Janesville*, 31 Wis. 648.

The paving with brick and macadam of a street previously graveled is not a maintenance, relaying, keeping in repair, or cleaning of that street.

14 Am. & Eng. Enc. Law, p. 2; *Moorhead v. Little Miami R. Co.* 17 Ohio, 340; *Central R. Co. v. Collins*, 40 Ga. 582.

This was a new construction with different materials upon a new grade, not a repair or maintenance of an old construction.

Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; *Blount v. Janesville*, 31 Wis. 648.

The general charter is such a law as the legislature is required by the Constitution to provide for the incorporation of cities.

47 L. R. A.

Re North Milwaukee, 93 Wis. 616, 33 L. R. A. 638, 67 N. W. 1033.

In its every aspect it is a complete general law, waiting only for the conditions to arise to cause it to go into operation, and is to be construed as such.

Johnson v. Milwaukee, 88 Wis. 389, 60 N. W. 270; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Clark v. Janesville*, 10 Wis. 136; 23 Am. & Eng. Enc. Law, p. 221; *Guild v. Chicago*, 82 Ill. 472.

The authorizing of the common councils of the various cities to adopt the general charter law, or portions thereof, is not a delegation of legislative power. It merely vests in such councils the right to fix the time when the act shall go into operation in the several cities.

Bank of Chenango v. Brown, 26 N. Y. 467; *Dowling v. Lancashire Ins. Co.* 92 Wis. 69, 31 L. R. A. 112, 65 N. W. 738; *Re North Milwaukee*, 93 Wis. 629, 33 L. R. A. 638, 67 N. W. 1033; *Smith v. Janesville*, 26 Wis. 291; *State ex rel. Atty. Gen. v. O'Neill*, 24 Wis. 149; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; 23 Am. & Eng. Enc. Law, p. 221; *Guild v. Chicago*, 82 Ill. 472.

The general charter law establishes a uniform government for all cities throughout the state. Its operation in all cities adopting it is uniform. It has no operation until adopted by the several cities.

Guild v. Chicago, 82 Ill. 472.

The uniformity of the operation of such a law is not measured or fixed by the number of cities that exercise the powers granted.

Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; *Guild v. Chicago*, 82 Ill. 472.

This court has recognized the constitutionality of such law in several cases.

McCue v. Waupun, 96 Wis. 625, 71 N. W. 1054; *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364; *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999.

Winslow, J., delivered the opinion of the court:

The questions arising in this case are purely questions of law. The Constitution of Wisconsin prohibits the enacting of any special or private law "incorporating any city, town, or village or to amend the charter thereof" (Const. art. 4, § 31), and further provides that general laws shall be provided for such purpose, and that such general laws shall be "uniform in their operation throughout the state" (Id. § 32). In order to carry out these constitutional provisions, a general charter law was passed in 1889 (Laws 1889, chap. 326), which, with its subsequent amendments, now appears as chapter 40a of the Revised Statutes of 1898. This general charter act originally divided all cities which might adopt it or be organized under it into three classes, according to population, and provided a complete charter for cities of each class. It also provided that any city existing under special charter might adopt the act by vote of three fourths of the members of its common council. Subsequently, by

amendatory acts, the number of classes of cities was changed from three to four, based also on population, and cities under special charters were divided into like classes. By § 72 of chapter 312 of the Laws of 1893, it was further provided that any city organized under the special charter might "adopt the provisions of any special chapter, section, or subdivision of any section of this act [chapter 326, *supra*], and may exercise any power or franchise hereby conferred upon cities organized under this act in addition to, or in lieu of, the provisions of its special charter," by ordinance to be adopted with certain formalities. This provision was re-enacted by § 1 of chapter 320 of the Laws of 1895, and now appears incorporated in § 926, chap. 40b, Rev. Stat. 1898. The city of Beloit was a city incorporated under a special charter, and it attempted, with all the required legal formalities, to take advantage of this last-named provision, and to adopt the entire scheme contained in the general charter for making street improvements in lieu of the provision of its special charter; and the first and great question in the case is whether the law which purports to authorize such adoption is a valid and constitutional law. The contention of the plaintiff is that the legislature itself could not amend the charter of the city of Beloit alone; that such an amendment, if attempted to be made, would be a special or private law, not uniform in its operation through the state, and hence void, under the constitutional provision above quoted; and that the legislature cannot delegate to the common council of a city a power which it cannot exercise itself. Upon the other side, the contention is that the law is a general law, complete in itself upon the statute books, and that it is not rendered special because it is to become effective in a certain locality upon the determination of some fact by some local authority or body. That the question is of the utmost importance is apparent. This provision has now been upon the statute books for more than six years. That it has been acted upon by numerous cities incorporated under special charters admits of no doubt. Several cases involving the validity of such attempted action have already been before this court. *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 353, 64 N. W. 999; *McCue v. Waupun*, 96 Wis. 625, 71 N. W. 1054; *Herman v. Oconto*, 100 Wis. 391, 76 N. W. 364, and in one of these cases (*McCue v. Waupun*) certain provisions of the general charter law were held to have been a part of the charter of the city by an ordinance of adoption, while in the other cases it was held that the adoption was not effective for other reasons. It is true that in none of these cases was the question of constitutionality raised or argued, and hence they are not authority upon that question, but they are simply cited as tending to demonstrate the fact that the provisions for adoption of parts of the general charter have been used by numerous cities. Doubtless, there have been contracts made, property rights acquired, and liabilities incurred in many municipalities upon the faith of such 47 L. R. A.

adopted provisions. These considerations are not very weighty, perhaps, and cannot operate to make an unconstitutional law constitutional, but they ought certainly to incite to great care in the consideration of the question, and to require that the alleged unconstitutionality be made very clear. Similar constitutional provisions have been adopted in many states for the evident purpose of repressing the flood of special legislation, and to secure a measure of uniformity, instead of almost infinite diversity, in the fundamental laws governing municipal corporations. Under such provisions there has been no lack of adjudications upon questions quite similar to those involved here, but it must be confessed that the decisions are not by any means harmonious. Some propositions, however, are quite well established, not only by the great weight of judicial authority in other jurisdictions, but by direct adjudication of this court. Among these propositions which are not now to be doubted are the following: First. A law otherwise unobjectionable is not invalid simply because power is given to some local officials or body of electors to determine the existence of a fact upon which it shall go into effect in the given locality, if the law itself is a complete law upon the statute books. This is not the delegation of power to make a law, but simply the delegation of power to determine or ascertain some fact upon which the action of the law, which is complete in itself, is to depend. *State ex rel. Atty. Gen. v. O'Neill*, 24 Wis. 149; *Smith v. Janesville*, 26 Wis. 291; *Slinger v. Henneman*, 38 Wis. 504; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *Re North Milwaukee*, 93 Wis. 616, 33 L. R. A. 638, 67 N. W. 1033. Nor does such option feature make it a special law. *Black, Intoxicating Liquors*, § 45, and the cases cited in note. Second. It is not necessary, in order to make a law affecting municipal corporations a general law, that it should affect every city in the state. Cities may be classified, and, if the classification be proper, laws may be passed affecting only a single class, and such laws will be general laws, and uniform in their operation throughout the state, within the meaning of the Constitution. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. Third. The constitutional amendment in question having been made after large numbers of cities had been organized under special charters, and not providing for compulsory surrender or superseding of such charters, there resulted, *ex necessitate*, a constitutional division of the cities of the state into two classes, namely, those continuing to operate under special charters, and those organized under the general charter law. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. Fourth. Classification by statute must be based upon some substantial and real differences of situation. It must be a distinction germane to the purpose of the law. It must not be based on existing circumstances only, so as to preclude additions to the class, and any law relating to the class may apply to all members of the

class. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270.

Now, under these admitted legal principles, it cannot be doubted that, had the legislature passed a law providing a complete system for the construction of city improvements, and declared that it should govern all cities in the state incorporated under special charters, in lieu of the various provisions on the subject contained in their several charters, such a law would be held to be a general law having uniform operation throughout the state. It would be general, because it applied to the whole of a constitutional class. It would be uniform throughout the state, not because it would operate over every square of land in the state, nor govern the rights of even a majority of the cities, but because, wherever in the state a city of the class was found, it would at once operate. The same result would necessarily follow had the legislature provided, by a section of the general charter law itself, that some portion of that law, complete in itself (such as the provisions governing city improvements), should govern all the cities of the state incorporated under special charters. No one, we think, could question the effectiveness of such provisions under the law as laid down in the *Johnson Case*. But, instead of making a law which is compulsorily effective at once upon the entire class, the legislature has provided that the law, which is complete in itself on the statute books, shall go into effect in any city of the class only when the city council shall decide by the adoption of an ordinance to that effect. It is, in effect, a local option law, confined to a class of cities; and the question is whether the option feature renders it unconstitutional, or, in other words, Can it be a general law, and uniform in its operation throughout the state, when it may never become effective in more than one city of the class? Right here we think there is confusion in the appellant's argument. The contention made by the appellant is practically this: The legislature could pass no law amending the special charter of the city of Beloit alone. The effect of this option legislation, when adopted by the city council of Beloit, is to amend the special charter of Beloit alone. The legislature cannot do indirectly what it cannot do directly; nor can it authorize the city council of a city to enact legislation which is prohibited by the Constitution to the legislature itself. Hence both the act of the legislature and the ordinance of the council must be void. The argument, at first glance, seems persuasive, but we are convinced that it is unsound. It proceeds upon a false assumption, and that the test of constitutionality is the present effect of the law, whereas the test is found by answering the question, Is the law a general law, and uniform in its operation throughout the state, within legal definitions? A law may affect at present but one city in the state, and still be general and uniform, within the meaning of the Constitution. For instance, all laws applicable only to cities of the first statutory class (i. e., cities containing over 150,000 inhabitants) can at present,

and for years to come, affect only the city of Milwaukee; and yet it is not doubted that such laws are general laws, and uniform in their operation, within the meaning of the Constitution. Indeed, the illustration may be carried further. There are at present no cities in the state of the first class organized under the general law, yet there is a complete charter standing upon the statute books for such cities; and we think none will contend that this part of the law is not general, or not uniform in its operation, because as yet there are no cities organized under it. So we say that the test is not found in the present territorial effect of the legislation, but in the character of the legislation itself, tested by approved legal rules.

Having shown that a law may in fact be in actual operation in but one city in the state, but still be a general law, and uniform in its operation, within the constitutional requirement, it remains to be seen whether the option feature of the law is fatal. Upon this subject, it is important to observe that the original general charter law (Laws 1889, chap. 326) contained an option clause, by the terms of which any city in the state, organized under special charter, could, by action of its common council, surrender that charter, adopt that act, and become a city under the general charter act. Hence the law as originally passed was, as regards all cities acting under special charters, a local option law, which might by its terms become effective in one city of the class, or in two or three, or in none, as might be decided by the various common councils. It has not been argued here that such option clause was invalid, but it is difficult to see why the argument against its validity is not just as persuasive as the argument now made against the law authorizing the adoption of an integral part of the act. The argument would run thus: The legislature could not pass an act amending the charter of the city of Beloit alone, by substituting the general charter therefor. The legislature cannot authorize the common council of Beloit to make a law which it cannot constitutionally make itself. Hence the option clause, and any action taken thereunder, are void. Surely, however, this argument could not be sustained. The object of the constitutional amendment and the general charter law was not to repeal all existing city charters by a single stroke, and thus throw the affairs of every city in the state into confusion, but to provide one comprehensive city charter for each statutory class, and to provide means by which existing cities might, at their leisure, and after examination, elect to place themselves under its provisions; thus, in the course of time, securing the desired uniformity without violent shock. Must it be said that the option feature of the law violated the Constitution, and rendered it impossible for any city under special charter to place itself under the general law? We think not. As we have already seen, a law general in its terms, and complete in itself, is not made special because it is limited to go into effect upon the contingency of the determination of a fact by

a local body of electors or official board; nor does it lack uniformity of operation because it is limited to a proper class. If, then, this option given in the original law to every member of the whole class of specially chartered cities was a valid law, what sound reason can be assigned for holding that the option to accept a definite and complete part of the general charter is invalid? It might well be that there would be serious objection to such law, so far as it attempts to provide for the optional adoption of a mere section or part of a section which covers only a part of a subject, and is not complete in itself, and which, when adopted, would produce confusion, and not provide a complete scheme for the government of the subject to which it pertains. The objection which might be urged with force to such an attempted adoption would be that the law so adopted does not fulfil the universal requirement of optional laws, namely, that they must be complete laws prior to their adoption. But this question is not presented by the record. As previously stated, the adoption here was an adoption of a complete scheme for the making of city improvements by cities in lieu of the scheme of the special charter.

View the subject as we may, we have been unable to convince ourselves that this option legislation is clearly unconstitutional; and we should be able to say that the act is unconstitutional, beyond reasonable controversy, before setting it aside. Option legislation upon proper subjects is now universally upheld, and declared to be general legislation, and not special legislation, nor to constitute a delegation of legislative power. *Black, Intoxicating Liquors*, § 45; *Locke's Appeal*, 72 Pa. 491; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *State ex rel. Sandford v. Morris County Common Pleas Ct.* 36 N. J. L. 72. While the great majority of the decisions upon the subject are with reference to liquor laws, still there are decisions upholding such legislation with reference to many other matters,—especially those affecting local or municipal government. *State ex rel. Warner v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166; *Re Cleveland*, 52 N. J. L. 188, 7 L. R. A. 431, 19 Atl. 17, 20 Atl. 317; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 51 N. E. 596, 8 N. E. 788. Such legislation is also upheld where there is a constitutional requirement of uniformity of operation. *Gordon v. State*, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; *Groesch v. State*, 42 Ind. 547. The ground of these holdings is that uniformity does not mean that every law must be in constant operation over the whole territory of the state, and affect every citizen, but that its operation should be uniform in all parts of the state, under the same circumstances and conditions. It is only in this sense that any law relating to a class of cities alone can be said to be of uniform operation, and in the same sense it seems certain that optional legislation for a class is equally uniform. The class is a constitutional class. Every city of the class may take advantage of the law. Thus, the law is operative alike in

every part of the state where there is a city of the class which places itself within its provisions.

This question of uniformity is the most serious question in the case, beyond doubt, and there are very respectable courts which hold adversely to our views upon this point. *State ex rel. Childs v. Copeland*, 68 Minn. 315, 34 L. R. A. 777, 69 N. W. 21; *Com. v. Denworth*, 145 Pa. 172, 22 Atl. 820. But, after careful consideration of such cases, we feel unable to follow them. The conclusions we reach are, in brief: that legislation applicable to a proper constitutional or statutory class of cities is general and uniform in operation; that option legislation, if otherwise unobjectionable, is not made special legislation, nor does it lack uniformity, because but one municipality accepts it; and that there may be option legislation for the benefit of a proper class.

There are some minor contentions which receive consideration. The claim is made that because the street had once been improved, by graveling to grade, at the expense of the adjoining property, no further paving can be done at the expense of the adjoining property, but that, if done, it must be paid for from public funds. We think this contention cannot be sustained. By § 173 of the general charter law adopted by the council (Rev. Stat. 1898, §§ 925-173), it is provided that the grade of all streets shall be established and recorded, and that no street shall be worked until that is done. By § 175 the city is authorized to open all streets, and to level, relevel, grade, regrade, gravel, regravell, macadamize, pave, and repave said streets with stone, wood, or other material, and that the expense thereof may be paid in whole or in part by the city, or by the property to be benefited thereby, as the council shall direct, but that the assessments shall not exceed the benefits, except in case of sidewalk. By § 177 it is provided that "the expense of maintenance, relaying, keeping in repair, and cleaning of streets," in all cases where they have once been constructed to grade, and graveled, planked, macadamized, or paved, as required by the council, shall be paid from the general city or ward fund. It will be seen that by § 175 it is expressly provided that streets may be paved and repaved at the expense of property benefited. This may be held to mean what it says, and when, in § 177, it is provided that the expense of maintenance, relaying, keeping in repair, and cleaning of streets which have been once paved shall be paid from the city or ward fund, a construction must be given to the words which will harmonize with the previous section, if such construction be possible. Keeping this in mind, we think it entirely reasonable to construe the latter section as referring only to what may properly be called "repairs," or maintaining in good condition an existing pavement, and not to the laying down of a new and different pavement. The word "relaying" is the only word whose meaning could be regarded as doubtful, and we think, in view of the connection in which it is used, and the positive

authority given in the previous section to repave at the expense of adjoining property, that it must be construed as simply covering the relaying of some part of an existing pavement in the ordinary course of repairs, and not the entire repaving of the street.

In this case there were three sets of defendants: (1) The city and its officers; (2) the county treasurer of Rook county; and (3) the holders of the improvement bonds issued by the city upon the plaintiff's property; and different relief was prayed against each set. These three sets of defendants appeared separately, and served separate answers, and were represented by separate counsel through the action in the trial court. Separate bills of costs were allowed to each set of defendants. Objection was made generally to the allowance of more than one bill of costs, and specific objections were made to the taking of certain items more than once; the principal of such items being the retaining fee, the fees for attendance on the trial, and the term fees. The rule is that different parties, with different interests, are entitled to be represented by different attorneys; that, so far as one proceeding could properly serve for all the defendants jointly, but one proceeding should be taxed for. In this category would fall the findings and judgment in the present case, which were taxed but once. But, where separate services are necessary and proper for defendants whose interests are separate, they may be taxed and recovered for. *Terry v. Chandler*, 23 Wis. 456. We do not think there was any violation of these rules in this case. A supplemental case was served by the respondents, but it was unnecessary, and will not be allowed for in the taxation of costs. But one bill of costs will be taxed in this court.

Judgment affirmed.

Cassoday, Ch. J., dissenting:

After careful consideration, and with due regard for the opinions of my associates, I am forced to the conviction that the decision in this case practically nullifies so much of the constitutional amendment of 1892 as prohibits the legislature "from enacting any special or private law" for amending the charter of any city. Const. art. 4, § 31. To appreciate the scope and effect of the decision, it is well to remember that, prior to the constitutional amendment of 1871, laws were constantly being enacted, during each session of the legislature, on almost every variety of subjects, which by their terms were limited, not only to one or more cities, but also to one or more towns, villages, or counties. The abuse became intolerable, and so the constitutional amendment of 1871 was adopted and ratified. That amendment expressly prohibited the legislature "from enacting any special or private laws," in nine different classes of cases, including (7) the granting "corporate powers or privileges, except to cities"; and (9) "for incorporating any city, town, or village, or to amend the charter thereof." Const. art. 4, § 31. That amendment of 1871 left the legislature free to

enact any special or private laws for incorporating any city, or to amend the charter thereof. As soon as that fact became generally understood, the legislature was from time to time induced, through local influence, to transform almost every village in the state into a city, under a special charter, to be equipped with a mayor and common council. The abuse was not confined to incorporated villages, but in some instances small groups of inhabitants were incorporated, under special charters, as cities, with such officials as were known to cities. The result was that Wisconsin became noted for its numerous cities; and as each city was under a special charter, peculiar to itself, any litigation as to the construction of such charter settled nothing as to any other charter, unless it happened to contain the same or similar provisions. Litigation naturally increased, and confusion multiplied. Such abuses led to a general demand for a constitutional amendment prohibiting the legislature "from enacting any special or private laws . . . for incorporating any city . . . or to amend the charter thereof."

Joint resolution No. 4, to that effect, was proposed to and passed by the legislature of 1889. At the same session of the legislature, and in anticipation of the final adoption and ratification of the proposed amendment, the legislature passed a general charter act, containing 269 sections, and dividing cities into three classes, with enactments peculiar to each class. Laws 1889, chap. 326. But the act expressly provided that no city which was then incorporated under the laws of this state should be affected by the provisions of that act unless such city should adopt the same for its government, in the manner therein prescribed, and that when so adopted, and a patent issued therefor, such city should cease to exist as a corporation under its then existing charter and laws, and should thereupon constitute a municipal corporation under such general charter act, and should be governed by its provisions. Laws 1889, chap. 326, §§ 3, 4. But the act also provided that all cities then organized and existing under any such special law should have authority to exercise certain powers therein granted. Sections 249-267, *Id.* Thus, the act of 1889 furnished a complete charter for each city of each of the three classes mentioned therein, and left it optional with such city to adopt such charter or not. All concede that the legislature had the power to thus leave it optional with each of such cities to accept such charter so completely framed and enacted by the legislature. The constitutional amendment so proposed and passed by the legislature of 1889 was agreed to by joint resolution No. 4, passed in 1891, and the same was ratified by the people in 1892. By that amendment the Constitution was made to declare that "the legislature is prohibited from enacting any special or private laws in the following cases: . . . 9th. For incorporating any city, town, or village, or to amend the charter thereof." Const. art. 4, § 31. "The legislature shall provide general laws for the

transaction of any business that may be prohibited by § 31 of this article, and all such laws shall be uniform in their operation throughout the state." Section 32, Id. It is true that this last section first appeared in the amendment of 1871, but it was never applied to cities until the amendment of 1892. By that amendment it was supposed by many that the state was in a fair way to have uniform charters for cities, as classified, since every amendment of such existing special charters, if made by "general laws" which would "be uniform in their operation throughout the state," would tend, from time to time, to make such charters more and more in conformity with each other. But the next legislature after the ratification of that amendment manifestly had a different purpose. That legislature, after dividing cities into four classes, and amending several provisions of chapter 326, Laws 1889, amended § 267 of that act so as to read as follows: "Any city now organized under a special charter may adopt the provisions of any special chapter, section, or subdivision of any section of this act, and may exercise any power or franchise hereby conferred upon cities organized under this act, in addition to, or in lieu of, the provisions of its special charter, and the powers and franchises therein specified by an ordinance adopted for that purpose by a three-fourths vote of all the members of the common council elect, and when adopted as herein prescribed such ordinance shall operate to that extent as an amendment of such special charter. . . . No city, however, shall be deemed to have surrendered its special charter and organized under this act, until it shall have adopted all its provisions in full as hereinbefore provided." Laws 1893, chap. 312, § 72. Such provisions were continued in § 1, chap. 320, Laws 1895, and power given to each city under a special charter to declare the class to which it belonged, and to adopt the provisions of that act, or any part thereof, relating to cities of such class, and to adopt any part of the section or sections of that act relating to officers of such city, and might add thereto and include therein any officer provided by such special charter. *Ibid.*

In addition to the four classes of cities under the general charter acts mentioned, this court has been obliged to recognize that, in the very nature of things, cities still remaining under special charters necessarily constituted a separate and independent class of cities, and hence that a statute conferring a new power upon all cities existing under special charters was a general law, and uniform in its operation throughout the state, within the meaning of the constitutional provision quoted, and hence valid. *Johnson v. Milwaukee*, 88 Wis. 383, 389-392, 60 N. W. 270. In a later case the validity of an act limiting the amount to be raised by taxation in the towns of a certain county was seriously doubted, on the ground that the enactment was special legislation, within the meaning of §§ 31, 32, art. 4, Const. *Crandon v. Forest County*, 91 Wis. 239, 242, 64 47 L. R. A.

N. W. 847. In the same volume it was held that an act for the drainage of certain lands in Dane county, and the levy of taxes to pay the expense thereof, was a special act, and therefore in violation of those sections of the Constitution. *State ex rel. Turner v. Bell*, 91 Wis. 271, 64 N. W. 845. In a still later case it was held that an act relating to assessments for paving and repaving streets "in any city having a population of over 20,000 inhabitants or more" was a general law, and therefore not in violation of the constitutional provisions quoted. But in the same case it was held that another act which purported to legalize contracts and special assessments for street improvements in certain cases, and by its terms applied to cities of the first and second classes, and therefore in fact applied only to the city of Milwaukee, was, so far as it attempted to cure past irregularities, a special act, and hence void, under the constitutional provisions quoted. *Boyd v. Milwaukee*, 92 Wis. 456, 464, 66 N. W. 603. In a still later case, where the facts were similar to those referred to in 91 Wis. 239, 64 N. W. 847, and 91 Wis. 271, 64 N. W. 845, cited above, the act was held to be void, and Mr. Justice Pinney, speaking for the whole court, said: "The power to levy taxes is undoubtedly one which belongs exclusively to the legislative department, and when exercised by a delegate town or city, through its officers, the legislature only exercises a power through its subordinate agents which it could exercise directly. *Meriwether v. Garrett*, 102 U. S. 472, 501, 26 L. ed. 197; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. ed. 521. . . . The object of § 31, art. 4, Const., was to restrict and lessen the evils of special legislation, so appropriately and vigorously stated by Ryan, Ch. J., in *Kimball v. Rosendale*, 42 Wis. 415, 24 Am. Rep. 421. . . . We hold, therefore, that the restriction against special legislation 'for assessment or collection of taxes or for extending the time of payment thereof' embraces all the proceedings for raising money by the exercise of the power of taxation, from the inception of the proceeding to its conclusion, and took from the legislature all jurisdiction, past, present, and future, of special legislation on the subject." *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 85, 88, 70 N. W. 78. In a still later case it was held that an act of the legislature providing "that the common council of any city of the first class, during the year 1897," might issue bonds in the manner therein indicated, not exceeding a certain amount, for the purpose of erecting garbage-reduction works, was special legislation and in violation of the constitutional provisions quoted, since Milwaukee was the only city of the first class in the state, and no other could possibly come into that class during the year 1897. *Burnham v. Milwaukee*, 98 Wis. 128, 135, 73 N. W. 1018.

Such adjudications are cited, not because they are necessary to explain the meaning of the constitutional provisions quoted, but merely to show that this court has repeatedly recognized the full force and effect of such

provisions. Those provisions are certainly free from all ambiguity. The language is plain, simple, direct, and commanding. It expressly prohibits the legislature from enacting any special law for the amendment of the charter of any city, and provides that such charters shall only be amended by "general laws," which "shall be uniform in their operation throughout the state." The amendment of the general act of 1889 found in § 72, chap. 312, Laws 1893, and quoted above, and then continued with an additional amendment by § 1, chap. 320, Laws 1895, above referred to, is not a law going into effect in cities organized and still existing under special charters, merely by virtue of its enactment by the legislature, but is, at most, an authority or power granted to cities existing under such special charters, whereby each such city was at liberty, if it so desired, to amend its own special charter by adopting "the provisions of any special chapter, section, or subdivision of any section," of the general charter act as so amended, and might "exercise any power or franchise" thereby conferred upon cities organized under the general charter act, "in addition to, or in lieu of, the provisions of its special charter." As indicated, the general charter act contains 268 sections, and has been in force for nearly eleven years, and the constitutional amendment in question has been in force for more than seven years; and yet it is said by those in a position to know that there are eighty-nine cities still existing under such special charters. If each city so under a special charter is thus at liberty to amend its charter, then it is very obvious that no additional cities will adopt the general charter, since the same section giving such power of amendment also provides that no such city shall be deemed to have surrendered its special charter and organized under the general charter act "until it shall have adopted all its provisions in full," as thereinbefore provided; that is to say, such special charter will continue so long as there is a section or part of a section of the general charter act which it has failed to adopt. Had such authority to adopt been confined to "any special chapter" of the general charter act, there would have been more force in the contention, but it extends to any "section or subdivision of any section" of that act. In the case at bar the common council of the city of Beloit, existing, under a special charter, only attempted to adopt a few fragmentary portions of the chapter on "City Improvements" contained in the general charter act. As indicated, it is settled by the adjudications cited, as well as the constitutional provisions in question, that the legislature had no power to amend the charter of any city, except by general laws which should "be uniform in their operation throughout the state," and that there could be no such general law unless it operated alike in all the cities of the state, or at least in all of any class of cities in the state. The question recurs whether the legislature had power to thus authorize the common council of each of the eighty-nine cities under special charter to

do what it could not itself do. Of course, such amendment of the special charter of Beloit could only be operative in Beloit, and could not be operative in any other city,—much less, uniform in its operation throughout the state. The same is true of any amendment of its special charter by any other of such cities. That the legislature could not thus authorize the common council of each city existing under a special charter to do what it was thus expressly prohibited from doing, would seem to be axiomatic. If any authority is deemed necessary, reference is made to 95 Wis. 85, 70 N. W. 78, and the authorities there cited by Mr. Justice Pinney, and quoted above. It is true, the legislature may rightfully authorize the common council of a city to accept or reject an enactment completely framed by the legislature itself. So, where certain powers are expressly granted to a common council, they may, within the scope of the powers so granted, enact by-laws and ordinances. But here the attempt is to delegate to the common council of each of such several cities so existing under such special charters the discretionary power, within the limits mentioned, to amend its own charter as such common council may see fit, by adding to its special charter any "section or subdivision of any section" of such general charter act, or by adopting the same "in lieu of the provisions of its special charter"; that is to say, such common council may repeal a portion of the special charter of their city, and in lieu thereof may select such sections and subdivisions of sections from the general charter act as they may see fit, and frame them into a composite amendment of the charter. That certainly would be a new creation, and if permissible, and related to a machine, would be patentable. In my judgment, the legislature can delegate to such common council no such discretionary authority, and this statement is, I think, supported by the adjudications of this court. *State ex rel. Atty. Gen. v. O'Neill*, 24 Wis. 149; *Slinger v. Henneman*, 38 Wis. 505; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 69, 70, 74, 31 L. R. A. 112, 65 N. W. 738. Thus, in the second of these cases it was held that "the legislative power vested by the Constitution in the senate and assembly cannot be delegated to any other body, although, in matters purely local and municipal, the legislature may enact conditional laws, and permit the people or proper municipal authorities to decide whether such laws shall have force in their respective municipalities." So, in the last of these cases, Mr. Justice Pinney, in part quoting from adjudications in other states, said that "the legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend." 92 Wis. 69, 65 N. W. 739, 31 L. R. A. 114. "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to

its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." 92 Wis. 70, 65 N. W. 739, 31 L. R. A. 114. "The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details in *presenti*, but which may be left to take effect in *futuro*, if necessary, upon the ascertainment of any prescribed fact or event." 92 Wis. 74, 65 N. W. 741, 31 L. R. A. 115. In this last case the first standard insurance policy in this state was held void because the legislature attempted to delegate to the insurance commissioner power to fill in certain quite obvious blanks. The ordinance in question

was not complete when it came from the legislature. It was certainly unsorted, unset, and unframed. That was done afterwards by the common council. As a whole, it was never before—much less, considered by—the legislature. The attempt of the legislature to clothe each of the eighty-nine cities under special charters with power, within the limits mentioned, to amend its own charter in the manner indicated, was, in my judgment, in direct violation of the constitutional provisions quoted. Those provisions are, to my mind, clear, plain, and unmistakable. There is no room for construction. To me they are imperative mandates. In my judgment, the legislature had no power to delegate to each of such cities power to amend its charter in the manner indicated,—much less, to authorize such cities to do what the legislature itself was expressly prohibited from doing.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

UNITED FIREMEN'S INSURANCE COMPANY, *Plff. in Err.*, v.

John S. THOMAS, for Use of Norman H. CAMP, Receiver.

(53 U. S. App. 517, 82 Fed. Rep. 406, 27 C. A. 42, 92 Fed. Rep. 127, 34 C. A. 240.)

1. An express provision in a policy, forbidding other insurance, will override any supposed agreement to consent to such insurance from the fact that the insurer's agent knew of an intention to procure it.
2. Waiver of a clause against other insurance is not effected by knowledge of the insurer's agent, when the policy was issued, of an intent to procure it.
On rehearing.
3. An insurance broker who, having authority to procure a certain amount of insurance on certain property in companies to be chosen by him, signs applications and delivers them to the recognized agents of the insurer, is not from the fact that he is by them allowed a commission upon the business, to be considered as the agent of the insurer so as to bind it by his knowledge; and it is immaterial that the policy is delivered to him without requiring prepayment of the premium.
4. A provision in a statute governing the relations of foreign insurance companies to the state, and requiring certain things to be done by agents representing them, that the term "agent" shall include "any person who shall in any manner aid in transacting insurance business" of any company not incorporated by the laws of the state, does not make a broker procuring insurance for a property owner the agent of the insurer so as to bind it with his knowledge.

NOTE.—On the question when an insurance agent is the agent of the assured, see *note* to *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* (Mich.) 20 L. R. A. 277.

For broker as agent of insurer, see also *Seamans v. Knapp, S. & Co. Company* (Wis.) 27 L. R. A. 362, and *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* (Wis.) 37 L. R. A. 131, 47 L. R. A.

5. An insurer is not chargeable with knowledge of other insurance obtained by one while acting as agent for the insured, merely because it makes him its agent to deliver a policy drawn in accordance with a contract made upon his representations while so acting.
6. That insurance in other companies is effected at the same time as a policy providing that it shall be void "if insured now has or shall hereafter make or procure" any other contract of insurance on the same property will not prevent the operation of such provision.

(October 6, 1897.)

ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

Before Woods, Jenkins, and Showalter, Circuit Judges.

Statement by Jenkins, Circuit Judge:

This action is in assumpsit, and was instituted by the defendant in error, John S. Thomas, for the use of Norman H. Camp, receiver, against the United Firemen's Insurance Company, the plaintiff in error, to recover for a loss by fire under a policy of insurance issued by the plaintiff in error to the amount of \$2,500 upon certain household furniture. The policy contained the following provisions: First, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy." Second, "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed

hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The defendant below pleaded the general issue, and also pleaded specially that the plaintiff below obtained a large and unreasonable amount of insurance in other companies, without notice to the defendant, and without its permission, and without written indorsement of other insurance permitted on the policy in suit, by which violation of the contract of insurance the insurance policy issued by the defendant became wholly void. It appeared at the trial that Carlton H. Prindle, an insurance broker, was employed by Mr. Thomas to procure insurance upon the household furniture in question. He testified that he was not, and never had been, an agent of the plaintiff in error; that his business was that of an insurance broker; that he solicited from owners of property the placing of insurance for them, and that in the absence of instructions he placed the insurance in such companies, and with such agents as he thought proper and desirable, receiving from the agents a certain commission for his service; that Mr. Thomas requested him to procure insurance to the amount of \$12,500, which he placed in four different companies; and that he applied to Hopkins & Hasbrook, the agents in the city of Chicago of the plaintiff in error, to place \$2,500 of this insurance, and signed a written application, which does not disclose that further insurance in other companies had been or was to be procured. In answer to a question by the court whether he stated to Hopkins & Hasbrook the amount of insurance that Mr. Thomas desired on his property, he answered, "So far as I recollect, I did," but he also stated that he could not recollect what he told them, nor whether he communicated with one of the firm or with a clerk in their service. Mr. Hopkins, of that firm, stated that the application for this insurance was made to him personally by Mr. Prindle, and the application for the policy was signed at that time; that nothing was said with regard to other insurance of the property, and that he first knew of other insurance after the fire. Prindle obtained the four policies of insurance from the different companies, and delivered them to Mr. Thomas who paid him the premiums, which Prindle paid to the agents, respectively, representing the several companies, receiving from each agent his proper commission. At the conclusion of the evidence the plaintiff in error requested the court to direct the jury to return a verdict in its favor upon the ground that the defendant was not legally

liable upon the policy of insurance, which motion was denied, and the ruling is assigned for error. The court charged the jury that the stipulation of the policy with respect to other insurance was binding and conclusive upon the parties unless that condition has been waived by the defendant, and that, if Prindle was the agent of the plaintiff, the latter would be chargeable with knowledge of the fact that his agent had procured this policy of insurance that did not permit additional insurance; but if, on the other hand, Prindle was in fact acting for and as the agent of the defendant company in placing this insurance, and agreed with the plaintiff that he would secure him policies of insurance to the amount desired, to become effective of the same date, and to run concurrently, then the defendant company would be chargeable with knowledge of the fact that there was to be such additional insurance; and if, with such knowledge the company or the agent that represented it issued the policy, and received the premium upon it, and applied it to its own use, it would constitute a waiver of the condition of the policy,—to which charge there was preserved, and is assigned for error, a proper exception. A verdict was found for the plaintiff below, and reversal of the judgment entered thereon is here sought because of the error stated.

Messrs. Cunningham, Vogel, & Cunningham, for plaintiff in error:

The law conclusively presumes that all the terms of the agreement are correctly expressed in the writing, and the conversations of the parties made before or simultaneously with the writing are not admissible in evidence.

Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 522, 5 Am. Rep. 64; *Abrams v. Pomeroy*, 13 Ill. 133; *Marshall v. Gridley*, 46 Ill. 250; *Heinsen v. Heinsen*, 145 Ill. 669, 21 L. R. A. 434, 34 N. E. 597; *Starkie*, Ev. § 648; *Strehl v. D'Evans*, 66 Ill. 76; *Loach v. Far-num*, 90 Ill. 369.

Where the contract between the parties is in writing, "the writing affords the only competent evidence of what that agreement was."

Wadhams v. Swan, 109 Ill. 59; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77.

A waiver, to be operative, must be supported by an agreement founded upon a valuable consideration; or the act relied on as a waiver must be such as to estop the party from insisting on the performance of the contract or the forfeiture of the condition.

Ripley v. Aetna L. Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; *McFarland v. Peabody Ins. Co.* 6 W. Va. 431.

Knowledge of a broker who makes application for insurance in behalf of another is not the knowledge of the company.

McFarland v. Peabody Ins. Co. 6 W. Va. 425; *Dolliver v. St. Joseph F. & M. Ins. Co.* 131 Mass. 39.

If appellee claims that any person but a

local agent has power to receive notice of other insurance, he must prove it.

Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670.

Where a policy requires a written notice of other insurance to be indorsed on the policy, mere verbal notice is insufficient.

Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74; *Gilbert v. Phoenix Ins. Co.* 36 Barb. 372; *Duclos v. Citizens' Mut. Ins. Co.* 23 La. Ann. 332; *Security Ins. Co. v. Fay*, 22 Mich. 472, 7 Am. Rep. 670.

A broker who effects insurance under no employment by the insurers, but for a commission paid by them upon the premiums received for such risks as he procures to be offered and they choose to accept, is not an agent in such a sense that the insurers will be bound by notice to him after the policies are issued.

Devens v. Mechanics' & T. Ins. Co. 83 N. Y. 168; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 615.

In order to establish a waiver of a condition against additional insurance, it must appear that the subject-matter of waiver and consent was in the minds of the parties, and that it was consciously and purposely done by the minds of the parties coming together upon the proposition.

Joyce, Ins. § 2487; *Hartford F. Ins. Co. v. Small*, 30 U. S. App. 127, 66 Fed. Rep. 490, 14 C. C. A. 33; *Miller v. South Side F. Ins. Co.* 87 Pa. 399; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 81; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Dryer v. Security F. Ins. Co.* 94 Iowa, 471, 62 N. W. 798.

Prindeville as broker was not ostensibly or actually connected with the company, or employed by it in any sense. All his authority to act in the matter came from Thomas.

By accepting the policy and retaining it, he ratified all his agent had done, ratified the manner of doing it, and ratified each and every provision of that written contract.

Lycoming F. Ins. Co. v. Rubin, 79 Ill. 404.

He had no authority, or the semblance of authority, to do anything for the company but deliver the policy and collect the premium,—a thing which any office boy could have done,—and that authority was given him after the insurance contract had been completed, and after the policy had been issued, and after Prindeville had examined it for Thomas to see that it was all right. Every act done by Prindeville prior to that moment was done solely for Thomas, and he had no authority to do or say anything for the company, and was not its agent in law or in fact.

Ostrander, Ins. § 45; *Gude v. Exchange F. Ins. Co.* 53 Minn. 220, 54 N. W. 1117; *Fromherz v. Yankton F. Ins. Co.* 7 S. D. 187, 63 N. W. 784; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Germania F. Ins. Co. v. Klever*, 129 Ill. 599, 22 N. E. 489; *Hamblet v. City Ins. Co.* 36 Fed. Rep. 118; *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Improv. Co.* 100 Pa. 137; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100.
47 L. R. A.

Prindeville made no representations, but if he had made representations they were those of the insured alone.

Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Devens v. Mechanics' & T. Ins. Co.* 83 N. Y. 168; *Mellen v. Hamilton F. Ins. Co.* 5 Duer, 101; *Lee v. Guardian F. Ins. Co.* 5 Ins. L. J. 26; *Birch, F. Ins. Contr.* p. 382; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609.

Brokers are only agents, under the statute, when they actually do some act as agents for the company, with the knowledge and by the authority of the company, under such circumstances that they actually represent the company in good faith.

Birch, F. Ins. Contr. § 368; *American Exp. Co. v. Triumph Ins. Co.* 5 Ins. L. J. 466; *Union Nat. Bank v. German Ins. Co.* 34 U. S. App. 308, 71 Fed. Rep. 473, 18 C. C. A. 203.

Courts of law enforce or reject a written contract, but do not reform it. Hence the reformation of instruments has always been within the exclusive jurisdiction of courts of equity.

Story, Eq. Jur. 468; *Iverson v. Hutton*, 98 U. S. 79, 25 L. ed. 66; *Hammel v. Queen Ins. Co.* 50 Wis. 240, 6 N. W. 805; *Winnipeg Paper Co. v. Eaton*, 64 N. H. 234, 9 Atl. 221; *Cunningham v. Wrenn*, 23 Ill. 64.

Messrs. John Woodbridge and William N. Jones, for defendant in error:

It was the duty of the company, when informed of the other insurance, either to decline the risk, or to indorse its consent upon the policy. It was a fraud to issue the policy, and then deny its validity because of its failure to indorse the required consent to other insurance.

New England F. & M. Ins. Co. v. Schettler, 38 Ill. 170; *Phoenix Ins. Co. v. Hart*, 149 Ill. 524, 36 N. E. 990; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 329, 36 N. E. 408; *Atlantic Ins. Co. v. Wright*, 22 Ill. 473; *Farmers' & M. Ins. Co. v. Chestnut*, 50 Ill. 116, 99 Am. Dec. 492; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494.

A soliciting agent for life insurance companies is the agent of the insurer for all purposes in connection with the application for and issuance of the policy.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; *American L. Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268; *Rowley v. Empire Ins. Co.* 36 N. Y. 550; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393, 7 N. W. 735; *First Nat. Bank v. American Cent. Ins. Co.* 58 Minn. 492, 60 N. W. 345; *Beotcher v. Hawk-eye Ins. Co.* 47 Iowa, 253; *Bennett v. Council Bluffs Ins. Co.* 10 Iowa, 600, 31 N. W. 948; *West End Hotel & Land Co. v. American F. Ins. Co.* 74 Fed. Rep. 114; *Standard Life & Acci. Ins. Co. v. Fraser*, 44 U. S. App. 694, 76 Fed. Rep. 705, 22 C. C. A. 499.

The distinction attempted between a "broker" and an "agent" is untenable.

Sun Mut. Ins. Co. v. Saginaw Barrel Co. 114 Ill. 99; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Bassett v. American F. Ins. Co.* 2 Hughes, 531, Fed. Cas. No. 1,094.

On petition for rehearing.

The concurrent insurance was not within the provisions of the policy at all. The policy provides that it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance.

This language does not include other insurance, like that in this case, which was made, not before or after the delivery of the policy, but contemporaneously with it.

Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Niagara F. Ins. Co. v. Soammon*, 100 Ill. 644; *May, Ins. 2d ed. § 175*; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213.

The assured relied on the company to deliver to him a valid policy, parted with his money upon his faith in the conduct of the company, reposed upon the validity of the insurance, and, without any notice of defect in his policy, suffered loss by fire.

Putnam v. Commonwealth Ins. Co. 4 Fed. Rep. 753; *Dicbold v. Phoenix Ins. Co.* 33 Fed. Rep. 807; *Roberts v. Continental Ins. Co.* 41 Wis. 321; *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804; *Goss v. Agricultural Ins. Co.* 92 Wis. 233, 65 N. W. 1036; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; *McDonald v. Fire Asso. of Philadelphia*, 93 Wis. 348, 67 N. W. 719; *De Witt v. Home Forum Benefit Order*, 95 Wis. 305, 70 N. W. 476; *Havens v. Home Ins. Co.* 111 Ind. 90, 12 N. E. 137; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494; *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 6; *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 477, 44 N. E. 159; *Gray v. Germania F. Ins. Co.* 84 Hun. 504, 32 N. Y. Supp. 424; *McGonigle v. Susquehanna Mut. F. Ins. Co.* 168 Pa. 1, 31 Atl. 868; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051; *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 33 Pac. 258; *Carrugi v. Atlantic F. Ins. Co.* 40 Ga. 135, 2 Am. Rep. 567; *Clay v. Phoenix Ins. Co.* 97 Ga. 44, 25 S. E. 417; *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600, 31 N. W. 948; *Erb v. Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261; *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kan. App. 225, 44 Pac. 35; *Nagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Queen Ins. Co. v. Kline*, 17 Ky. L. Rep. 619, 32 S. W. 214; *Phoenix Ins. Co. v. Angel*, 18 Ky. L. Rep. 1034, 38 S. W. 1067; *Emlau v. Travelers' Ins. Co.* 108 Mich. 554, 66 N. W. 469; *Redstake v. Cumberland Mut. F. Ins. Co.* 44 N. J. L. 294; *Geib v. International Ins. Co.* 1 Dill. 443, Fed. Cas. No. 6298; *Putnam v. Commonwealth Ins. Co.* 47 L. R. A.

18 Blatchf. 368, 4 Fed. Rep. 753; *Reed v. Equitable F. & M. Ins. Co.* 17 R. I. 785, 18 L. R. A. 496, 24 Atl. 833; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393, 7 N. W. 735; *First Nat. Bank v. American Cent. Ins. Co.* 58 Minn. 492, 60 N. W. 345; *Anderson v. Manchester Fire Assur. Co.* 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241; *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 18 So. 86; *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. 931; *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; *Columbia Planing Mill Co. v. American F. Ins. Co.* 59 Mo. App. 204; *Rocheester Loan & Bkg. Co. v. Liberty Ins. Co.* 44 Neb. 537, 62 N. W. 877; *Graham v. American F. Ins. Co.* 48 S. C. 195, 26 S. E. 323; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125; *Hartford F. Ins. Co. v. Moore*, 13 Tex. Civ. App. 644, 36 S. W. 146; *West v. Norwich Union F. Ins. Soc.* 10 Utah, 442, 37 Pac. 685; *Coles v. Jefferson Ins. Co.* 41 W. Va. 261, 23 S. E. 732.

Policies of insurance are long, involved, and technical. It is the business and duty of the insurance broker, as a specialist in this line, to see to it that the policies are in proper form.

Park v. Hamond, 4 Campb. 344; *Mallough v. Barber*, 4 Campb. 150; *Turpin v. Bilton*, 5 Mann. & G. 455; *De Tastett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; 1 Joyce, Ins. §§ 674-678.

Jenkins, Circuit Judge, delivered the opinion of the court:

If, under the construction of the statute of the state of Illinois (1 Starr & C. Stat. p. 1322) held by the supreme court of that state in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 376, 20 N. E. 77, Prindeville must be deemed the agent of the insurance company with respect to the transaction in hand, the question is presented whether his knowledge, prior to the issuance of the policy, of intended other insurance, will vitiate a stipulation in the policy forbidding such other insurance. It is the settled law with respect to written contracts of insurance, as well as to other written contracts, that all negotiations or agreements leading up to the written contract are merged in it, and that parol evidence of a supposed prior agreement cannot be entertained to contradict the express stipulations of the written contract. Thus, in *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 259, 26 L. ed. 765, 768, it was ruled that "a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing." We have had occasion to speak to the same effect, and in no doubtful language. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.* 18 U. S. App. 438, 453, 59 Fed. Rep. 49, 7 C. C. A. 660; *Gorrell v. Home L. Ins. Co.* 24 U. S. App. 188, 63 Fed. Rep. 371, 11 C. C. A. 240; *Chicago Lumber Co. v. Comstock*, 34 U. S. App. 414, 71

Fed. Rep. 477, 18 C. C. A. 207. The written contract speaks conclusively the agreement of the parties, and cannot be contradicted by parol. Therefore a supposed agreement to permit other insurance, made before the written contract, cannot avail to defeat the subsequent express stipulations of the written instrument. Much less can mere knowledge of an intention of the proposed insured to effect, or that he had effected, other insurance, avoid the conditions of the subsequent written contract. The insured knows, or is bound to inform himself, of the conditions and stipulations of his contract before its acceptance. He should not be allowed to accept the contract, and afterwards defeat an essential condition of it, through plea of ignorance of its conditions. Nor do we understand that the doctrine of waiver can have application here. A waiver is an intentional relinquishment of a known right,—an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren v. Crane*, 50 Mich. 301, 15 N. W. 465. Mr. Bishop thus defines the term:

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward." Bishop, Contr. § 792.

But manifestly there can be no waiver of a nonexistent right,—of that which does not exist. Delivery of the policy containing the stipulations against other insurance under circumstances which indicate a previous or contemporaneous parol agreement that such other insurance would be permitted cannot avail, for within the decision in *Thompson v. Knickerbocker Ins. Co.* 104 U. S. 252, 259, 26 L. ed. 768, 768, and the other cases cited, no prior or contemporary parol agreement can be set up to contradict the writing. The waiver must be subsequent to the written contract, and, to be operative, must be made, not only with knowledge of the fact of other insurance, and with intent to waive the provisions of the existing contract, but must be supported by a valuable consideration, or become operative by way of estoppel. Here, subsequent to the supposed knowledge of an intent to effect other insurance, the parties stipulated by their contract that it should be void if other insurance had been or should be effected, and that no waiver of any condition of the contract should be valid unless written upon or attached to the policy. An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term of the contract made and delivered subsequent to such knowledge. There was here shown no intent or agreement to waive subsequent to the delivery of the contract, and no consideration for a waiver is disclosed, nor is any estoppel proved. There was no act or conduct upon the part of the insurance company subsequent to the delivery of the contract, inducing change of

position by the insured. He knew, or should have known, of the conditions of the policy, and, so knowing them, was informed of the terms of the contract proposed by the insurance company, and with such knowledge paid the premium demanded. There was, subsequent to the delivery of the contract, no act by the insurance company prejudicial to the insured. It was the duty of the latter to have disclosed to the company the other insurance effected, and to procure to be indorsed upon the policy a written waiver of the condition. We have ruled upon the precise question in *Union Nat. Bank v. German Ins. Co.* 34 U. S. App. 397, 71 Fed. Rep. 473, 18 C. C. A. 203,—a case that is the counterpart of the one in hand. There, prior to the issuance of the policy, the agent of the company knew of and had himself issued other insurance upon the property covered by the policy. We there held that such knowledge could not affect the written stipulations of the subsequent contract, and that the policy declared conclusively the agreement of the parties. We are unable to distinguish that case from the one before us, and our ruling here must accord with that decision. In a proper case, and in a proper proceeding, a contract which, through error, mistake, or fraud, does not speak the actual agreement of the parties, may be reformed in equity. Such was the case in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 370, 20 N. E. 77, where reformation of the policy was sought and decreed in equity. No such case is presented here. The assured brought suit at law upon the policy, and stands upon the very terms of his contract. He asks no reformation of it, and cannot, in this action at law, avoid its express stipulations.

Error is also assigned for certain remarks of the presiding judge during the course of the trial and upon the examination of witnesses. The brief of counsel does not, as it should, refer us to the pages of the record which are thought to contain the objectionable language. We might properly, therefore, and for that reason, decline to entertain the complaint, and in fact it appears from an examination that some of the language complained of and stated at large in the brief is not contained in the record. In view of our ruling upon the question previously considered, we think it unnecessary to pass upon the language of which complaint is made. It is sufficient to say upon the subject in general that every party in a court of justice is entitled to a fair and impartial trial of his cause, and that neither court nor counsel may rightfully use language in the presence and hearing of a jury which shall tend to excite passion or prejudice, or prevent calm, dispassionate consideration of the case. *Reynolds v. United States*, 98 U. S. 145, 168, 25 L. ed. 244, 251; *Hicks v. United States*, 150 U. S. 442, 452, 37 L. ed. 1137, 1141, 14 Sup. Ct. Rep. 144; *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; *Hickory v. United States*, 160 U. S. 403, 425, 40 L. ed. 474, 480, 16 Sup. Ct. Rep. 327; *Atchison, T. & S. F. R. Co. v. Meyers*, 24 U.

S. App. 295, 304, 63 Fed. Rep. 793, 11 C. C. A. 439.

The judgment is reversed, and the cause remanded, with directions to the court below to award a new trial.

A petition for rehearing having been filed, Jenkins, Circuit Judge, on February 7, 1899, delivered the following additional opinion:

The facts in this case are sufficiently stated in our former opinion. 53 U. S. App. 517, 62 Fed. Rep. 406, 27 C. C. A. 42, *ante*, 453. We granted a rehearing of the cause principally for a discussion of the question whether Prindeville, either as a matter of law or as a matter of fact, could be deemed the agent of the insurance company, appellant, in effecting the insurance in question. Aided by the oral arguments at such rehearing, and in view of certain decisions of the supreme court of the state of Illinois, we have carefully considered the case, both with respect to the question whether such agency can be deemed established as matter of fact or as matter of law, and the further question whether, under the statute of the state of Illinois, he must be deemed to be the agent of the insurance company because he participated in procuring the insurance in question. The evidence to our minds is undisputed and conclusive that Prindeville had never been in the service of this insurance company, was never authorized by it or its general agents to procure any insurance for it, was employed by the defendant in error to procure insurance for him in such companies as he might approve; that he placed such insurance in several companies, applying to the general agents of the plaintiff in error for a policy in that company; that he signed, on behalf of the defendant in error, the application for that insurance, and authorized the statements therein contained; that neither the plaintiff in error nor its general agents were at any time advised by Prindeville or by the defendant in error or by any other person that other insurance upon the property insured had been or was expected to be procured; that Prindeville received from the several companies, probably upon the same day, the policies for which he had applied, delivered them to the defendant in error, and received from him the premiums. He thereupon paid to the general agents of the plaintiff in error the premium due to the company, and was allowed by the general agents a certain commission. The question, then, is (irrespective of the statute of the state of Illinois, which we will consider hereafter) whether Prindeville, by reason of the facts stated, was the agent of the insurance company in such manner and to such extent that the company is chargeable with the knowledge that he was possessed of other insurance upon the property insured. We are of opinion that he was not, and that the insurance company was not bound by his knowledge. Unless the fact that he was allowed by the general agents a commission—a certain proportion of the amount which they received from the company for placing insurance—

can be deemed to constitute him an agent, there is no color for declaring him such. It might with equal propriety be said that if the son of the plaintiff in error had, on behalf of his father, sought this insurance and that placed in other companies, the plaintiff in error would be chargeable with the knowledge that the son was possessed of other insurance obtained by him for his father. The payment by the general agents to Prindeville of a certain share of the commissions which they were entitled to retain of the premium did not constitute him an agent of the company. That fact did not authorize him in any way to represent the company by his act, or to charge them with his knowledge. He never had been, and was not then, in the service of the insurance company. He was employed by the defendant in error. Prindeville made application for him, and made the representations and warranties in his behalf. The policy was delivered to Prindeville as the agent of the defendant in error. It does not matter that the general agents of the insurance company delivered the policy to Prindeville for the defendant in error without exacting payment of the premium at the moment. If they saw fit to trust either of them for the amount until Prindeville could hand to his principal the policy and receive the premium, that was their choice and risk. The policy was none the less delivered when it was handed to Prindeville as the agent of the defendant in error, and was in force from that moment. If the property covered by it had been destroyed before Prindeville had opportunity to hand the policy to his principal, it would have been a loss covered by this policy. It was effective according to its terms from the moment of the delivery of the policy to Prindeville. Upon the question whose agent was he, the fact that the general agents allowed to Prindeville a certain proportion of their commission for placing the insurance in their company, if coupled with other facts, might be of some avail in determining the question of agency; but, standing alone, it is without probative force.

Thus, the supreme court of Illinois has said, in *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 403: "This supposed agent is Mr. Ludlum, who was not at that time, nor at any other time, the appointed agent of this company. He was a man in the habit of picking up, as a broker on the street, any risk of which he might get information. It was on his application to appellee to permit him to place some insurance for appellee that the policy was written. . . . After this showing, Ludlum took the application to the agent of the company, and obtained the policy in question. In this he was the agent of appellee, and not of appellants. The fact that the agent allowed him a commission does not change the character in which he acted."

And so, also, in *American F. Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373, the principle is thus stated: "It appears to be well settled that, when one engages another to procure insurance, the person so employed is the agent of the insured, and not of the insurer,

in all matters connected with such procurement."

See also *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599, 611, 22 N. E. 489; *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85; *Devens v. Mechanics' & T. Ins. Co.* 83 N. Y. 168; *Mellen v. Hamilton F. Ins. Co.* 5 Duer, 101; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100; *Hamblet v. City Ins. Co.* 36 Fed. Rep. 118; *Ostrander, Ins.* § 45; *Mechem, Agency*, § 931; *Wharton, Agency*, § 708; *May, Ins.* §§ 122, 123.

We come, then, to the question whether, under the statute of the state of Illinois, Prindeville must be regarded as the agent of the insurer, and in what respect such agent, and whether his knowledge should be imputed to the insurer. In other words, has the statute, as between insurer and insured, worked any change in the law? The statute to which we are referred is part of chapter 73 of the Revised Statutes of Illinois, and is part of § 40. That section treats of the terms upon which foreign companies may be authorized to do business in the state of Illinois. It provides for the appointment of an attorney in the state upon whom process may be served, and that a written instrument certifying such appointment shall be lodged with the auditor of public accounts. It provides that a copy of the charter shall be filed with the auditor, for the deposit of certain securities by a company organized under any foreign government, and that it shall not be lawful for any agent to act for any company referred to in taking risk or transacting the business of fire or inland navigation insurance in the state of Illinois without procuring from the auditor of public accounts a certificate of authority stating that the company has complied with the requisitions of the act, and providing a certain penalty for violation of the act. Then follows the provision in question: "Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town, or village in which the company is located, and the state or government under the laws of which it is organized. The term 'agent' or 'agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall, in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of this state."

The subsequent section of the chapter provides for revocation of the certificate by the auditor in case of false annual reports, for the examination by the auditor into the business of the company, and contains general provisions with respect to the inspection of state and foreign companies. The part of the statute quoted is the only provision to which we are referred, or which we have been able to find, upon which is rested the contention that Prindeville is thereby created the agent of the insurance company.

It is apparent from the examination of the provisions of this chapter that the legislature of the state of Illinois is dealing with

the relations which shall exist between foreign insurance companies and the authority of the state, and, as to them, declares what shall be done by such companies before they shall be authorized to do business within the state, or to continue the business of insurance under such authorization. It provides penalties for any infraction of the law. It sought to so hedge about the transaction of the business of insurance that no foreign insurance company, by any cunning device, could overreach the statute and transact business within the state without compliance with the terms of the statute. It imposes penalties, not only upon the company which should so unlawfully transact business within the state, but, since the company was beyond the reach of its courts, like penalties were imposed upon anyone within the state who should act for such company unlawfully transacting business within the state. And, that there might be no escape from compliance with the law, it was enacted that the term "agent," as used in the section in question, should include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting insurance business of any insurance company not incorporated by the laws of the state. Any such person was declared to be the agent of the company with respect to the penalties declared by the statute. This was done that there might be no evasion of the statute. This view of the sense in which the term "agent" is defined, and the purpose sought to be accomplished, throws light upon the decisions of the supreme court of Illinois which we are about to consider. The statute did not undertake to say that, as between the insurer and insured, one who acts for the insured in procuring insurance should be deemed to be the agent of the insurer.

The case of *People v. People's Ins. Exchange*, 120 Ill. 406, 2 L. R. A. 340, 18 N. E. 774, was an action brought in the name of the people to recover certain penalties provided by the section of the statute to which we have referred. The defendant was a corporation of Illinois, had an office in Chicago, and was engaged in soliciting and procuring insurance, delivering the policies, and collecting premiums. It clearly appeared that its actual business was to procure insurance for various parties in insurance companies doing business in other states which were not allowed to transact the business of insurance in the state of Illinois; and the defendant insisted that it acted, not as agent of the insurer, but as agent of the insured. It clearly was a case of an attempted evasion of the statute. It solicited the insurance. Policies were issued upon its representations to the foreign companies as to the condition and situation of the property proposed to be insured. The policies were sent by mail to the defendant, and by it delivered to the insured. It collected the premium, and remitted the same to the insurance companies, deducting the commissions. Clearly, it was the agent of the foreign companies, within the meaning of the

statute, and properly subject to the penalties the statute imposed. As the court remarked: "Suppose the defendant corporation was not the agent of the foreign insurance companies, in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the act, be liable."

We certainly are not inclined in any way to dissent from that decision.

In *Continental Ins. Co. v. Ruokman*, 127 Ill. 364, 20 N. E. 77, an action in chancery was brought by the insured for the reformation of a policy of insurance, and for a decree for the amount of the loss. Whipple and Smiley were the agents of the insurance company at Alton. Milne was in their service, and accustomed to solicit insurance for them. He solicited the insurance then in question, and assured the complainant that, if the insured premises did not remain vacant to exceed thirty days, the insurance would not be affected thereby, and agreed that the policies to be issued should so provide. On the following day, the complainant applied at the office of Whipple and Smiley for the policy, and found Milne there alone. The latter filled up a blank policy, delivered it to the complainant, and received from him the premium. The complainant was an illiterate man, being unable to read or write, which fact was known to Milne at the time. Upon being asked whether the clause in relation to the vacancy of the buildings was in the policy, Milne assured him that it was, and the complainant had no knowledge to the contrary until after the destruction of the buildings by fire. Here was clearly a case of fraud, and the policy was properly reformed to correspond with the contract made. And it is equally clear that Milne was authorized and accustomed to solicit and to make contracts of insurance. Having determined the case upon the ground that the act of Milne was the act of Whipple and Smiley, the agents of the company, and was within the authority which they had from the company, the opinion proceeded *obiter* to consider the statute in question. The writer of the opinion would seem to have inadvertently overlooked the sense in which the word "agent" is used in the statute, or the purpose for which it was employed. The opinion says properly enough that the general assembly had the undoubted right to make foreign companies responsible, not only for the acts of those who are in fact their agents, but of those who assume to act as their agents, and in fact aid them in the transaction of their insurance business, and then proceeds: "That such was the intention of the statute seems too plain to admit of doubt. We placed this construction upon said statute in *People v. People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340, 18 N. E. 774." As we have shown, that case was one between the people of the state and the insurance exchange, to enforce certain penalties of the statute, and is not authority for the assertion that as between insurer and insured the statute made or designed any

change in the law. It is proper also to observe that Milne was unquestionably authorized to solicit insurance by the general agents of the insurance company, and had authority to make the contract, and that, irrespective of any statute upon the subject; while, in the case with which we have to deal, Prindeville did not assume to act, nor did he aid them in the transaction of its insurance business, but acted for the insured. The opinion asserts authority for its conclusion in the respect mentioned in the decisions of the supreme court of Wisconsin upon the statute of that state. That statute differs widely from the Illinois statute, and does not treat alone of the relations between the state and the company, but is general. It is as follows (Wis. Rev. Stat. 1898, § 1977): "Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation, to all intents and purposes, unless it can be shown that he receives no compensation for such services."

Under this statute it is held that the rule was changed which required the insured at his peril to know whether the person with whom he is dealing had the power he assumed to exercise, or whether he was acting within the scope of his authority, and that one who procures policies from an authorized agent, delivers them, and collects and shares in the premium, is the agent of the company (*Schomer v. Hekla Ins. Co.* 50 Wis. 575, 7 N. W. 544; *Knob v. Lycoming Ins. Co.* 50 Wis. 671, 7 N. W. 776); and that one who applies for insurance, and delivers a policy in a company not represented by him, but by other agents, is its agent (*Alkan v. New Hampshire Ins. Co.* 53 Wis. 136, 10 N. W. 91; *Body v. Hartford F. Ins. Co.* 63 Wis. 157, 23 N. W. 132). But it is also held that the statute does not change the rule respecting the relations of principal and agent, and cannot be construed to prevent an insurance broker employed to procure insurance from another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies,—that the principal is bound by the acts and representations of the agent within the scope of his authority. *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 37 L. R. A. 131, 70 N. W. 84. The true meaning of the statute is well expressed in *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34: That the word "agent" is limited to the act of the particular person doing one or more of the things specifically designated; in other words, whenever an insurance company authorizes any person to do any one of the things thus specified, it cannot disclaim the agency of such person in the doing of anything necessarily implied in the

specific act thus authorized, and that the word "agent," as used in these statutes, means, as expressly stated in the Illinois statute, an authorized agent of the company.

In *Wood v. Firemen's Ins. Co.* 126 Mass. 310, it is said of a similar statute that the statute relating to agents of insurance companies does not change the relation of the common law regulating the power of agents to bind their principals, and that the statute cannot be construed so as to prevent the person who is agent for the insurer for some purpose by virtue of the statute, from being the agent of the insured for other purposes, and that he may well be the agent for each in matters which do not conflict.

We have here the acknowledged fact that Prindeville was never employed by the plaintiff in error, nor authorized to act for it; that he was the agent of the insured in procuring the policy, and in the application which he made. If it may be said with respect to the actual delivery of the policy by him to the assured that he was therein the agent of the insurer, the knowledge which he had of other insurance, derived from his agency for the insured, is not chargeable to the insurer merely because the company authorized him to deliver the policy drawn in accordance with the contract made, and upon representations made by him as agent of the insured. See also *Ostrander, Ins.* § 40, where the statutes of the various states are reviewed.

We need not stop to consider the Iowa statute, which is widely different from that before us, nor refer to the case of *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600, 31 N. W. 948, further than to say that in that case the agent of the company, having authority to solicit insurance and issue policies, sent his clerk to solicit a risk and take an application, and the clerk soliciting and taking the application knew of other insurance upon the property; and it was held—we think properly so—that the company was bound by the knowledge of the clerk, who must be regarded as the company's soliciting agent.

We recognize the rule that the Federal courts are bound to follow that construction of a state statute which has been deliberately placed upon it by the court of last resort of such state. If we could find such deliberate holding and construction here, we should follow it, although it was opposed to our own views of the question. But we cannot say here that there has been any such deliberate construction of the statute. The only expression which in any way can be construed to militate with our own view is, as we have shown, an *obiter* expression in an opinion, and that expression is not binding even upon the court in which it was rendered. We think the expression is manifestly inadvertent, and without consideration of the sense in which the term "agent" is employed in the statute. It is directly opposed to the construction placed upon much broader statutes by the supreme courts of Massachusetts and of Wisconsin, the latter of which is erroneously invoked as author-

ity by the author of the expression which it is said should control our judgment. We cannot consider the inadvertent expression in that case as a deliberate decision, giving a settled construction to the statute.

It was urged at the hearing that the other insurance effected upon the property was contemporaneous with the insurance in question, and did not fall within the condition which rendered the policy void, "if insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy." The case of *Washington F. Ins. Co. v. Davison*, 30 Md. 91, is relied upon to sustain this contention. We think the cases clearly distinguishable. There the plaintiffs applied to the defendant company, seeking their whole insurance from that company; and the latter company, before issuing its policy, and for its own convenience, and not at the request of either of the plaintiffs, applied to the Maryland Company to share the risk. The premises were examined by the secretaries of the two companies together, with the view of taking the risk conjointly. Both policies as originally drawn were alike, of the same date, for the same amount, and the premiums paid to both companies on the same date. The court says, on page 109: "It thus appears the Maryland policy was effected with full knowledge on the part of the defendant, indeed, at its request and for its convenience, that both policies were precisely similar, and became effective and binding contracts at the same time. The proviso is that, 'if any other insurance has been or shall hereafter be made on the said property' without the consent of the company in writing indorsed thereon, the policy shall be void."

After observing upon the necessity of such clauses in policies of insurance, the court held that, under the circumstances stated, the policy in the Maryland Company was neither prior nor subsequent to the policy sued on, but took effect contemporaneously, and was not within the spirit or letter of the clause in question. Without undertaking to criticise the ground upon which that decision rested, it is enough to say that we fully concur in the result there reached. The Washington Company, having itself procured the issuing of this policy, was estopped, in our judgment, to assert the condition prohibiting other insurance, or must be deemed to have waived it. Possibly this would be the better ground upon which to have placed the decision. But the facts of the case are widely divergent from those here presented. We do not think that decision controlling or relevant here. We are satisfied that a correct result was arrived at in our previous decision.

It is proper to say that Judge Showalter sat at the hearing, and is understood to have concurred in the result, but died before the preparation of this opinion.

The judgment is reversed, and the cause remanded to the court below, with direction to award a new trial.

(NINTH CIRCUIT.)

Frank C. ROBERTSON, *Plff. in Err.*,
v.

BLAINE COUNTY.

(61 U. S. App. 242, 90 Fed. Rep. 63, 82 C. C. A. 512.)

1. The obligation imposed by statute upon a county to pay bonds of another county from which it was formed is in the nature of a specialty, and not governed by a statute limiting the time for bringing actions upon contract obligations or liabilities founded upon an instrument in writing.
2. The limitation period for bringing an action against a county upon an obligation of another county from which it was formed, payment of which is imposed upon it by statute, must begin at or after the date of the imposition of the obligation.
3. An obligation created by the passage of a new and independent act casting the burden of paying a county debt upon another county is within the rule that when payment is provided for out of a particular fund the debtor cannot plead the statute of limitations to a suit thereon, without first showing that the particular fund has been provided.

(October 3, 1898.)

ERROR to the United States Circuit Court for the District of Idaho to review a judgment in favor of defendant in an action brought to enforce payment of county bonds. *Reversed.*

Before *Gilbert* and *Ross*, Circuit Judges, and *Hawley*, District Judge.

Statement by *Hawley*, District Judge:

This action was commenced September 30, 1897, by Frank C. Robertson, the plaintiff in error, to recover a judgment against Blaine county, Idaho, the defendant in error, for the sum of \$10,590, with interest, the amount alleged to be due on certain bonds and coupons issued by Alturas county, Idaho, under and in pursuance of an act of the legislature of the state of Idaho entitled "An Act Providing for the Erection of a Courthouse and Jail at Hailey, the County Seat of Alturas County." Act of February 8, 1883 (Laws 1882-83, p. 119). The bonds were issued May 1, 1883, and were made payable November 1, 1891. The legislature of Idaho, in 1895, passed an act entitled "An Act to Abolish the Counties of Alturas and Logan, and to Create and Organize the County of Blaine," Act of March 5, 1895 (Laws 1895, p. 31). This act provides: Section 1: "The counties of Alturas and Logan are hereby abolished, and the county of Blaine is hereby created, embracing all of the territory heretofore included within the boundary lines of said Alturas and Logan counties." Section 7: "All valid and legal in indebtedness of Alturas and Logan counties shall be assumed and paid by the county of

Blaine." Section 8: ". . . All rights of action now existing in favor of, or against, said Alturas or Logan county, may be maintained in favor of or against Blaine county." It appears from the averments of the amended complaint that the act authorizing the issuance of the bonds provided that "the board of county commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the courthouse bond tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all the taxable property of said county is hereby pledged." That said bonds and coupons were, as they respectively matured, presented for payment to the treasurer of Alturas county, while it existed, and to the treasurer of Blaine county since the creation thereof, and payment thereon demanded by the holder thereof; and that the payment thereof, or any part thereof, was refused, on the ground that there was no money in the treasury applicable to their payment. That the commissioners of Alturas county neglected and refused to levy any tax to meet the interest and principal of said bonds as they became due. That on February 7, 1889, the legislature of Idaho divided Alturas county, and from its territory formed the counties of Elmore and Logan, and gave other portions to Bingham county, provision being made for apportioning the indebtedness, except the bonded courthouse indebtedness, which was to remain the indebtedness of Alturas county. That on the 18th of March, 1895, the legislature of Idaho passed an act creating the county of Lincoln out of the territory of Blaine county, apportioning the indebtedness between said counties, the bonded courthouse indebtedness of Alturas being included as part of the indebtedness of Blaine county. Laws 1895, p. 170. And that since the creation of Lincoln county, such proceedings have been had that Blaine county has a judgment against Lincoln county for its proportion of said indebtedness, including the courthouse bonded indebtedness of Alturas county. *Blaine County v. Lincoln County* (Idaho) 52 Pac. 165. To the original complaint the defendant interposed a demurrer upon two grounds: (1) That the said complaint does not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action in the complaint is barred by the provisions of § 4052 of the Revised Statutes of the state of Idaho. This section, in prescribing the time within which suit may be brought, reads as follows: "Sec. 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing." The court sustained this demurrer. *Robertson v. Blaine County*, 85 Fed. Rep. 735. The complaint was thereafter amended. A similar demurrer was interposed thereto, and sustained,

NOTE.—For statute of limitations in respect to claim against state, see *note* to *Houston v. State* (Wis.) 42 L. R. A. on page 69. 47 L. R. A.

and judgment thereafter rendered in favor of the defendant for its costs.

Mr. Selden B. Kingsbury, for plaintiff in error:

The provision relating to the special tax and special fund, in the law authorizing the issue of the bonds here in suit, became, and is, a part of the contract between the county and the bondholders.

Von Hoffman v. Quincy, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *Bates v. Gerber*, 82 Cal. 550, 22 Pac. 1115; *Rails County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Bassett v. El Paso*, 88 Tex. 168, 30 S. W. 893; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190.

The authority to tax for the payment of municipal liabilities is in the nature of a trust; the power given becomes a trust which the donor cannot annul and the donee is bound to execute; and the separate fund to be realized from the taxes levied will constitute a special trust fund.

Morgan v. Beloit, 7 Wall. 613, 19 L. ed. 203; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *Parish Bd. of School Directors v. Shreveport*, 47 La. Ann. 1310, 17 So. 823; *Maenhaut v. New Orleans*, 2 Woods, 108, Fed. Cas. No. 8,939.

The trustee of an express trust cannot invoke the statute of limitations against the cestui que trust until he has done some act in open violation or in disaffirmance of the trust.

2 Perry, Tr. § 863, p. 511; *Lemoine v. Dunklin County*, 38 Fed. Rep. 567; *Ooster v. Murray*, 5 Johns. Ch. 522; *Lewin*, Tr. p. 580, *729; *Oliver v. Piatt*, 3 How. 411, 11 L. ed. 657; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113.

The trustee of a direct trust, when sued by the beneficiary, cannot interpose the defense of the statute of limitations.

Rush County Comrs. v. State ex rel. Hord, 103 Ind. 497, 3 N. E. 165; *State ex rel. Hord v. St. Joseph County Comrs.* 90 Ind. 359; *Board of Trustees v. Harrodsburg Educational Dist. (Ky.)* 7 S. W. 312; *Underhill v. Senora Trustees*, 17 Cal. 172; *Parish Bd. of School Directors v. Shreveport*, 47 La. Ann. 1310, 17 So. 823; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391.

Taxes such as are here under consideration "always constitute a separate fund."

State ex rel. Hudson v. Trammel (Mo.) 11 S. W. 747; *Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580, 834; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *State ex rel. Davis v. Lincoln County Comrs.* 23 Nev. 262, 45 Pac. 982; 1 Wood, Limitations of Actions, 2d ed. 363; *Underhill v. Senora Trustees*, 17 Cal. 172; *Freehill v. Chamberlain*, 65 Cal. 603, 4 Pac. 646.

The duty of providing this fund was a 47 L. R. A.

continuing one, and "until it was performed the statute of limitations would not apply."

Spaulding v. Arnold, 125 N. Y. 194, 28 N. E. 295; *Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467; *Greenough v. Welles*, 10 Cush. 571; 1 Perry, Tr. § 248, p. 330; *Wood v. Monroe County Suprs.* 50 Hun, 1, 2 N. Y. Supp. 369; *Board of Trustees v. Harrodsburg Educational Dist. (Ky.)* 7 S. W. 312; *People v. Bond*, 10 Cal. 563; *People v. Morse*, 43 Cal. 534.

The statutory provision, at least to the extent of Lincoln county's proportionate part of the debt which Blaine was liable to pay, expressly establishes a special trust fund, designates the trustee, and states the object or purpose of the trust.

People v. Bond, 10 Cal. 563; *People v. Morse*, 43 Cal. 534; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363.

Blaine became *eo instante* bound to execute the requirements of the trust.

Lewin, Tr. p. 279, *270; 2 Pom. Eq. Jur. § 1048; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *McGuire v. Linneus*, 74 Me. 344; *Newsom v. Bartholomew County Comrs.* 103 Ind. 526, 3 N. E. 163; *Rush County Comrs. v. State ex rel. Hord*, 103 Ind. 497, 3 N. E. 165.

When Blaine county was created there was legislated upon it an indebtedness.

The statute of limitations may run against a specialty, but it will begin to run not prior to the date of the creation of the specialty.

Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121; *Van Hook v. Whitlock*, 3 Paige, 409; *Custer County Comrs. v. Yellowstone County Comrs.* 6 Mont. 39, 47, 9 Pac. 586; *Presque Isle County Suprs. v. Thompson*, 22 U. S. App. 418, 61 Fed. Rep. 923, 10 C. C. A. 154; *Cheyenne County Comrs. v. Bent County Comrs.* 15 Colo. 320, 25 Pac. 508; *Whitney v. Stow*, 111 Mass. 368; *Higby v. Calaveras County*, 18 Cal. 176; *Grant County v. Lake County*, 17 Or. 453, 21 Pac. 447.

Blaine county, having come into possession of all the property, territory, and population of Alturas county, would have been bound by the obligations of Alturas county by operation of law.

1 Dill. Mun. Corp. §§ 171-173; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. ed. 896; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398.

The Idaho statute of limitations does not in terms prescribe a period of limitation for actions for relief in cases where the right of action arises by "operation of law."

Defendant having pleaded § 4052, it is confined to that section.

Thomas v. Glendinning, 13 Utah, 47, 44 Pac. 652; *Bank of San Luis Obispo v. Wick-ersham*, 99 Cal. 655, 34 Pac. 444.

When the acknowledgment and new promise were made the statute commenced anew for another statutory period on the contract debt, if no legislative debt was created.

1 Wood, Limitations of Actions, 2d ed. p. 249; *Green v. Coos Bay Wagon Road Co.* 23 Fed. Rep. 67; *Taylor v. Slater*, 16 R. L.

86, 12 Atl. 727; *Browne v. French*, 3 Tex. Civ. App. 445, 22 S. W. 581.

A county is a part of the state, and a county debt is a part of the state debt.

Hunsaker v. Borden, 5 Cal. 288, 63 Am. Dec. 130; *San Francisco v. Jones*, 20 Fed. Rep. 188; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248.

The date of this act must be taken as the time when the debt was incurred.

Massachusetts & S. Constr. Co. v. Cane Creek Twp. 45 Fed. Rep. 336; *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W. 607; *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521.

The validity of a debt of a county may be recognized by the legislature so as to avoid the operation of the statute of limitations, even after the debt has been barred.

Caldwell County v. Harbert, 68 Tex. 321, 4 S. W. 607.

The consent of Blaine county, or any active acknowledgment or recognition of the debt by it, was not necessary to make binding on it the recognition of the debt made by the legislature.

Whitney v. Stow, 111 Mass. 368.

Mr. Lyttleton Price, for defendant in error:

Whether this be called an action for debt, or given any name within the classifications of common-law actions, the cause of action is the bonds and the assumption of liability by defendant for their payment according to their terms.

The statute does not create any new action, or obligation, or cause of action. It expressly preserves and continues those "now existing," without enlargement, and confines plaintiff's rights to such as he then and theretofore enjoyed. It also prescribes plaintiff's "mode of recovery," and limits him to it.

On the face of the bonds alone, it is clear that the statute has run. The right of action accrued upon them more than six years before this suit was commenced.

There is a distinction between an action founded upon a statute creating a cause of action and a statute granting a right of action upon a cause already existing, recognized, affirmed, and its payment provided for.

Hawley, District Judge, delivered the opinion of the court:

Did the court err in sustaining defendant's demurrer? Is this action barred by the statute of limitations? The entire argument on behalf of the defendant clusters around the proposition that this is an action upon the original bonds, and not upon a debt growing out of them created at a subsequent date; that the act creating the county of Blaine simply provided that Blaine county should assume the payment of the bonded indebtedness of Alturas county; that it did not in terms create any new debt or obligation, but simply recognized the validity of the obligation created by Alturas; that there was no change as to the time when said bonds should become due; that Blaine county

agreed to pay the bonds, stepped into the shoes of Alturas county, and was to pay just as Alturas would have paid them had it lived; that it assumed all the burdens and became invested with all the rights and privileges that Alturas would have possessed if Blaine county had not been created; and that, if Alturas had continued to exist in the same condition as when the bonds were issued, it could have successfully pleaded the statute of limitations. The proposition contended for is tersely stated in his brief as follows: "If plaintiff has an action at all, it is not upon a new debt, nor a legislative debt, nor a new obligation, nor upon a specialty, nor a novation; it is the old debt of Alturas county. That county being dissolved, a new payor is created to discharge the obligation just as Alturas had it and left it."

If this contention is sustained, it necessarily follows that as the bonds became due November 1, 1891, and more than five years elapsed from that date before the action was commenced, the statute of limitations would apply. On the other hand, the plaintiff contends that the statute does not apply for various reasons, which are specifically stated by counsel as follows:

"(1) Because the duty of providing for and paying this debt was so imposed and assumed as to make the debtor county the donee of a power, and a trustee of a direct, express, and continuing trust, unaffected by the statute of limitations.

"(2) Because the act authorizing and requiring the creation of this debt provided for the levy of a special tax, and created a special fund, which tax was never levied, and which fund never contained any moneys; nor was any money ever in the treasury of the debtor county applicable to the payment of this debt.

"(3) Because of new promises; of renewal of the indebtedness; of many subsequent acknowledgments of the debt; and because of the creation of a new legislative obligation and debt upon the defendant county, based upon the original debt, and into which the original debt is merged.

"(4) Because of the new promises and acknowledgments embraced in and implied in legislative acts and legal proceedings thereunder; of the making provision for the payment of said indebtedness; of the apportioning of the same, and creating legislative debts upon other counties than the debtor county, to aid the debtor county in the payment of the same.

"(5) Because of statutory provisions requiring a new county to pay its proportionate share of any bonded indebtedness outstanding against the parent county, and requiring such payments to be used only in aid of paying such bonded indebtedness; and because of various acts, suits, and proceedings done, instituted, and undertaken by the debtor county to secure aid from other counties in obtaining funds on account of and for payment of this indebtedness.

"(6) Because of the various acts of the legislature regarding said indebtedness, re-

garding the county which created the same, regarding other counties created out of said county, regarding the funding of the indebtedness, regarding the apportionment of the indebtedness; and because of acknowledgments and promises made and necessarily implied in various suits, actions, and legal proceedings had and taken concerning said indebtedness by the defendant county, and the result of the same."

What is the character of this action? How should it be classified? Is it an action upon a contract, obligation, or liability founded upon an instrument in writing? No action could be maintained against Blaine county upon the bonds and coupons issued by Alturas county except by force of the act of the legislature approved March 5, 1895. It is by virtue of the provisions of this act that plaintiff seeks to maintain this action against defendant. The liability or obligation of Blaine county to pay the bonds and coupons issued by Alturas county did not, and could not, arise except by legislative action. Under the provision of the act organizing and creating the county of Blaine, it assumed and agreed to pay "all valid and legal indebtedness of Alturas" county; and in said act it was provided "that all rights of action now existing in favor of or against said Alturas . . . county may be maintained in favor of or against Blaine county." The bonds and coupons at that time were a part of the "valid and legal indebtedness" of Alturas county, which Blaine county agreed to pay. Its liability was then fixed and determined. The bonds and coupons issued by Alturas county constitute an important ingredient in the action, but they are not all of the case. As against Blaine county, they are but matters of inducement to the action. All these things must be taken into consideration in determining the character, cause, and nature of this action. It is not simply an action upon a contract made with, or an obligation or liability created by, Alturas county. The act abolishing Alturas county, and creating the county of Blaine, is as essential to the plaintiff's right of action as is the fact of the issuance of the bonds in the first instance by the county of Alturas. The cause of action is the bonds issued by Alturas county, and the statute which fixes the liability of the county of Blaine for their payment. In order to state his cause of action, the plaintiff was required to plead, and, if the case was tried, would be compelled to prove, both the issuance of the bonds and the statute whereby Blaine county agreed to pay them. Neither pleaded alone would constitute a cause of action in favor of plaintiff against defendant. It is the nature of the whole cause of action which determines the applicability of the statute of limitations.

So far as Blaine county is concerned, the bonds are but the evidence of the valid and legal indebtedness of Alturas county, which it agreed to pay. The debt was originally to be paid by Alturas county. Blaine county, except for the provisions of the statute referred to, could not be held answerable for the debt; but, by the act, new obligations

were created, and the manner of payment was changed. To recapitulate: The statute created a debt, duty, or obligation against Blaine county, to recover a portion of which this action is brought; but, in order to show a cause of action against Blaine county, it devolved upon the plaintiff to allege the issuance of the bonds by Alturas county, and their nonpayment, because the existence of such facts was necessary in order to show that they constituted a part of the valid and legal indebtedness of Alturas county, which Blaine county, by virtue of the provisions of the statute, became liable to pay. This debt, or obligation, or whatever it may be called, is in the nature of a specialty, and, in our opinion, is not barred by the provisions of § 4052 of the Revised Statutes of Idaho.

The legal principle which controls this question is not new. It is found in leading text books, and in a great variety of decided cases,—in relation to the jurisdiction of courts; to the different character and causes of action, as well as to the construction of the statute of King James (21 Jac. I. chap. 16) and to different state statutes of limitation. It has been applied to actions of debt created partly by contract and partly by statute, as well as to debts created solely by statute. The cases, although different in their facts, are all more or less akin in principle to the present case, and the general trend of all analogous cases is substantially in the same vein, and is in accord with the views we have expressed. *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121; *Van Hook v. Whitlock*, 3 Paige, 409; *Cowenhoven v. Middlesex County Freeholders*, 44 N. J. L. 232; *State v. Baker County*, 24 Or. 141, 145, 33 Pac. 530; *Pease v. Howard*, 14 Johns. 479; *Lane v. Morris*, 10 Ga. 162; *Higby v. Calaveras County*, 18 Cal. 176, 179; *Andrews v. Bacon*, 38 Fed. Rep. 777; *Barling v. Bank of British N. A.* 7 U. S. App. 194, 50 Fed. Rep. 260, 262, 1 C. C. A. 510; *Richards v. Bickley*, 13 Serg. & R. 395, 399; *Jordan v. Robinson*, 15 Me. 167; *Cork & B. R. Co. v. Goode*, 13 C. B. 826; 1 Wood, Limitations of Actions, §§ 19, 38, 39, 40a; Angell, Limitations of Actions, 79, 80.

In 1 Wood, Limitations of Actions, § 39, it is said that "the test by which to determine whether a statute creates a specialty debt or not is whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute; . . . but, if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute."

Apply this test to the present case. Independently of the statute, the law does not imply any obligation upon Blaine county to pay the debt; nor, independently of the statute, could any right of action be maintained against Blaine county. But the statute does

create the duty or obligation on Blaine county to pay the same, and "the obligation thereby imposed is a specialty," and is not within the provisions of the statute of limitations pleaded herein.

Cork & B. R. Co. v. Goode was an action of debt by a railway company against one of its members, for calls, under the authority of an act of Parliament; and the plea was that such causes of action did not accrue within six years; and this plea was confronted by a demurrer. The argument in the case on the one side went upon the ground that the liability of the defendant, which gave the right of action, was the creature of the statute, while in opposition it was insisted that the sole liability was founded upon an implied contract. Jervis, Ch. J., said: "I think it is an action upon statute. . . . But for the act of Parliament, no action could be brought by the company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute, and the plea which relies upon the six-years' limitation is no answer to it." Maule, J., said: "A declaration in debt upon a statute is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability are facts *dehors* the statute: that must constantly arise in actions for liabilities arising out of statutes. . . . The allegation in the plea that the action is upon contracts without specialty is a false allegation of a matter of law. . . . I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty." The other judges concurred in this view.

In *Lane v. Morris*, *supra*, a stockholder pleaded the statute of limitations in an action brought against him upon his liability for the debts of a corporation. The court held that the cause of action was founded on the statute creating his liability, and numerous authorities were there cited "to sustain the position that an action of debt, founded upon a statutory liability, has never been considered as being within the statute of limitations of 21 Jac. I. chap. 16, of England, or of the like statutes in this country, but that such statutory liability has always been regarded in the nature of a specialty." And in the course of the opinion the court said: "There can be no doubt that the liability of the defendant, as a stockholder, for the ultimate redemption of the bills of the bank, is created by the 11th section of the statute incorporating the Planters' & Mechanics' Bank of Columbus. Without that section in the act, he would not be liable to the plaintiff as a holder of the bills of the bank."

In *Bullard v. Bell*, *supra*, Mr. Justice Story held that the statute of New Hampshire did not apply as a bar to an action of debt against a stockholder of a bank under the provisions of its charter imposing a personal responsibility upon the shareholders for the notes of the institution in case they should be dishonored. There, as here, the

action was brought upon a liability created, not merely by the original parties, but by the express terms of the statute. In the course of the opinion the learned justice said: "I agree at once to the position that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except for some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. . . . Whatever is enjoined by a statute to be done creates a duty on the party, which he is bound to perform. The whole theory and practice of political and civil obligations rest upon this principle. When, therefore, a statute declares that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral, or not, but it is not a subject-matter of inquiry. . . . Here, then, the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. . . . The law has created a direct liability, a liability as direct and cogent as though the party had bound himself under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty."

In *Van Hook v. Whitlock*, *supra*, which was a suit against the stockholders for the debt of the corporation, the court, in discussing the question as to the statute of limitations, among other things, said: "If the debts were actually due from the corporation at the time of its dissolution, it can make no difference whether they were due from the corporation by judgments, or specialty, or only by simple contract. The right of action against the stockholders is founded upon the statute; and the form of the action against them must be the same, whatever may be the nature of the original indebtedness of the company. If an action at law is brought against the stockholders, it must be either an action of debt or assumpsit founded upon their liability created by the statute."

In *Barling v. Bank of British N. A.* it was contended that the action was founded upon the assignment of certain bills of exchange; but the court held that it was founded on the liability created by § 322 of the Civil Code of California (2 Deering, Anno. Codes & Stat.) which provides for the individual liability of the stockholders for the debts of a corporation. Deady, J., in delivering the opinion of the court, said: "But the present action is not really founded on an assignment of the bills, but on the liability created by said § 322 of the Civil Code. In this action the assignment of the bills of exchange is a mere ingredient or inducement. By reason or means thereof the plaintiff became and was a creditor of the Alaska Improvement Company. In this condition the statute operated, and gave it a right of action against the defendant, as stockholders of the corporation, for the amount of its claim

against the latter. This was an original right, then created, which did not exist before or otherwise."

In *Angell on Limitations of Actions*, 6th ed. § 80, p. 76, it is said:

"That where the liability of the defendant is created, not merely by the act of the parties, but by the positive requisitions of a statute, the plaintiff is not barred."

Under the law of Idaho, the statute of limitations may run against a specialty. Section 4054, p. 437, Rev. Stat. Idaho, reads as follows: "Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture." But this action was commenced within less than three years after the act making Blaine county liable for the indebtedness of Alturas county was passed. An action against a county upon which the legislature has imposed a duty of paying the indebtedness of the county out of which territory it was carved does not stand precisely in the same condition as one against an individual who assumes and agrees to pay the debt of another person. The liability in the case against the county is created by a statute, and the other by the voluntary act of the individual. It is true that the right to sue or be sued attaches, under the statute of most of the states, to a county the same as to an individual. But it is not true that debts created by statute are placed upon the same plane as debts created by a contract. Numerous illustrations of this principle might be given; for instance, the constitutional provision that no county shall create any debts or liabilities which shall exceed a specified sum does not necessarily imply that all debts and liabilities against the county over and above that sum are in violation of such provision. Counties, as is well known, do not create all the debts and liabilities they are under. Debts and liabilities are, ordinarily, imposed upon them by law. A county is often said to be a mere agency of the state government,—a function through which the state administers its affairs; and it frequently has but little, if any, option in the creation of debts and liabilities against it. It is for these or similar reasons that courts have generally held that this provision of the Constitution only applies to such debts and liabilities as the county in its corporate capacity and character, like an individual, voluntarily creates.

In whatever light this case may be viewed, it must always be admitted that the liability of Blaine county to pay the valid indebtedness of Alturas county, which existed at the time Blaine county was organized, is a liability created by the statute. No twisting of words, no reference to the facts, no analogy drawn from any of the decided cases, will permit any denial of this proposition. Concede, for the purpose of the argument, that, if Alturas county had continued to exist, it could have successfully pleaded the provision of the statute of limitation pleaded in this case; it does not follow that Blaine county could plead it be-

cause its liability is fixed definitely by the statute, and has nothing to do with the special character of the indebtedness of Alturas county. It is wholly immaterial whether plaintiff's claim was a judgment, an ordinary indebtedness for services rendered or supplies furnished, or a "contract, obligation, or liability founded upon an instrument in writing;" the liability of the defendant in either event is created by the statute, and the limitation, and the only limitation which the defendant can plead, must begin at or after that date, because that is the date when its liability first began.

In *Custer County Comrs. v. Yellowstone County Comrs.* 6 Mont. 39, 47, 9 Pac. 586, 590, which was a case growing out of a legislative act creating the county of Yellowstone from what had formerly been Custer county and a small portion of Gallatin county, the act provided that the indebtedness of the county of Custer existing at that time should be apportioned between the two counties by the commissioners' act February 26, 1883, Mont. Laws 1883, p. 119. In passing upon certain questions involved therein, the court said: "The indebtedness, if any, is one wholly created by the statute. Without a provision for the existence of such indebtedness by the respondent, the liability for the whole of the indebtedness of Custer county, as it existed immediately before the creation of Yellowstone county, would rest upon the appellant. . . . When, by the terms of this act, did this indebtedness arise? Section 2 of the act provides that the indebtedness of the county of Custer, as the same shall exist on the 1st day of March, 1883, shall be apportioned between the said county and the county of Yellowstone, and then the provisions for the manner of the apportionment follow. This was not merely the recognition of a moral right in Custer county, and a corresponding moral obligation upon Yellowstone county in respect to this indebtedness, to be afterwards erected into a legal right and corresponding legal obligation by the action of the county commissioners of both counties at their meeting on the first Monday of March, 1883, as provided in § 3; but it was then and there the creation upon the 1st day of March, 1883, of a legal right in Custer county to have paid to it, and a legal obligation upon Yellowstone county to pay to the appellant, in the manner provided in the act, its proportion of the indebtedness as it existed upon the 3d of March, 1883."

See also *Cheyenne County Comrs. v. Bent County Comrs.* 15 Colo. 320, 329, 25 Pac. 508; *Canyon County v. Ada County* (Idaho) 51 Pac. 748; *People v. Hulbert*, 71 Cal. 72, 12 Pac. 43.

The views already expressed are conclusive upon the questions involved herein. But there is another principle which we also believe to be applicable to this case which leads to the same result. The bonds and coupons herein sued upon were, by the statute authorizing their issuance, payable out of a particular fund, which was never provided for by Alturas county. The provi-

sions of this statute, imposed a continuing duty (*Elmore County v. Alturas County* [Idaho] 37 Pac. 349), and became a part of the contract between Alturas county and its bondholders. *Von Hoffman v. Quincy*, 4 Wall. 535, 554, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403, 409; *Mobile v. Watson*, 116 U. S. 289, 305, 29 L. ed. 620, 626, 6 Sup. Ct. Rep. 308; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Gasquet v. City Schools Bd. of Directors*, 45 La. Ann. 342, 12 So. 506; *Rassett v. El Paso*, 88 Tex. 168, 30 S. W. 893; *Maenhaut v. New Orleans*, 2 Woods, 108, Fed. Cas. No. 8,939, and authorities there cited; *Cooley*, Const. Lim. 355. The facts alleged in the complaint bring this case within the general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without first showing that the particular fund has been provided, or that the particular method prescribed by statute has been complied with. It is true that, in the cases cited by plaintiff's counsel where this principle is announced, there was either an amendment to the original act, or a new law providing a different method of levying and collecting the necessary tax to create a fund out of which the bonds or coupons should be paid.

Defendant, in this connection, contends that, in the cases cited upon this point, the obligation was created by the statute, while in this case "only the right of action is given by statute." It would, it seems to us, be more accurate to say that the statute not only gives the right of action against Blaine county, but creates an obligation upon Blaine county to pay the debt. In so far as the principle of law is involved, what difference does it make whether an amendment is made to the law, as to the levy and collection of a special tax to pay the indebtedness, or a new and independent act is passed which casts the burden of payment upon another county? In both cases the right of action might be said to be upon the bonds; but in both a new obligation or liability is created, either as to the indebtedness or the method of collecting the same. In neither can the debt be paid unless provision is made for a fund applicable to its payment. A well-settled principle of law should not be cast aside simply because the case in hand is not "on all fours" with the decided cases in which it has been applied. Facts often change. The principle of law remains the same. It is unusual or rare that cases are found precisely alike in the facts; but it is quite common to find a principle of law applicable by analogy and reason to varied conditions as to the facts.

The general principle referred to is clearly stated in *Lincoln County v. Luning*, 133 U. S. 529, 532, 33 L. ed. 766, 767, 10 Sup. Ct. Rep. 363, 364, where the court said: "The remaining question arises on the statute of limitations. By the general limitation law of the state, some of the coupons were barred; but there has been this special legislation in reference to these coupons. 47 L. R. A.

The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. Nev. Stat. 1877, 46. The coupons, which by the general limitation law would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877; and, from the time of their registration to the commencement of this suit, there was no money in the treasury applicable to their payment. This act providing for registration and for payment in a particular order was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

In support of these views, the court cites *Underhill v. Sonora Trustees*, 17 Cal. 172; *Freehill v. Chamberlain*, 65 Cal. 603, 4 Pac. 646.

In *Freehill v. Chamberlain* it was argued that as the coupons in question matured, according to their face, on the 1st of January, 1872, the statute of limitations barred any proceeding on the part of petitioner to enforce payment; that, if the proper amount of taxes had not been levied in any one year, such levy should have been compelled by mandamus; that, if any step necessary to have the proper funds in the treasury had been omitted, a proceeding to compel such step was the proper course. The court, in reply to this contention, said:

"We do not understand this to be the law as applicable to this case. According to the act of April 25, 1863, . . . no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons according to the statute under which they were issued; and, by omitting to perform such duty, the city could not create the defense of the statute of limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run. Not until that period would the petitioner have any right of action or proceeding against the

treasurer. The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because if, by concert of action, each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result." See also *State ex rel. Davis v. Lincoln County Comrs.* 23 Nev. 262, 45 Pac. 982; *Sawyer v. Colgan*, 102 Cal. 283, 292, 36 Pac. 580, 834; *Spaulding v. Arnold*, 125 N. Y. 194, 198, 26 N. E. 295; *Gasquet v. City Schools Bd. of Directors*, 45 La. Ann. 342, 12 So. 506; *King Iron Bridge & Mfg. Co. v. Otoe County*, 124 U. S. 459, 31 L. ed. 514, 8 Sup. Ct. Rep. 582.

Alturas county was not at the time of its dissolution in such a condition that it could have pleaded the general statute of limitations herein relied upon.

We do not deem it necessary to examine any of the other grounds discussed by the plaintiff in error. After a careful consideration of all the questions involved herein, we are of opinion that the section of the statute of limitations pleaded and relied upon by defendant does not apply, and was not intended by the legislature to apply to a case like the present. The court erred in sustaining the demurrer.

The judgment of the Circuit Court is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

CALIFORNIA SUPREME COURT.

Re Bernard WARD.

(.....Cal.....)

Bail pending appeal from a conviction may be allowed because of the extraordinary character of the circumstances, on proof by physicians, one of whom is selected by the district attorney, that the prisoner is suffering from asthma and trouble with his lungs to such an extent that his continued incarceration in the county jail in the physical conditions existing there will be fraught with serious impending danger to his health, and will probably be fatal if he is left there three months or more.

(January 29, 1900.)

PETITION for a writ of habeas corpus to obtain the release of petitioner on bail from the custody of the warden of the state's prison, to which he had been committed upon conviction of embezzlement from which he had taken an appeal. *Granted.*

The facts are stated in the opinion.

Mr. F. M. Gowan for petitioner.

Per Curiam:

The petitioner was on the 2d day of December, 1899, convicted of a felony in the superior court of the city and county of San Francisco, to wit, of embezzlement. A judgment was rendered against him that he be imprisoned in the state's prison at San Quentin for the term of seven years. From this judgment he has taken an appeal and a certificate of probable cause was granted him by the judge of the court in which he was convicted. He made application to said court to be allowed to give bail pending the appeal, and the application was by said court denied. He is now before this court on habeas corpus for the purpose of being allowed to give such bail. Upon the hear-

ing he produced the certificates and affidavits of three respectable physicians, in all of which it is stated that he is suffering with chronic catarrh and asthma, and that confinement in jail would be injurious to his health, and in one of which it is stated that "confinement in jail is injurious to his health and endangers his life." At the hearing there was the additional testimony of Dr. James H. O'Connor, a reputable physician, who testified very fully as to the condition of the petitioner, and stated very positively that, from his frequent examinations of the petitioner, his opinion was that confinement in the jail under the conditions there existing would, if continued two or three months, result fatally. At this hearing, which was on January 13, 1900, it was stated by an attorney who represented the district attorney's office that petitioner and his counsel had refused to allow any physician selected by the district attorney to examine petitioner. As this statement was not denied (the main counsel for the petitioner being absent), it was suggested by the court that the case would be continued to allow an examination of the petitioner by some physician selected by the district attorney. Afterwards a stipulation was entered into by the district attorney and the attorney for petitioner that Dr. J. G. Morrissey was a physician satisfactory to both parties, and that said physician "may make and file his affidavits herein showing the physical condition of Bernard Ward, petitioner herein." Such an examination was afterwards made by Dr. Morrissey, and his affidavit has this day been presented to the court, and is as follows: "I am now, and during all the times hereinafter mentioned was, the city physician in and for the city and county of San Francisco, state of California. I made a physical examination of Bernard Ward, the defendant in the above-entitled matter, at the county jail in the said city and county, on the 19th day of January, 1900. I find said defendant to be suffering from asthma,

NOTE.—As to prisoner's right of action for imprisonment in unhealthful or unfit prison, see *Shields v. Durham* (N. C.) 86 L. R. A. 293, and note.

47 L. R. A.

and his lungs are involved; and the physical conditions now existing at said county jail, where said Ward is now incarcerated, are such that further confinement of said Ward at said jail is fraught with serious impending danger to his health. The balance of chances is that, if said Ward shall continue to be confined for a period of three months or more in said county jail, a fatal result will ensue."

We think that in this case circumstances of an extraordinary character appear, within the meaning of former decisions of this court, and that it is a proper exercise of discretion to admit petitioner to bail pending the appeal. *It is therefore ordered that the petitioner be admitted to bail*, pending his appeal, in the sum of \$7,000, the undertaking to be approved by the judge of the superior court in which he was convicted, and that upon the giving of such an undertaking, approved by said judge, the petitioner be discharged from custody.

Henry GRUNDEL, Admr., etc., of Frank Grundel, Deceased, Appt.,

v.

UNION IRON WORKS *et al.*, Respts.

(.....Cal.....)

Admiralty proceedings in a Federal court for limitation of liability under the United States laws, instituted by ship-owners who have been sued for damages in a state court with other persons as joint tortfeasors, but who obtain an injunction from the Federal court against further proceedings against them in the state court, will not bar the prosecution of the action for damages against the other defendants in the state court while the admiralty proceedings are pending and plaintiff has not actually received satisfaction, or the equivalent of satisfaction, in any amount.

(January 9, 1900.)

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in a proceeding to recover damages for the alleged negligent killing of plaintiff's intestate, in which a recovery was denied because of proceedings in the Federal courts on behalf of certain of defendants to limit their liability. *Reversed.*

The facts are stated in the opinion.

Messrs. Sullivan & Sullivan, for appellant:

The liability of joint tortfeasors is joint and several, and redress may be had against one or more or all, and the claim may be enforced until once satisfied.

2 Black, Judgm. § 777; *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386; *Cooley*, Torts, pp. 136, 137; *Nichols v. Dunphy*, 58 Cal. 605; *Dawson v. Schloss*, 93 Cal. 195, 29 Pac. 31.

NOTE.—For exclusiveness of admiralty jurisdiction, see also *Braithwaite v. Jordan* (N. D.) 81 L. R. A. 238.

47 L. R. A.

Where joint tortfeasors are jointly sued, recovery may be had as against some, though denied as to others.

Dawson v. Schloss, 93 Cal. 199, 29 Pac. 31; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Urton v. Price*, 57 Cal. 270; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, 18 Cal. 402; *Bank of Stockton v. Howland*, 42 Cal. 129; *Nichols v. Dunphy*, 58 Cal. 605.

Messrs. Wilson & Wilson and Andros & Frank for respondents.

Van Dyke, J., delivered the opinion of the court:

The plaintiff brings this action under § 377 of the Code of Civil Procedure of this state, as administrator of the estate of Frank Grundel, deceased, to recover damages on account of the death of the latter, occasioned by the wrongful acts of the defendants. Eighteen defendants were named in the complaint, five of whom are fictitious, and no person appeared or answered in their names. The corporation defendant answered separately, and the twelve other defendants, represented by other attorneys, also appeared and answered. Nine of these twelve subsequently filed a supplemental answer, setting forth that they were the owners of the schooner *Gracie S.* on or about which the injury occurred, and had made application in the United States district court of the northern district of California for limitation of liability under the provisions of the Revised Statutes of the United States in reference to American merchant marine, and that upon filing their petition in said court a monition was issued in the usual form, and served upon the plaintiff and his attorneys, and all persons claiming damages resulting from the accident mentioned in the plaintiff's complaint, and the said court enjoined plaintiff from any further proceedings in the suit in the superior court against the nine defendants claiming to be the owners of said vessel. An appraisal of the schooner was made, the value being fixed at \$12,500. The plaintiff filed his answer in the United States district court to the petition of said nine defendants, but said cause has never been tried in the admiralty court, and is still pending.

The plaintiff made no further attempt to proceed in the superior court against the alleged owners of the vessel, but as to the other defendants who had appeared, to wit the Union Iron Works, Barber, Castle, and Swanson, the plaintiff elected to proceed to trial in the said court. The case was regularly on the calendar of the superior court for trial December 2, 1897; whereupon the defendant the Union Iron Works moved the court to dismiss the action as to it, on the ground that nine of the defendants had instituted proceedings in the Federal court for limitation of liability, and that said defendant Union Iron Works was sued as a joint tortfeasor with said nine defendants in whose behalf the restraining order had been issued against the plaintiff from proceeding to trial. The court took the motion under

advisement, and the trial of the action was continued till April 4, 1898, at which time plaintiff endeavored to proceed with the trial as to said defendants other than the nine who were the owners of said vessel. The Union Iron Works thereupon renewed its motion to dismiss the action upon the grounds stated, and said defendants Barber, Castle, and Swanson, also on the same grounds, moved to dismiss the action. The court granted the motion of said four defendants, and a judgment of dismissal was accordingly entered. The appeal is from this judgment of dismissal, on a bill of exceptions.

The question presented on the appeal is whether the plaintiff, with a cause of action alleged in the complaint to be for \$50,000 damages, is barred from recovery of a proper measure of damages, as against the respondents herein, in consequence of the proceedings in the Federal court by the nine defendants, the owners of said vessel, in which their liability is limited to the appraised value of said vessel. The plaintiff has not actually received satisfaction in any amount, nor what in law is deemed the equivalent of satisfaction. The law as to the liability of joint tortfeasors is thus stated by Black on Judgments: "The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently a judgment recovered against one of two joint tortfeasors, remaining unsatisfied, is no bar to an action against the other for the same tort." 2 Black, Judgm. § 777. Judge Cooley, in his work on Torts, 2d ed. p. 159, says: "The rule laid down by that eminent jurist, Kent, in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, and which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is received. . . . It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." In *Dawson v. Schloss*, 93 Cal. 199, 29 Pac. 31, the plaintiff had recovered a judgment in the sum of \$5,000 against Schloss and Hinkle in an action for mali-

cious prosecution. A new trial was granted as to defendant Schloss, which resulted in a verdict and judgment against Schloss for \$3,000, and he appealed from the judgment. At the time of the second trial, the original judgment for \$5,000 against Hinkle was of record and unsatisfied. It was contended by the appellant that no judgment should have been rendered against Schloss on the new trial, so long as the original judgment existed against Hinkle; that, while separate suits may be brought against each of several joint tortfeasors, yet, if the defendants are sued jointly, there can be but one verdict and judgment. This court answered this contention that "such is not the prevailing rule in the United States," quoting from Judge Cooley the above-cited paragraph. The court, continuing, says: "There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon that judgment." *Nichols v. Dunphy*, 58 Cal. 605, was an action in tort. A judgment had been obtained against defendants. One of the defendants appealed, and secured a reversal of the judgment. Thereupon the other defendant, against whom execution had been taken out, moved for an order quashing the execution. That motion was granted, on the theory that there could not be a several judgment when the action had been joint. Discussing the action of the court below, this court says: "We think the court erred in quashing the execution against Carmen. The judgment against her was unaffected by the appeal of her codefendant and the subsequent proceedings thereon." In *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 4, 386, it is said: "If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tortfeasors, and may, at his election, sue them individually or together." In case one of the wrongdoers has become bankrupt or insolvent, the effect as to him would be to limit the liability to the available assets of his estate, which might be merely nominal. His bankruptcy proceedings, however, would not have the effect of discharging the solvent wrongdoers. Nothing short of satisfaction in some form constitutes a bar in a proceeding like the present.

The judgment is reversed, and the cause remanded.

We concur: **Harrison, J.; Garoutte, J.**

IOWA SUPREME COURT.

Chauncey J. BLAIR, *Appt.*,
v.

C. A. OSTRANDER *et al.*

SAME, *Appt.*,
v.

Thomas EARLEY *et al.*

(.....Iowa.....)

1. The restriction on the lien of judgments of Federal courts, declared by Code 1873, § 2872, as amended by act 1878, chap. 120, which provided that such liens should extend only to the county in which the judgment was rendered and counties in which a copy thereof should be filed, was ineffectual prior to the act of Congress of August 1, 1888, which authorized such legislation by the

states; but such judgments had operation throughout the district in which the court had jurisdiction.

2. The re-enactment of a state statute which was ineffectual when passed, because it attempted to regulate the lien of judgments of Federal courts without any authority to do so, is not necessary in order to make the statute operative, after Congress has removed the obstacle to such state legislation, or conferred authority for it.

(October 10, 1890.)

APPEALS by plaintiff from judgments of the District Court for Adair County dismissing petitions filed to redeem certain real estate from sheriff's sales and for an accounting. *Affirmed.*

The facts are stated in the opinion.

NOTE.—Lien of judgment of Federal court.

- I. Similarity of liens of Federal judgments to those of judgments in state courts.
- II. Derivation of liens.
- III. Territorial extent of liens.
 - a. Generally.
 - b. As limited by state recording acts.
- IV. Time of attaching.
- V. Statutes of limitation.
- VI. Suspending the lien.
- VII. Judgments rendered in another state.
- VIII. Priority of judgment in favor of United States.
- IX. Decree in admiralty.
- I. Similarity of liens of Federal judgments to those of judgments in state courts.

The lien of a Federal judgment differs in different states. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

Judgments rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of the state courts are made liens by the law of the state. *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Baker v. Morton*, 12 Wall. 150, 20 L. ed. 262; *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924.

And a judgment in the United States court is as much a lien as a judgment of a state court. Judgments in that court being matters of record, which parties are as much bound to notice as they are judgments of the state court, it follows that a purchaser at a sheriff's sale under a younger judgment would be a purchaser with notice of a prior judgment of the United States court. *Andrews v. Doe ex dem. Wilkes*, 6 How. (Miss.) 554, 38 Am. Dec. 450.

A judgment in the Federal court creates only a general lien, and the judgment creditor acquires thereby no higher or better right to the property than the debtor himself had, unless he can show fraud, or, in other words, it does not attach to the mere legal title to the exclusion of a prior equitable title. *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134.

"The process, both mesne and final, in the district and circuit court of the United States, being conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends, also, upon the state law 47 L. R. A.

where Congress has not legislated upon the subject." *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007. It was held that under the Mississippi law a judgment obtained against an administrator after the estate had been declared insolvent was not a prior lien.

In *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319, it was said that under act of Congress, May 19, 1828, 4 Stat. at L. 281, chap. 68, § 2, providing that the right of imparance is made to depend in certain cases upon state laws, where judgments are a lien upon the property of the defendant, and where by the laws of the state defendants are entitled in the courts thereof to an imparance of one term or more. It is the intention of Congress to prevent a creditor suing in the Federal courts to obtain an advantage over another suing in the state courts.

The lien of a Federal judgment continues notwithstanding successive levies of executions thereunder, on several tracts of land, as against an intervening mortgage where the levies fail to satisfy the debt under Arkansas statute entitled, "Judgment and Decrees," § 4 providing that judgments and decrees rendered in the circuit court are a lien on the real estate of the person against whom they are rendered situated in the county in which the court is held, and § 5, that liens commence on the day of the rendition of the judgment, and continue for three years subject to be revived, and by § 6, that a sale of the land under a junior judgment will pass the title of the defendant subject to the lien of all prior judgments and liens then in force. *Trappall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

In regard to liens of judgments, as in all other matters relating to the practice and proceedings for obtaining and enforcing judgments in the Federal courts, it has always been the policy of Congress to conform the processes in the Federal courts to those of the state courts. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

The lien of judgments in the Federal court is a rule of property. *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Clements v. Berry*, 11 How. 411, 13 L. ed. 750; *United States v. Morrison*, 4 Pet. 124, 7 L. ed. 804; *Lombard v. Bayard*, 1 Wall. Jr. 106, Fed. Cas. No. 8,469; *Woodley v. Gilliam*, 67 N. C. 237; *Tarpley v. Hamer*, 9 Smedes & M. 310; *Morris's Estate*, 6 Phila. 134.

So, under the judiciary act of 1789, § 34, providing that the laws of the several states shall be regarded as rules of decision at common

Mr. H. E. Long, for appellant:

There being no Federal statute on the subject prior to August 1, 1888, chapter 129 of the Acts of the 17th General Assembly of Iowa, was inoperative and void in so far as it referred to judgments obtained in the Federal courts sitting in this state.

If we had no valid state law on the subject then there was no law to which the act of Congress could apply until October 1, 1897. This left our judgment a lien upon the land in question.

A state legislature cannot pass any law binding upon the courts of the United States, or in any manner affect or change judgments rendered therein, or affect the liens of such judgments.

Carroll v. Watkins, 1 Abb. (U. S.) 474,

law in courts of the United States, the Federal courts have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments as far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase. *Lombard v. Bayard*, 11 Wall. Jr. 196, Fed. Cas. No. 8,469; *Woodley v. Gilliam*, 67 N. C. 237.

And the United States courts have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments so far as the same are applicable, treating them as rules relating to or affecting real property and its transmission, whether by descent or purchase. *Morris' Estate*, 6 Phila. 184.

A judgment does not bind land in Kentucky, and the lien attaches only from the delivery of an execution to the sheriff. *Bank of United States v. Tyler*, 4 Pet. 366, 7 L. ed. 888.

And a sale of land by a sheriff under a judgment from the state court divested the lien of a prior judgment of the Federal court, under Pa. act 1705, § 4 (1 Smith, 59), providing that all the land sold by the sheriff shall be held and enjoyed by the purchaser as fully and for such estate as he for whose debt the same shall be sold might, could, or ought to do before the taking thereof in execution. *Thompson v. Phillips*, 1 Baldw. 246, Fed. Cas. No. 18,974.

This was following the construction placed on this act by the state supreme court.

II. Derivation of Liens.

The lien of Federal judgments depends on the adoption by act of Congress of the procedure in a state, whether the lien in state courts exists by right to a writ of *elegit* or by virtue of the state statute. The state lien law existing at the date of the act of Congress is the one adopted, without regard to subsequent repeal or amendments, even though the judgment in question is not rendered until after the repeal of the state statute. Prior to act of Congress 1888 there was no direct legislation on the part of Congress, but liens were maintained under the judiciary acts 1789, 1792, process act 1828, and subsequent acts. The expression is sometimes found in the cases that such liens depend on state laws, but the lien is by virtue of acts of Congress giving the same effect to Federal process as is given by state law to process of state courts. State legislation cannot alter or impair the lien of a Federal judgment.

Since the passage of the judiciary act in 1789, in the absence of a state statute giving a lien to judgments of state courts the lien of a Federal judgment depends on the right in that court to take out an *elegit*. *United States v. Morrison*, 4 Pet. 126, 7 L. ed. 804; *Bank of United*

Fed. Cas. No. 2,457; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. ed. 264; *Ward v. Chamberlain*, 2 Black. 430, 17 L. ed. 319; *Beers v. Haughton*, 9 Pet. 330, 9 L. ed. 146; *Doyle v. Wade*, 23 Fla. 90, 1 So. 516; *McCracken v. Haycard*, 2 How. 608, 11 L. ed. 397.

Chapter 129 of the Acts of the 17th General Assembly was invalid as to judgments of the Federal courts, because said chapter impaired the obligations of contracts entered into prior to the passage of chapter 729 of the Acts of the 50th Congress, passed August 1, 1888.

The obligation of a contract is the law which binds the parties to perform their agreements.

States v. Winston, 2 Brock. 252, Fed. Cas. No. 944; *Burton v. Smith*, 13 Pet. 464, 10 L. ed. 248.

And in *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340, it was said that this was the rule of common law,—citing *Morsell v. First Nat. Bank*, 91 U. S. 357, 23 L. ed. 436; *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818.

The principal acts of Congress affecting this question are:

Judiciary act, September 24, 1789 (1 Stat. at L. 92, chap. 20, § 34), Rev. Stat. 721, providing that the laws of the several states, with certain exceptions, should be regarded as rules of decisions in trials at common law in courts of the United States in cases where they applied, and that the forms of writs and executions and modes of process in the circuit and district courts in suits at common law should be the same in each state respectively as in the supreme court of the same.

Act May 8, 1792, 1 Stat. at L. 275, chap. 30, continuing these forms and modes of proceedings as then in use in the courts of the United States, subject to such alterations as the said courts should deem expedient, or to such regulations as the Supreme Court of the United States should by rule prescribe.

Process act May 19, 1828 (4 Stat. at L. 278, chap. 68), Rev. Stat. § 913, with similar provisions and declaring that it shall be in the power of the courts so far to alter final process therein as to conform the same to any change made by the state legislatures for the state courts.

Act July 4, 1840 (5 Stat. at L. 392, 393, chap. 43), Rev. Stat. 967, providing that the judgments or decrees rendered in a circuit or district court within any state cease to be liens on real estate in the same manner and at like periods as the judgments and decrees of such state cease by the law to be liens thereon.

Act August 1, 1888 (25 Stat. at L. 357, chap. 729), providing that judgments in the Federal courts shall be liens to the same extent as if rendered in courts of the state, and that where the state laws make provision for recording Federal judgments the same shall be so recorded.

The lien of Federal judgments exists solely by force of process acts 1789, 1792. *McCullough v. Colby*, 5 Bosw. 492.

And depend on acts of Congress 1789, 1792, 1828, 1840, *supra*, and the rules of Federal courts. *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

And depend on acts of Congress adopting the state laws. *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145; *Ward v. Chamberlain*, 2 Black. 430, 17 L. ed. 319; *Ross v. Duval*, 13 Pet. 45, 10 L.

Sutherland, Stat. Constr. § 471, p. 613; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

A contract valid in its inception cannot be made invalid, its construction changed, or the remedy thereon taken away or materially impaired by state legislation.

Green v. Biddle, 8 Wheat. 92-103, 5 L. ed. 570, 572; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Bronson v. Kinzie*, 1 How. 317, 11 L. ed. 145; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *White v. Hart*, 13 Wall. 647, 20 L. ed. 686; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

ed. 51; *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253.

The lien laws of the state existing at the date of the passage of the act of Congress adopting forms of state proceedings are the ones that apply to judgments of the Federal courts rendered after the act of Congress was passed. *Ross v. Duval*, 13 Pet. 45, 10 L. ed. 51; *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924; *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *Myers v. Tyson*, 13 Blatchf. 242, Fed. Cas. No. 9,995; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134, Citing *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Bayard v. Lombard*, 9 How. 530, 18 L. ed. 245; *Williams v. Benedict*, 8 How. 113, 12 L. ed. 1009.

An exception to this proposition should be noticed, since the act of Congress of 1828 authorizes Federal judgments to be recorded in various counties where the state statute provides for such recording. A subsequent state statute providing for such recording will then apply to a Federal judgment rendered subsequently thereto. See *Territorial extent of lien*, subdiv. b.

So, the acts of Congress 1789, 1792, *supra*, adopted the execution laws of the states existing in 1789. *Ross v. Duval*, 13 Pet. 45, 10 L. ed. 51; *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924.

The act of Congress May 19, 1828 (4 Stat. at L. 278, § 1), *supra*, adopted the state laws existing at that date in regard to final process. *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818.

And the state law as it existed in 1840, *supra*, was adopted by the act of Congress July 4, 1840. *Myers v. Tyson*, 13 Blatchf. 242, Fed. Cas. No. 9,995.

In *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422, it was held that the Virginia law of March, 1872, abolishes the writ of elegit. *United States Rev. Stat.* § 919, giving the same effect to remedies on judgments of the United States courts as were then (1874) given by state law to judgments of state courts, repeals by substitution in Virginia, the process act of 1828 as to the elegit, whatever it may do in other states, under the particular legislation of this state bearing upon this subject.

State legislation cannot alter, impair, or affect a lien of a judgment in the Federal courts. *Beers v. Houghton*, 9 Pet. 329, 9 L. ed. 145; 47 L. R. A.

An unconstitutional act is not a law; it binds no one and protects no one.

Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 101, 102, 30 L. ed. 589, 590, 7 Sup. Ct. Rep. 469.

The act of Congress of August 1, 1888, was not retrospective or retroactive, and cannot be held either.

United States v. Heth, 3 Cranch, 399-413, 2 L. ed. 479-483; *Chew Heong v. United States*, 112 U. S. 559, 28 L. ed. 778, 5 Sup. Ct. Rep. 255; *Murray v. Gibson*, 15 How. 421-423, 14 L. ed. 755, 756; *McEwen v. Den*, 24 How. 242-244, 16 L. ed. 672, 673; *Harvey v. Tyler*, 2 Wall. 328-347, 17 L. ed. 871-875; *Sohn v. Waterson*, 17 Wall. 596-599, 21 L. ed. 737, 738.

Plaintiff's judgment was a lien upon the land in question, notwithstanding the act of

Carroll v. Watkins, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457; *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818.

In *Carroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457, it was said: "Were it conceded that the lien of judgments rendered in the Federal courts depends upon the legislation of the state, or the construction given to it by the courts of the state, the controversy would be at an end."

In *Fullerton v. Bank of United States*, 1 Pet. 604, 7 L. ed. 280, in reference to the judiciary act of Congress on another question, it was said: "An act of Congress adopting the state practice in existence at the time of its passage, is valid; but an act prescribing such rules of practice as the state legislatures might in future enact would be unconstitutional, as it would transfer to the states the powers vested by the Constitution in Congress."

The United States courts have adopted principles of state policy and jurisprudence as to liens of judgments so far as applicable. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546; *Morris's Estate*, 6 Phila. 134; *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319; *Ludlow v. Clinton Line R. Co.* 1 Filpp. 25, Fed. Cas. No. 8,600; *United States v. Sturgis*, 14 Fed. Rep. 810, Citing *Maasingill v. Downs*, 7 How. 760, 12 L. ed. 903.

And this in some cases was adopted by acquiescence. *Sellers v. Corwin*, 5 Ohio, 399.

The extent of the lien of a judgment of the Federal court is a question of Federal law, and is to be determined by the construction placed upon the Federal and state statutes by the Supreme Court of the United States. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, Aff'g 74 Ill. App. 54.

And is a Federal question. *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

And the lien of Federal judgments does not result from any direct legislation by Congress. *Jones v. Guthrie*, 23 Ill. 421; *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; *Morris's Estate*, 6 Phila. 134; *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

And this was so prior to act of Congress August 1, 1888, making such judgments liens. *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

The lien of a Federal judgment might be fixed by acts of Congress independently of state laws. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546; *Wayman v. Southard*, 10 Wheat. 1, 6 L.

Congress, and notwithstanding our state statute as to filing transcripts.

Masingill v. Downs, 7 How. 760, 12 L. ed. 903; *Curroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Cropsy v. Crandall*, 2 Blatchf. 341, Fed. Cas. No. 3,418; *United States v. Scott*, 3 Woods, 334, Fed. Cas. No. 16,242; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 2,457; *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; *Brown v. Pierce*, 7 Wall. 217, 19 L. ed. 137; *Barth v. Makeever*, 4 Biss. 208, Fed. Cas. No. 1,069; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Byers v. Fowler*, 12 Ark. 219, 54 Am. Dec. 271; *United States v. Duncan*, 12 Ill. 523; *Lawrence v. Belger*, 31 Ohio St. 175; *Branch v. Lowery*, 31 Tex. 96; *Pollard v. Coker*, 19 Ala. 188; *Doyle v. Wade*, 23 Fla. 90, 1 So. 516; *Met-*

calf v. Watertown, 153 U. S. 678, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa, 360, 73 N. W. 875.

If by the statute of a state a judgment is made a lien upon land of the defendant within the county where rendered, because that is the extent of the jurisdiction of the state court, upon the same principle, judgments of the Federal courts are in the same manner liens to the extent of the boundary of the Federal district wherein rendered.

Prevost v. Gorrell, 5 W. N. C. 151, Fed. Cas. No. 11,400.

Messrs. John A. Storey and Smith McPherson, for appellees:

Congress might lawfully adopt the existing state law.

Sutherland, Stat. Constr. pp. 619, 620; *Re Rahrer*, 140 U. S. 545, *sub nom. Wilker-*

ed. 253; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. ed. 264; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089.

The Supreme Court of the United States is not authorized to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an act of Congress, under judiciary act, § 17, giving United States courts authority to make and establish necessary rules for conducting business, and act March 2, 1793, § 7 (1 Stat. at L. p. 83, chap. 20, p. 335, chap. 22), conferring additional authority upon the courts of the United States to make rules and orders and to regulate practice, and act August 23, 1842, § 6 (5 Stat. at L. 518, chap. 188), giving the supreme court authority to prescribe, regulate, and alter forms of writs and process to be used in circuit and district courts. *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319. In this case it was said: "Remarks are to be found in the opinion of the court in *Beers v. Houghton*, 9 Pet. 380, 9 L. ed. 157, which give some countenance to that theory, but the remarks were not necessary to the adjudication of the matter in controversy, and evidently should be understood as referring to the examples previously mentioned in the opinion of the court where process had been modified to make it conform to state laws adopted by rule of court."

In *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422, it was said that judgments in the Federal courts "are liens, not by virtue of the adoption of state laws by the United States courts by rules of court or otherwise, but by virtue of acts of Congress giving the same effect to final process of United States courts as is given by state laws to process of the courts of the states in which they are held, giving the same remedies on judgments and decrees of Federal courts as are given by state laws on judgments and decrees of state courts, and giving authority to the United States courts to make proper rules for securing these objects."

In *United States v. Sturges*, 14 Fed. Rep. 810, it was said: "If the lien had any other foundation than the laws and practice of the states themselves, it might be different; but as that is its foundation it must be subject to such changes, modifications, and discretionary powers as are from time to time made or conferred by the laws and practice of the several states. When these are adopted by rule, under §§ 914 and 916 [Rev. Stat.]. In December, 1881, this court and the circuit court, by general rules, adopted all the provisions of the state practice and of the Code of Procedure in existence on that 47 L. R. A.

date, as far as the same might be applicable in common-law actions to remedies or judgments, and they therefore became the law of this court." The only question involved in this case was the right to suspend the lien of a judgment pending writ of error, and the statements *supra* are in regard to adopting the procedure of a state under court rules.

The process act of 1828, passed by Congress, refers to state laws for the creation and effect of liens; but the preparatory steps by which they are created depend upon the rules adopted by the United States courts. *Clements v. Berry*, 11 How. 411, 13 L. ed. 750.

In *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924, it was said that in *Hurst v. Hurst*, 2 Wash. C. C. 69, Fed. Cas. No. 6,931; *United States v. Slade*, 2 Mason, 71, Fed. Cas. No. 10,312; *Thelsson v. Smith*, 2 Wheat. 397, 4 L. ed. 271; and *Conard v. Atlantic Ins. Co.* 1 Pet. 443, 7 L. ed. 214—it was assumed that the lien created by the judgment in the courts of the United States upon land and the mode of proceeding to obtain satisfaction were regulated entirely by the state law.

In *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124, it was said, in discussing act of Congress June 1, 1872, as modified by Rev. Stat. § 916, providing that a party recovering a judgment in the Federal court shall be entitled to similar remedies as are now provided in like causes by the laws of the state in which such courts are held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be enforced in such state in relation to remedies upon judgments as aforesaid by execution or otherwise,—that this section "adopts all remedies afforded by state laws to judgment creditors who have recovered in the state court, and extends the same to creditors who have recovered judgments in common-law causes in the courts of the United States. Not only are existing remedies provided in the several states thus introduced, but the act is expansive, and adapts itself to such as may be provided by future state legislation."

In *Tarpley v. Hamer*, 9 Smedes & M. 310, it was held that the lien of a judgment in the Federal court is derived entirely from the state law, and when it is enforced as a lien it is done on the authority of the state laws, and as it exists only by virtue of the state law it must submit to any changes which the legislature may think proper to make which do not affect the process.

This decision is contrary to the holding of the

son v. Rahrer, 35 L. ed. 572, 11 Sup. Ct. Rep. 805; *Tierman v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

Robinson, Ch. J., delivered the opinion of the court:

The material facts stated in the petition are as follows: In the year 1884, one D. J. Clark, then the owner of a section of land in Adair county, executed mortgages thereon to the Creston Loan & Trust Company. The mortgages were afterwards foreclosed, the land sold to satisfy the mortgage debts, sheriff's deeds were issued, and the defendants Ostrander and Earley now own the interests conveyed by the sheriff's deeds. The mortgages were foreclosed in the district court of Adair county, and the decrees of foreclosure were rendered on the 28th day

of August, 1889. On the 14th day of May, 1889, the plaintiff recovered in the United States circuit court for the southern district of Iowa judgment against Clark for \$19,205.16. The plaintiff was not made a party to the foreclosure proceedings, and for that reason claims the right to redeem from the sales. He had never filed a transcript of his judgment in Adair county, and his alleged right to redeem depends upon the effect to be given to certain Federal and state statutes in regard to judgment liens, and the filing of transcripts in counties other than those in which the judgments are rendered. Section 2882, Code 1873, as amended by chapter 129, Acts 17th Gen. Assem., enacted in 1878, provided that "judgments in the supreme, district, or circuit court of this state . . . are liens upon the real estate owned by the defendant at the time of such

Federal courts, and is a remnant of "states' rights doctrine."

In *Andrews v. Doe ex dem. Wilkes*, 6 How. (Miss.) 554, 38 Am. Rep. 450, it was said: "We admit the lien created by their judgments; they must admit the lien created by ours, because under our law both liens originate; and, the effective operation of the lien being admitted, no difficulty can ever arise in settling the rights of parties, unless, indeed, the judgments should have been rendered so nearly at the same time as to make it difficult to ascertain which was the oldest." The question in this case was as to the priority of liens in the Federal and state courts. See *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007.

In *Perkins v. Brerfield Iron & Coal Co.* 77 Ala. 403, it was said that the liens of judgments of the Federal courts, within the limit of that court, depend upon the state law, where Congress has not legislated.

In *Ludlow v. Clinton Line R. Co.* 1 Filpp. 25, Fed. Cas. No. 8,600, it was said, in determining this question of lien, we are to be governed by the laws of the state of Ohio, and the construction given to those laws by the supreme court of the state.

III. Territorial extent of lien.

a. Generally.

In the absence of the requirements of a recording act or of its application, the lien of a judgment in a Federal court is coextensive with the jurisdiction of the court in which it is recovered. *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903; *Ludlow v. Clinton Line R. Co.* 1 Filpp. 25, Fed. Cas. No. 8,600; *Ward v. Chamberlain*, 2 Black. 432, 17 L. ed. 322; *Cropsey v. Crandall*, 2 Blatchf. 341, Fed. Cas. No. 3,418; *Barth v. Makeever*, 4 Bliss. 206, Fed. Cas. No. 1,069; *Carroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457; *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422; *United States v. Scott*, 3 Woods, 334, Fed. Cas. No. 16,242; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 601, 50 N. E. 1089; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Lawrence v. Belger*, 31 Ohio St. 175; *Branch v. Lowery*, 31 Tex. 96; *Simpson v. Niles*, 1 Ind. 196; *Pollard v. Cocke*, 19 Ala. 188; *Bank of Cleveland v. Sturges*, 2 McLean, 341, Fed. Cas. No. 861.

So, where a state statute provides that the lien of a judgment of a state court shall be co-extensive with that court's territorial jurisdiction, the lien of a judgment of a Federal court in such state in a similar action is co-47 L. R. A.

extensive with the Federal court's territorial jurisdiction. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, Affirming 74 Ill. App. 54.

And a judgment of the United States circuit court of the district of Indiana is a lien from its date on all lands of the defendant within the district, and attaches to subsequently acquired lands, and a sale of them by the defendant before execution issues does not divest the lien, and, as between purchasers from a judgment debtor, the purchaser of the subsequently acquired lands cannot insist that the officer shall first levy and sell the lands held by a prior purchaser. *Barth v. Makeever*, 4 Bliss. 206, Fed. Cas. No. 1,069. This was on the grounds that acts of Congress are construed as adopting the Indiana statutes, and under them lands of the debtor owned by him at the rendition of the judgment are bound by this lien, and also subsequently acquired lands.

A judgment rendered in the circuit court of the United States has the same lien on the lands of the debtor within the district that is given to a judgment of the state court within the limits of its territorial jurisdiction. *Lawrence v. Belger*, 5 Rep. 532 (*Sellers v. Corwin*, 5 Ohio, 398, approved).

And the lien of a judgment rendered in the circuit court has the same effect, and operates to the same extent, upon the debtor's land throughout the district of Ohio as the lien of a like judgment rendered in the state court operates upon the debtor's land in the county. *Ludlow v. Clinton Line R. Co.* 1 Filpp. 25, Fed. Cas. No. 8,600.

In this case the court said that the limits of a Federal judicial district in the exercise of the jurisdiction of the United States circuit court is as the limits of the county to the local courts. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, as they are made to operate throughout a more extended jurisdiction.

So, a judgment in the circuit court of the United States is a lien upon land situated within the district, whether the same is in the county where the judgment is rendered or not. *Branch v. Lowery*, 31 Tex. 96.

Where the judgment or execution of the state courts creates a lien only within the county in which the judgment is created, a similar proceeding in the circuit court of the United States creates a lien to the extent of its jurisdiction. *Carroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457.

In *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546, it was said that before the passing

rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment."* Section 2 of the chapter cited is as follows: "Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens upon the real estate owned by the defendant, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment by filing an attested copy of the judgment in the office of the clerk of the state district court

*In addition to the provisions set out in the opinion, § 4091 of McClain's Code provided that "if the lands lie in any other county the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies.

of the act of Congress, August 1, 1888 (25 Stat. at L. 357, chap. 729), the lien imposed by judgments of Federal courts was coextensive with their territorial jurisdiction.

In the following cases the lien was held to be coextensive with the state: *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818; *Dermott v. Carter*, 109 Mo. 21, 18 S. W. 1121; *United States v. Duncan*, 4 McLean, 607, Fed. Cas. No. 15,003; *Sellers v. Corwin*, 5 Ohio, 398; *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; *Prevost v. Gorrell*, 5 W. N. C. 151, Fed. Cas. No. 11,400; *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Pollard v. Cocke*, 19 Ala. 188.

So, the lien of a judgment of the circuit court of the United States extends throughout the state, and is not confined to the county in which the court is situated. *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271. In this case it was said that if it should be supposed that inasmuch as the laws of this state, in regard to judgments and executions, were not adopted by Congress until 1842, the judgment could not create a lien throughout the state. Such lien does not depend alone upon the adoption of the state law, but it existed prior to and independent of such adoption.

The jurisdiction of the circuit court of the United States is coextensive with the limits of the state of Indiana, and the lien of its judgment extends throughout the state notwithstanding the Indiana act of 1824, limiting the liens of judgments in the circuit court in Indiana to the counties in which the judgments were rendered, and act of 1831, so limiting the liens of judgments of the supreme court. As the latter act was passed subsequently to the act of Congress May 19, 1828, which adopted the execution laws of the states, it had no effect on the judgments of the Federal courts. *Den ex dem. Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818.

The lien of a judgment of a Federal court was held coextensive with the territorial jurisdiction of the court, and extended throughout the state, where the cause was pending prior to act of Congress June 8, 1872, establishing the two circuit courts in Missouri. The judgment lien was preserved by act of Congress February 25, 1873, U. S. Rev. Stat. 1878, § 653, providing that the circuit court for the eastern district of Missouri shall have jurisdiction to dispose of all matters which were pending at the time the circuit court for the eastern district was created, and to issue all processes as if the former circuit court had not ceased to exist. *Dermott v. Carter*, 109 Mo. 21, 18 S. W. 1121.

In *United States v. Duncan*, 4 McLean, 607, Fed. Cas. No. 15,003, it was conceded that judgment of the county in which the land lies; and no

lien shall attach to the lands in any county of this state until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition." It is well settled that the legislature of a state has no independent power to limit or affect the proceedings in, or process from, Federal courts. *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. ed. 284; *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145. Judgments were not liens on land at common law, but were made liens by early English statutes, and in this country by statutes of different states. 1 Jones, Liens, § 13; *Freeman*, Judgm. § 3339; 12

ments at law and decrees in chancery of the circuit court of the United States for the district of Illinois create liens throughout the state on the real estate of the party against whom they are rendered.

In *Sellers v. Corwin*, 5 Ohio, 398, it was said that the profession has almost uniformly acquiesced in the practice of considering the judgments of the United States circuit court as having the same lien throughout the state that judgments in the state courts have in the courts where rendered.

The lien of a judgment in the circuit court of the United States is coextensive with the district (which was the state), and is not confined to the county, and is not affected by Pa. act March 28, 1799, § 14, limiting the liens of circuit and supreme courts of Pennsylvania to the county where they were rendered. *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469.

This was so held because in 1780, when the Federal courts were established, judgments of the supreme court bound lands over the whole state.

In this case the court said that from the earliest history of Pennsylvania judgments have been considered as liens upon lands, and this not by adoption of the English statute of 13 Edw. I. chap. 18, Statute of Westminster, II. or the statute of eleignt, nor by virtue of the Statute of 2 Geo. II., but because from the first settlement of the colony, or at least since the years 1700 (act 1700), all lands and houses whatsoever were liable to sale upon judgment and execution obtained against the defendant, the owner, his heirs, etc.

Under U. S. Rev. Stat. § 985, authorizing writs of execution to be executed throughout the state where the state is divided into several districts, the lien of a judgment in the United States court operates from the day of its date upon real estate situated in all parts of the state, even though the state may be divided into two or more judicial districts. *Prevost v. Gorrell*, 5 W. N. C. 151, Fed. Cas. No. 11,400.

And judgments rendered in the circuit court of the United States create a lien on the lands of the defendant within the state, as such judgments are coextensive with the lien of judgments rendered in the state courts. *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Pollard v. Cocke*, 19 Ala. 188.

In the latter case it was said that judiciary act of Congress 1789, chap. 20, provides that the laws of the states, except when provided otherwise by the United States statute, etc., shall be regarded as rules of decision at common law in the Federal courts. The act of 1828 provides that the rules of proceeding shall be the same in the circuit courts of the United States as in the highest court of general jurisdiction in the

Am. & Eng. Enc. Law, p. 104. Judgments of Federal courts are liens upon the real estate of the judgment debtor, where similar judgments of state courts are made liens by the law of the state. *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 319. If, in such a case, a judgment of the state court operates as a lien only within the county in which the judgment is rendered, nevertheless a judgment of the Federal court would operate in like manner, not only in the county in which it was rendered, but, if not restricted by rule or statute, would operate throughout the district in which the court had jurisdiction. *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903; *Freeman, Judgm.* § 405; 12 Am. & Eng. Enc. Law, p. 104. Prior to the 1st day of August, 1888, Con-

gress had not enacted any law which authorized or gave effect to the statutes of this state to which we have referred. It follows, from the authorities cited, that prior to that date judgments of the district and circuit courts of the United States were liens upon real estate of the judgment debtors subject to execution throughout the districts in which the judgments were rendered, notwithstanding the limitation attempted to be made by the statutes of this state. On the date specified, chapter 729 of the Acts of the 1st Session of the 50th Congress [25 Stat. at L. 357, § 1] was approved. That provided "that judgments and decrees rendered in any circuit or district court of the United States within any state, shall be liens on property throughout such state in the same

state. These Federal statutes, and the construction placed by the state courts on Alabama statutes, create a lien in any portion of the state.

b. As limited by state recording acts.

The case of *BLAIR V. OSTRANDER* holds that a judgment in a Federal court rendered May 14, 1889, is not a lien upon real estate in another county, where the same is not recorded as provided by Iowa act 1878, chap. 129 (amending Code 1873, § 2882), providing for recording Federal judgments, although this act was passed prior to act of Congress August 1, 1888, making Federal judgments liens, and providing for their recording in counties other than where rendered, when the state law authorizes such recording. This is in accord with the general rule on this question.

Some few cases held that the lien of a Federal judgment was not restricted by state recording acts; but it will be found that most of them so held on the ground that the state statute was not retroactive, notably *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903, *infra*, a leading case on this question. Since the Federal act August 1, 1888, providing for recording such judgments in the counties of the state in order to affect the real estate, where the state law makes provision for recording Federal judgments, the lien of a Federal judgment is gone if the judgment is rendered after the passage of the Federal act and a state law requiring registration exists at the time of the judgment, and the judgment is not recorded as required by the state laws. It seems that to retain the lien if such a state statute is subsequently passed the judgment of the Federal court should be recorded within a reasonable time.

In the following cases the state recording acts were held applicable to judgment liens of the Federal courts: *First Nat. Bank v. Clark*, 55 Kan. 219, 40 Pac. 270; *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546; *Bonafee v. Fisk*, 13 Smedes & M. 682; *Tarpley v. Hamer*, 9 Smedes & M. 310; *Brown v. Bacon*, 27 Miss. 589; *Hall v. Green*, 60 Miss. 47; *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124; *Reid v. House*, 2 Humph. 576; *Vance v. Johnson*, 10 Humph. 214; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

So, a judgment of the Federal court was held not to be a lien on property in another county in the same state, where a transcript was not filed in the clerk's office of the district court for such county within a reasonable time after the passage of act of Congress August 1, 1888, providing for such filing, and Kan. Code of Civ. Proc. § 419 (Gen. Stat. 1868), provided for filing abstracts from the Federal courts. *First Nat. Bank v. Clark*, 55 Kan. 219, 40 Pac. 270.

47 L. R. A.

As to whether a judgment of the Federal court is a lien out of the county where rendered, without a compliance with Kan. Code of Civ. Proc. § 419 (Gen. Stat. 1868), providing that judgments of the courts of the United States shall be liens on real estate from the first day of the term, and will be liens on real estate in any county from the date of filing a transcript of the same in the office of the clerk of the district court for that county, prior to act of Congress August 1, 1888, was not decided. *First Nat. Bank v. Clark*, 55 Kan. 219, 40 Pac. 270.

This case was distinguished in *Commercial Bank v. Eastern Bkg. Co.* 51 Neb. 766, 71 N. W. 1024, saying that the supreme court of Kansas refused to consider whether, under the circumstances indicated, the lien of the Federal judgment was operative against land in W. county. The court said that that decision was controlled by the provision in the state statute unaffected by the Federal statute. (*Quare.*)

A judgment in the United States court in Kansas is a lien upon the lands of the debtor only in the county in which the court is held and the judgment rendered; but the lien may be extended to any other county by recording an abstract with the clerk of the district court of such county, under Kan. Gen. Stat. 1868, chap. 80, § 419, *supra*, and act of Congress August 1, 1888 (25 Stat. at L. 357, chap. 729), providing that judgments in the circuit and district courts of the United States within any state shall be liens to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state, provided that whenever the laws of any state require a judgment or decree of the state court to be registered in a particular manner or in a certain office, or county, or parish, before a lien shall attach, this act shall be applicable therein whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be so registered; but nothing herein shall be construed to require the docketing of a judgment or decree of the United States court in the same county in which it is rendered. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

This case was distinguished in *Commercial Bank v. Eastern Bkg. Co.* 51 Neb. 766, 71 N. W. 1024, saying that in that case the state legislation existed in 1868, and it was only required that Congress should pass the act of 1883 to give Federal sanction to what had been attempted twenty years before by the legislature of that state, and the opinion merely held that the state statute was the proper complement of the law of Congress to effect the purpose of both statutes; but whether this was with refer-

manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner or in a certain office or county or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgment and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." It is claimed that the statute enacted by the general assembly of this state

in the year 1878 was void when passed, and the act of Congress set out did not give it effect. That it was not effectual prior to the taking effect of the act of Congress is, as we have seen, true; but it does not follow that the end sought to be accomplished could be attained only by the enactment of a new statute after the act of Congress was passed. In the case of *Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, the effect of a statute of the state of Kansas in regard to the sale of intoxicating liquors within the state was considered. It was passed before the act of Congress of August 8, 1890, entitled "An Act to Limit the Effect of the Regulations of Commerce between the Several States and with Foreign Countries in Certain Cases," which made subject to the laws of the state intoxicating liquors transported into it, and it was contended that, as

ence to a judgment rendered before August 1, 1888, we are not informed.

Under Miss. recording enrolment act 1844, § 9, requiring a sheriff after selling property under execution to examine the judgment roll and pay off the oldest lien, the enrolment of a Federal judgment gives it a prior lien. *Bonafee v. Flek*, 13 Smedes & M. 682.

The court said that the liens of judgments in the United States courts and the state court of Mississippi stand upon the same footing, and that if this court had followed *Massingill v. Downs*, 7 How. 160, 12 L. ed. 903, *infra*, a different result might have been reached.

In *Tarpley v. Hamer*, 9 Smedes & M. 310, it was held that the Mississippi act of February 6, 1841, providing that judgments and decrees theretofore rendered should be liens from the date of rendition, upon property out of the county, where the judgment was obtained on condition that an abstract of such judgment issued by a certain date be filed in the office of the circuit court of the county in which the property is situated, is constitutional and valid, notwithstanding, previous to the passage of that law, such judgment was a lien on the property of the defendant within the state; and if the abstract of such judgment is not filed according to the provisions of the statute, the lien of such judgment out of the county of its rendition is lost. In this case the court said that the Mississippi act of February 6, 1841, does not impair a lien where it leaves it entirely at the discretion of the party whether he will preserve it or not, and it deprives the creditor of no right, but imposes a duty upon him required by public necessity and safety so as to preserve his right, and if he fails in that duty he voluntarily abandons the right.

Tarpley v. Hamer, 9 Smedes & M. 310, and *Bonafee v. Flek*, 13 Smedes & M. 682, were followed by the court in *Brown v. Bacon*, 27 Miss. 559, which held that the Mississippi act of 1844 (Clutch. Code, 891), requiring judgments to be enrolled to be liens, applied to judgments previously rendered in the Federal courts as well as those in the state courts.

So, in *Hall v. Green*, 60 Miss. 47, it was held that a judgment of a Federal court was not a lien on property in a county where the judgment was not rendered, and where the judgment was not enrolled pursuant to the provisions of the Mississippi statutes.

These Mississippi cases, *supra*, can hardly be considered sound, as they were prior to act of Congress 1888, authorizing the record of Federal judgments. See *Carroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457, *infra*.

In *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 47 L. R. A.

124, a judgment of the Federal court was held not to be a lien where it had not been docketed in the county in which the real estate was situated, under N. C. Code, §§ 433, 435, 436, providing for docketing the same and making them liens if so recorded. Under the prior statutes judgments were not liens, and a lien was only acquired by execution and levy. It was held that under act of Congress June 1, 1872, Rev. Stat. §§ 915, 916, providing that plaintiff is entitled to similar remedies as now provided by the laws of the state and rules of the Federal court adopting such state laws, where no rules had been adopted no lien was given to judgments of the Federal court greater than to those of a state court. In this case the judgment was rendered in 1887, and action tried in 1889. The North Carolina act of 1889 provided for docketing Federal judgments, and was made to carry into effect act of Congress August 1, 1888, an act to regulate the liens of judgments and decrees of courts of the United States, and this was said to be the appropriate remedy.

Tennessee Stat. 1831, chap. 90, § 8, providing that a judgment rendered in a county where the defendant does not reside shall not be a lien on real estate unless recorded in the county of the debtor's residence, applies to Federal judgments as well as to judgments of the state courts. *Reld v. House*, 2 Humph. 576.

And a judgment of a Federal court not registered in the county of the residence of the judgment debtor, as required by the act of 1831, chap. 9 (90?), § 8, does not create a lien upon the debtor's real estate, and no lien attaches until the actual levy of the execution. *Vance v. Johnson*, 10 Humph. 214.

A Federal judgment rendered January 17, 1882, execution March 3, 1882, and August 11, 1886, indexed in defendant's name and by plaintiff's firm name, was a lien on the real estate, under Texas Rev. Stat. 1879, arts. 3153-3160, providing for recording by the clerk of the county court, an abstract of judgments, showing names of plaintiff and defendant and indexing the same, making the judgment a lien upon the debtor's real estate for ten years, unless the execution failed to issue within twelve months after judgment, and art. 3163, providing for recording and indexing abstracts of Federal court judgments, notwithstanding the names of "plaintiffs" were not given. *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

In the following cases it was held not necessary to record the Federal judgments in counties under the state law to preserve the lien. In some of them this was so held on the ground

the Kansas statute had not been re-enacted, it was without effect as to intoxicating liquors taken into the state. But the Supreme Court of the United States held, in effect, that the state statute was not effectual as against intoxicating liquors brought into the state until the act of Congress took effect, not because the act of the state was void, but for the reason that there was an impediment to its enforcement, which the act of Congress removed, and it was said that there was "no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property." Although the state statute considered in that case was enacted in the exercise of the police power of the state, and the one in question was not, we are of the opinion that the same general principle applies in both cases. The

statutes of this state in terms required the filing of transcripts of judgments rendered by both state and Federal courts in counties other than those in which the judgments were rendered, in order to create liens on real estate in such other counties. The act of Congress of August 1, 1888, made judgments of circuit and district courts of the United States, rendered within any state, liens on property throughout such state in the same manner, and to the same extent, and under the same conditions, as if such judgments had been rendered by a court of the state having general jurisdiction. To that extent the statute of this state in regard to judgments of the state courts was adopted. The provision that the act should take effect in a state, the laws of which required certain things to be done in respect to a judgment before a lien should attach, only whenever

that the state law is not retroactive; in others that the state law may be a basis for a lien by virtue of a judgment, and at the same time the exceptional clause in the state statute in regard to recording may be ignored as inapplicable to Federal judgments.

Where a judgment was obtained in a circuit court of the United States for the district of Mississippi in 1839, Miss. act February 8, 1841, requiring judgments of any circuit, district, or superior court in the state to be recorded in the county in order to make them a lien upon the property, did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by statute. *Massingill v. Downs*, 7 How. 760, 12 L. ed. 903. This was on the ground that prior to the state statute a judgment in the state court extended throughout the district, and a statute cannot impair the vested rights and liabilities connected with a judgment.

And the lien of a judgment of the United States court was not affected by Miss. Code 1837, p. 525, arts. 262, 263, providing that no judgment of the United States court shall be a lien upon property of defendants situated out of the county in which the judgment is rendered, until plaintiff shall file in the office of the clerk of the circuit court of the county in which the property may be situated an abstract of such judgment containing the names, etc., and art. 263, providing that no judgment or decree in any court of the United States shall be a lien upon the property of the defendants in the county in which the judgment is rendered, unless the abstract of the judgment is filed, etc. *Carroll v. Watkins*, 1 Abb. (U. S.) 474, Fed. Cas. No. 2,457.

This was on the ground that the judgment lien grew out of the process act of 1828; and Miss. act 1834 (1824?), chap. 74, § 12, making all judgments liens from their rendition, was in force when the process act of 1828 was passed by Congress.

Mississippi Stat. 1824, chap. 74, § 12, provided that a judgment is a lien on all the property of the defendant from the time of entering the judgment.

The Illinois act of 1889, amending § 1 of the act on judgments, decrees, and executions, which provides that the filing of a transcript of a judgment rendered in one county with the clerk of the court of any other county shall create a lien on the debtor's real estate in the latter county, has no retroactive effect on a Federal judgment. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, Affirming 74 Ill. App. 54.

47 L. R. A.

So it was held not to be necessary to record a transcript of a Federal judgment in a county where the real estate was situated in order to secure a lien, under act of Congress August 1, 1888, 25 Stat. at L. p. 357, chap. 729, § 1, providing that judgments and decrees of the Federal courts shall be liens throughout the state in the same manner as if rendered by a court of jurisdiction of such state, providing that when the laws of any state require registering, recording, or indexing in a certain county, this act shall be applicable whenever the laws authorize the judgments and decrees of the Federal courts to be so registered, and the Nebraska act of March 28, 1889, provided for such registration of Federal judgments. This was held not to be retroactive, and did not affect the prior lien. *Commercial Bank v. Eastern Bkg. Co.* 51 Neb. 766, 71 N. W. 1024.

Judgments and decrees rendered in the United States courts, and duly recorded, become liens upon lands of the judgment debtor lying within the district where they are rendered, and it is not necessary that they should be registered in any state office. *Cropsey v. Crandall*, 2 Blatchf. 341, Fed. Cas. No. 3,418; *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469.

This was on the ground that N. Y. Stat. May 4, 1840, prescribing filing a transcript of the judgment in the county in order to affect real estate, does not apply to judgments or decrees of a court of the United States.

In Virginia a judgment of the United States courts in that state need not be recorded to become a lien on real estate, and, as against a subsequent purchaser, without notice, the lien of a judgment of a Federal court does not cease, though it is not docketed in accordance with the state laws. *United States v. Humphreys*, 8 Hughes, 201, Fed. Cas. No. 15,422.

This was on the ground that the rights attaching under Rev. Stat. § 910, act of Congress, June 1, 1872, adopting Va. Code, chap. 182, § 6, providing that every judgment for money rendered in this state shall be a lien on the real estate of such person, is not controlled by § 8 of the same chapter, providing that no judgment shall be a lien on real estate as against a purchaser for a valuable consideration without notice, unless it is docketed. The court said "that in any case of a law of a state conferring rights upon conditions or with exceptions, and adopted by Congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, . . . such a condition or exception in the state law is uniformly held by the United

the laws of that state should authorize the doing of the same things relating to judgments of the Federal courts, did not adopt any law of this state, but the effect of the act was to remove any obstacle to state legislation, or to confer authority for it, and there does not appear to have been any more reason for requiring the re-enactment of the state law in order to give it effect than there was for the re-enactment of the Kansas statute considered in the *Rahrer Case*. See *First Nat. Bank v. Clark*, 55 Kan. 219, 40 Pac. 270.

It is contended in argument that the statutes we have considered are unconstitutional as to indebtedness contracted before the Federal statute took effect, for the alleged reason that, if enforced as against such indebtedness, they would impair the obligation of the contract by which the indebtedness was

created. The case of *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397, and cases holding the rule therein announced, are cited as supporting the claim thus made. We have no occasion to determine whether it is well founded. The petitions do not show when the indebtedness on which the plaintiff's judgment was rendered was contracted, and we are not authorized to presume that it was incurred before the act of Congress of 1888 took effect. A transcript of the plaintiff's judgment not having been filed in Adair county, the judgment was not a lien on the land in question when the decrees of foreclosure were rendered and the sheriff's sales were made, and the plaintiff is not entitled to redeem from the sales.

The demurrers to the petitions were properly sustained, and the judgments of the District Court are therefore affirmed.

States courts not to limit the rights conferred by the act of Congress adopting the state law."

And a judgment of the circuit court of the western district of Texas was held to be a lien upon all lands in the district within the jurisdiction of the court and within reach of its process, even though it was not recorded in the several counties where the lands lie. *United States v. Scott*, 3 Woods, 334, Fed. Cas. No. 10,242.

And judgments and decrees of the courts of the United States become liens on any lands of the defendant lying anywhere within the district over which the court has jurisdiction, and state statutes requiring judgments to be recorded in the county in which the land lies have no effect upon a lien of a judgment of the United States courts. *Doyle v. Wade*, 23 Fla. 90, 1 So. 516.

IV. Time of attaching.

Lands in the state of New York are subject to sale on execution issued upon a judgment in the circuit court of the United States, and such judgment is a lien on the land on the day it is docketed, under process acts 1789, 1792, 2 U. S. Laws, 72, 299, adopting the state law upon the subject, and thereby in effect adopting the state law as to the operation of the judgment under N. Y. act March 19, 1787, providing that no judgment shall affect land but upon the filing of the roll and docketing the judgment, as this implies that it shall then become a lien. *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924.

So, a judgment recovered in the district or circuit court of the United States for the southern or northern district of the state of New York is a lien upon land throughout the state for the term of ten years from the time of docketing such judgment in conformity to local laws of the state. *Manhattan Co. v. Evertson*, 6 Paige, 457.

And a judgment in the United States court is as much a lien as a judgment of a state court, under Mississippi act of 1824, providing that a judgment is a lien on all the property of the defendant from the time it is entered. *Andrews v. Doe ex dem. Wilkes*, 6 How. (Miss.) 554, 38 Am. Dec. 450.

The lien of a judgment of the Federal court attaches on the last day of the term, under 5 Stat. at L. 338, chap. 81, § 10, and p. 393, chap. 43, § 4, p. 518, chap. 188, § 8, recognizing the existence of liens of Federal courts under the local laws, and regulating their continuance and termination at the periods fixed by the local laws, and *Scates* (Ill.) Comp. 603, providing that judgments become liens on land from the 47 L. R. A.

last day of the term at which the judgment is rendered, and for the period of seven years. *Jones v. Guthrie*, 23 Ill. 421; *Kemper v. Adams*, 5 McLean, 507, Fed. Cas. No. 7,688.

The lien of a Federal judgment attached to the lands of the debtor on the day court adjourned, under Ill. Rev. Stat., providing that a judgment shall be a lien on the last day of the term in which judgment is rendered for the term of seven years. It was further held that the statute of limitation did not affect the judgment, as, until the marshal's deed was executed, there was no title in the grantee against which the statute could run. *Kemper v. Adams*, 5 McLean, 507, Fed. Cas. No. 7,688.

A judgment binds real estate of the defendant from the first day of the term at which it is rendered, under Swan's (Ohio) Stat. 468, providing that the lands of the debtor shall be bound for the satisfaction of the judgment against such debtor from the first day of the term at which judgment shall be rendered. *McLean v. Rockey*, 3 McLean, 235, Fed. Cas. No. 8,891.

A judgment from the circuit court creates a lien on all the lands of the debtor from the first day of the term at which judgment is entered, and is superior to a mortgage executed before and recorded after the term began, under 3 Chase's (Ohio) Stat. 1709, providing that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor from the first day of the term. *Bank of Cleveland v. Sturges*, 2 McLean, 341, Fed. Cas. No. 801, 3 McLean, 140, Fed. Cas. No. 13,571.

Where several judgments are rendered the same day in a Federal court, the liens thereon are equal under statutes of Indiana providing that a judgment creates a lien on the real estate of the defendant from the time of its rendition to the expiration of ten years. This statute does not provide for acquiring any superior lien by diligence in the issuance of execution. *Rockhill v. Hanna*, 4 McLean, 554, Fed. Cas. No. 11,980.

V. Statutes of limitation.

The state statutes of limitation apply to judgments of the Federal courts. This is also provided for by act of Congress July 4, 1840, providing that judgments in the Federal courts shall cease to be liens in the same manner and at like periods as judgments and decrees of state courts now cease to be liens.

The lien of a judgment of a Federal court held within a state is subject to the statute of limitations. *Thompson v. Phillips, Baldwin*, 246, Fed. Cas. No. 13,974; *Abbey v. Commercial*

Bank, 34 Miss. 571, 69 Am. Dec. 401; Hansen's Empire Fur Factory v. Teabout, 104 Iowa, 360, 73 N. W. 875. See also Kemper v. Adams, 5 McLean, 507, Fed. Cas. No. 7,688.

And the lien of a Federal judgment expired in three years under the Missouri statute, providing that three years is the duration of the lien of a judgment, and act of Congress July 4, 1840, providing that judgments in the Federal courts shall cease to be liens in the same manner and at like periods as judgments and decrees of the courts of such state now cease to be liens thereon. It was further held that the pendency of a writ of error in the Supreme Court of the United States did not prolong the lien. *Chouteau v. Nuckolls*, 20 Mo. 442.

So, under U. S. Rev. Stat. § 967, providing as above, the lien of a Federal judgment was lost where no execution was issued within ten years, as required by the Alabama statutes. *Perkins v. Brierfield Iron & Coal Co.* 77 Ala. 403.

In *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422, it was said that the lien of a judgment of a United States court would cease just as that of a state court would do under a state statute of limitations, under U. S. Rev. Stat. § 967, providing that judgments of United States courts within a state shall cease to be liens on real estate in the same manner and at like periods as judgments of the courts of such state cease by law to be liens thereon.

The New York statutes which limit the duration of the lien of a judgment and decree of the state courts apply to judgments and decrees of the courts of the United States within the state. *Cropsey v. Crandall*, 2 Blatchf. 341, Fed. Cas. No. 3,418.

A Federal judgment lien remains in full force where execution is issued and levied within a year, under *Swan's* (Ohio) Stat. 470, § 12, providing that unless execution shall be taken out and levied within twelve months after rendition it shall not operate as a lien on the estate of any debtor to the prejudice of any bona fide judgment creditor. *McLean v. Rockey*, 3 McLean, 235, Fed. Cas. No. 8,891.

And where a levy was made under a Federal judgment in 1823, and a levy was made under a judgment of a state court after the lapse of one year from the date of the judgment and more than one year from the passage of Ohio act 1824, providing that no judgment shall be a lien unless execution is taken out within one year after the judgment, but that the act shall not affect prior levies, the lien of the execution on the Federal judgment was superior. *Corwin v. Benham*, 2 Ohio St. 36. In this case the law in effect at the time gave the judgment creditor a lien for five years against any other bona fide judgment creditor who might thereafter levy first, and as more than one year had elapsed the lien of the state judgment was gone.

If more than seven years have intervened between the rendition of the judgment and the filing of a bill on a judgment of the Federal court to set aside a fraudulent conveyance, there is no lien on the property, and a court of equity will not lend its aid to enforce it. *Hall v. Green*, 60 Miss. 47.

In *Lombard v. Bayard*, 1 Wall. Jr. 196, Fed. Cas. No. 8,469, it was said that the Pennsylvania act of assembly of April 4, 1798, § 2, limiting the liens of judgments to five years unless revived by scire facias, has been considered as a rule of property binding upon the United States circuit court, and therefore adopted by it, although passed subsequently to 1789.

VI. Suspending the Lien.

The pendency of a writ of error in the Supreme Court of the United States does not prolong the lien of a judgment in the Federal court. *Chouteau v. Nuckolls*, 20 Mo. 442.

And the lien of a Federal judgment is not suspended by a writ of error and supersedeas, under Ill. Rev. Stat. 1874, p. 621, § 2, providing that where the owner of a judgment is restrained by injunction or appeal from obtaining execution, the time of such restraint shall not be counted as a part of the year allowed in which to obtain execution to preserve the lien of the judgment from its rendition. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1080.

The lien of a Federal judgment may be suspended by the district court under U. S. Rev. Stat. §§ 914-918, providing that the practice, pleadings, and forms, and modes of proceedings in common-law actions and remedies on execution or otherwise upon judgments shall be the same as now provided in like causes by the laws of the state, or by such laws hereafter enacted which may be adopted by the general rule of the circuit and district courts, and under N. Y. Code Civ. Proc. § 1257, providing for suspending the lien of a judgment by giving security on appeal. The district and circuit courts by general rule adopted all the provisions of the state practice and of the Code of Procedure in existence on that date, so far as the same may be applicable in common-law actions to remedies or judgments. *United States v. Sturgis*, 14 Fed. Rep. 810.

In *Myers v. Tyson*, 13 Blatchf. 242, Fed. Cas. No. 9,995, it was held that decrees in the Federal court are not affected by N. Y. Code Proc. § 282, authorizing the court to exempt from the lien of a judgment the property where the same is secured on appeal, as when the act of July 4, 1840 (5 Stat. at L. 393, chap. 43, § 4), was passed no statute of New York authorized the suspension of the lien of a judgment on appeal, and Rev. Stat. § 967, is, in effect, a re-enactment providing that judgments and decrees rendered in a circuit or district court within any state shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.

But in *United States v. Sturgis*, 14 Fed. Rep. 810, it was said that this was a case of a decree in equity, and not a judgment in a common-law action.

VII. Judgments rendered in another state.

It seems that a judgment in favor of the United States, recovered in one of the Federal courts out of the state of New York, is not a lien upon lands within that state from the docketing of the judgment, although by the laws of the United States an execution on such a judgment may be issued against the defendant's property in any state in the Union. *Manhattan Co. v. Everton*, 6 Paige, 457.

VIII. Priority of judgment in favor of United States.

The lien of a judgment nisi rendered two days prior to an assignment for creditors, and final judgment a year thereafter, must yield to a subsequent judgment in favor of the United States, under act of Congress 1799, chap. 128, § 65, providing that in case of insolvency, or where any estate in the hands of assignees shall be insufficient to pay all the debts, the debts due the United States on the bond of the collector shall be first satisfied. *Thelsson v. Smith*, 2 Wheat. 396, 4 L. ed. 271.

In regard to this case, the court in *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 7 L. ed. 189, said:

"The real ground of the decision was that the judgment creditor had never perfected his title by any execution and levy on the S. estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision; and it is obvious that it established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien."

In *United States v. Humphreys*, 3 Hughes, 201, Fed. Cas. No. 15,422, it was said: "I am inclined to believe on authority, and would so decide if necessary in this case, that judgments in favor of the United States stand on the same principle as those in favor of the commonwealth and of the Crown; that they are a lien independently of laws making judgments generally a lien upon the estates of debtors, and do not depend upon those laws."

IX. Decree in admiralty.

A decree in admiralty for the payment of money rendered in a Federal court in a suit *in personam* is a lien upon the lands of the defendant in the decree, and an execution issued on the same day, for the want of goods and chattels of the execution debtor, may be lawfully levied on his real estate. *Ward v. Chamberlain*, 2 Black, 430, 17 L. ed. 819.

In conclusion, it may be said that the lien of judgments of Federal courts is similar to those of the state courts; that the lien depends on acts of Congress; that such lien cannot be altered or impaired or rendered ineffectual by state legislation; that the lien extends throughout the territorial jurisdiction of the court, but since 1888 the judgment to be effectual must be recorded in the county where the real estate is situated if the state law makes provision for such recording; that the time of taking effect, and the bar of limitations, follow the state law.

Cases in regard to liens of courts of District of Columbia and territories are not included in this note.

I. T.

Claud D. WALROD

v.

WEBSTER COUNTY, Appt.

(.....Iowa.....)

1. Defects in the railing of a bridge were the proximate or efficient cause of the accident, when the railing was broken by a team of horses, one of which was frightened by a flash of lightning. If the accident would not have happened had the railing been sufficient, although, on the other hand, it would not have happened except for the lightning.
2. One whose negligence concurred with some other cause, both operating proximately at the same time in producing the injury, is liable therefore, whether the

NOTE.—As to the liability of a county for torts and negligence in respect to bridges or in other matters, see note to *Hughes v. Monroe County* (N. Y.) 39 L. R. A. 33; and *Jasper County Comrs. v. Allman* (Ind.) 39 L. R. A. 58, 47 L. R. A.

other cause was one for which he was responsible or not.

3. A formal statement of the issues by the court to the jury need not present all the issues, if they are all fairly and sufficiently presented in other portions of the charge.
4. Evidence as to the habits of a team both before and after an accident is admissible in an action for injury by the accident, when the character or disposition of the team is in issue.
5. Affidavits, or those parts of them which contain statements at variance with the testimony of a witness on the stand, are properly admitted in evidence to impeach him.
6. Failure to object to evidence when offered is ground for refusing to strike it out afterward, if no reason is given for the failure to object.
7. An objection to the whole of an affidavit is properly overruled, if part is admissible in evidence.

(January 25, 1900.)

APPEAL by defendant from a judgment of the District Court for Wright County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. T. Chantland and Duncombe & Kenyon, for appellant:

What was the cause or instrument which at the time of this accident set the other in motion and gave to it its efficiency for harm at the time of the disaster?

This accident would not have happened, and could not have happened, only on account of the sudden flash of lightning frightening the horses.

The proximate cause, in order to create any liability in any possible event, must be an act or default of the defendant.

Elliott, Roads & Streets, p. 629; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Lee v. Union R. Co.* 12 R. I. 383, 34 Am. Rep. 668; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114.

Suppose in this case that the lightning which frightened these horses had been negligently caused by some individual, instead of the powers of nature, and these horses had jumped against the railing, tumbled over, hurled the driver over with them, and caused the injury, would anyone have doubted that the lightning was the real, moving, proximate cause?

Addison, Torts, § 12; *Cooley, Torts*, § 70; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Scott v. Shepherd*, 2 W. Bl. 892; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199; *Weick v. Lander*, 75 Ill. 93; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Lane v. Atlantic Works*, 111 Mass. 136.

If, instead of the lightning being the act of God, it had been the act of a private individual, even if another wrongdoer's act had

intervened between it and the final result, the injured person would have been entitled to recover against the party who set in motion the original, proximate cause; namely, the lightning.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; *Lane v. Atlantic Works*, 107 Mass. 104; *Tu-tein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13; *Pollett v. Long*, 56 N. Y. 200; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608.

The liability of horses to take fright at lightning is one of the liabilities which every owner or driver of horses necessarily takes at any time during a storm; and that does not make the lightning any less the proximate cause when an injury results.

Elliott, Roads & Streets, p. 51; *Harris v. Vigo County Comrs.* 121 Ind. 299, 23 N. E. 92; *Porter County Comrs. v. Dombke*, 94 Ind. 72; *Shearm. & Redf. Neg.* 4th ed. § 261.

When the cause has so far expended itself that its influence in producing the injury is too minute for the law's notice, or when it is a cause which some independent force merely took advantage of to accomplish something not the natural or probable effect thereof, "the cause is remote."

Bishop, Non-Cont. Law, Rights, and Torts, § 41; *Cooley, Torts*, 69; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 252, 26 L. ed. 1071; *Broom, Legal Maxims*, 216; *Swan v. Union Ins. Co.* 3 Wheat. 168, 4 L. ed. 361; *Waters v. Merchants' Louisville Ins. Co.* 11 Pet. 213, 9 L. ed. 691; *Peters v. Warren Ins. Co.* 14 Pet. 99, 10 L. ed. 371; *Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co.* 12 Wall. 194, 20 L. ed. 378; *Max. Reg.* 1.

One who does an act likely to cause horses to take fright "must be deemed to be responsible for injuries caused by horses running away under the influence of the fright."

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; *Bosch v. Burlington & M. R. Co.* 44 Iowa, 402, 24 Am. Rep. 754; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 49, 19 L. ed. 65.

The proximate cause was the flash of lightning frightening the horses, causing them to jump against the railing of the bridge.

6 *Rapalje & Macks' Dig. Railway Law*, p. 1106; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 252, 26 L. ed. 1071; *Burroughs v. Housatonic R. Co.* 15 Conn. 124, 38 Am. Dec. 77; *Knecht v. Mutual L. Ins. Co.* 90 Pa. 118, 35 Am. Rep. 643.

To entitle the plaintiff to recover, it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge.

McClain v. Garden Grove, 83 Iowa, 235, 12 L. R. A. 482, 48 N. W. 1031; *West v. Ward*, 77 Iowa, 323, 42 N. W. 309; 2 *Dill. Mun. Corp.* § 789; *Raymond v. Lowell*, 6 Cush. 524; *DeCamp v. Sioux City*, 74 Iowa, 392, 37 N. W. 971; *Handelun v. Burlington, C. R. & N. R. Co.* 72 Iowa, 710, 32 N. W. 4; 47 L. R. A.

Knapp v. Sioux City & P. R. Co. 65 Iowa, 91, 54 Am. Rep. 1, 21 N. W. 198.

Messrs. Botsford, Healy, & Healy, for appellee:

Was not the jury authorized in finding that the force applied by these horses walking toward this railing, in the way that the evidence shows that they did, was not great, and that it was not sufficient to break down a railing had it been in good condition? Were they not justified in saying that the shrinking and swerving of those horses by reason of the flash of lightning upon the bridge was not such an uncommon occurrence that it can be said to be a contingency against which the corporation should not be required to provide, and that the defendant might well be held liable for a failure to provide against a pressure which the jury might rightly have found was applied to this railing?

Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Pratt v. Chicago, R. I. & P. R. Co.* 107 Iowa, 287, 77 N. W. 1064.

Deemer, J., delivered the opinion of the court:

Between the hours of 12 o'clock midnight and 1 o'clock A. M. of March 8, 1897, plaintiff was thrown from a county bridge in the defendant county, in consequence of his team going off the south approach thereto. Railings were erected on either side of the approach, something like twelve years before the accident, that, in consequence of neglect and the action of the elements, became out of repair, insecure, and insufficient to meet the purposes intended. The approach from which plaintiff fell was about 22 feet long, and the railings were each supported by three posts, the first of which was 2½ feet from the main pier, the second near the middle of the railing, and the third at the end thereof. Plaintiff was driving a team over the bridge, and when near the north or bridge end of the approach the off horse became frightened by a flash of lightning, and, squatting and setting back in the harness, guided or pushed the near horse towards the left or east side of the approach, and against the railing, which gave way, and precipitated the horses and driver over the side of the approach, down to the ground beneath, resulting in the injuries of which plaintiff complains. The evidence tended to show that the horses were not seriously frightened, and were at no time beyond the control of the driver; that they were both on a walk until they went over the side of the approach; and that the sleigh in which plaintiff was riding, and to which the team was attached, traveled from 16 to 20 feet from the main traveled track to the point where it went over the approach. No question is made as to the extent of the injuries, and there is no serious dispute regarding the condition of the railing. Contributory negligence is not claimed, and there is no doubt that defendant had knowledge of the condition of the bridge and of the approach. Defendant's main contention is that the defects

in the railing were not the proximate or efficient cause of the accident, and that the court was in error in submitting the case to the jury, and in refusing defendant's instructions to the effect that the lightning, and not the defect in the bridge, was the proximate cause.

The jury was plainly told that the county was not an insurer against all accidents that might happen upon its bridges; that it was only bound to maintain its bridges and approaches thereto in reasonably safe condition for the ordinary uses to which the same was subject, and was not required to provide for extraordinary emergencies; and that defendant was not guilty if it maintained the railing in the condition required, and was not liable if it were negligent in respect to the railing, unless plaintiff also showed that the accident would not have happened had the bridge been in the condition required. The court further instructed that, if the accident would have happened had the railing been in proper condition, then plaintiff could not recover. The question of proximate cause was left to the jury under these instructions, with the further admonition that they should consider all the evidence in the case relating to the manner in which the accident occurred, how the horses came against the railing, the speed at which they were going, and the force brought against the barrier, and all the other evidence in the case that would aid them in determining the questions submitted. Defendant does not claim that these instructions are faulty in so far as they state abstract propositions of law, but it claims that they are erroneous as applied to the facts, because the real and efficient cause of the injury was the flash of lightning, which caused the horses to jump against the railing, and not the defective condition of the bridge. If the flash of lightning was the proximate cause, then defendant was not responsible.

What is the proximate cause of an injury is often a troublesome and perplexing question. Many definitions are given, but, like definitions of reasonable doubt, they tend to obscure rather than to enlighten. It has been defined to be "the efficient cause," "the direct cause," "the cause that set another or other causes in operation," "the dominant cause," and "that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster." But as said by Justice Miller in *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 52, 19 L. ed. 67: "If we could deduct from them [the cases] the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." Had the evidence shown, as defendant claims, that the horses were frightened and jumped upon the railing, it may be that the case should not have gone to the jury. See *McClain v. Garden Grove*, 83 Iowa, 235, 12 L. R. A. 482, 48 N. W. 1031. However, we express no opinion on this point, for the reason that the evidence tended to show that

the team gradually veered from the main traveled track against the barrier, and did not jump or fall against it. The off horse was frightened by the lightning, and settled back in his harness. This caused the near horse to pull the load, and the team and vehicle to deviate from its course, and, after traveling for some distance at a comparatively slow rate of speed, to come in contact with the railing of the bridge. Now, the court said, in view of this state of facts, that, if the jury found the accident would not have happened had there been sufficient barriers, then the defective barrier was the proximate cause of the injury, but, if they found that the accident would have happened had the barrier been sufficient, then the defective railing was not the cause of the injury, and plaintiff could not recover. These instructions announced the rule correctly, and there was evidence in their support. True it is that the accident would not have happened, even under plaintiff's version, had it not been for the flash of lightning; but the jury may well have found that it would not have occurred had it not been for the defective condition of the railing. When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither is responsible,—the municipality is liable, provided that the injury would not have been sustained but for such defect. *Langhammer v. Manchester*, 99 Iowa, 295, 68 N. W. 688. Or, as stated in *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697: "The mere fact that some other cause operates with the negligence of the defendant to produce the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the other cause was one for which the defendant was responsible or not." See also, as sustaining these rules, *Faulk v. Iowa County*, 103 Iowa, 442, 72 N. W. 757; *Pratt v. Chicago R. I. & P. R. Co.* 107 Iowa, 287, 77 N. W. 1064; *Baldwin v. Greenwood's Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 33; *Hunt v. Pownal*, 9 Vt. 411; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Ring v. Cohoes*, 77 N. Y. 84, 33 Am. Rep. 574; *Perkins v. Fayette*, 68 Me. 152; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; *Palmer v. Andover*, 2 Cush. 600; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568.

2. The contention that the verdict is contrary to the twenty-sixth and twenty-eighth instructions is answered by what is said in the first paragraph of this opinion, and need not be further considered. Error is assigned on the failure of the court to fully state the issues to the jury. It is contended that certain defenses pleaded by the defendant were not stated. It is true that many of the matters pleaded in answer were not specifically referred to by the court in stating the issues. But in other parts of the charge all the mat-

ters pleaded by defendant were fully and explicitly covered. It is not necessary that all of the issues be presented in the formal statement of the issues. It is enough if they are all fairly and sufficiently presented in other portions of the charge. *Siltz v. Hawkeye Ins. Co.* 71 Iowa, 710, 29 N. W. 605; *Hall v. Carter*, 74 Iowa, 364, 37 N. W. 956. Much of the matter pleaded by defendant in answer was either conclusions of law or statements of fact that it tended to prove, rather than ultimate facts that were defensive in character; and, as the court fully submitted all the issues tendered by the pleadings, there was no error of which defendant may justly complain.

3. A witness was permitted to state, over objections made by defendant, that some months after the accident the team that went over the bridge rendered him first-class service in every respect. It is claimed that this evidence was inadmissible, for the reason that it related to the character and disposition of the team after the accident occurred. There are several sufficient answers to this contention: First, another witness had theretofore testified, without objection, to being with the team on the same night that the former witness testified regarding, and that the team did all right; second, if the evidence was inadmissible, there was no prejudice, for there is nothing in it to indicate the character or disposition of the team at that time; and, third, when the character or disposition of a team is in issue, evidence as to its habits both before and after the accident is admissible. *Whitney v. Leominster*, 136 Mass. 25; *Maggi v. Cutts*, 123 Mass. 535. Certain affidavits purporting to have been made, one by a man named Parnum, and another, a joint one by Emmons and Condon, were admitted in evidence. Parnum and Condon were witnesses for the defendant, and testified regarding the condition of the bridge. On cross-examination their attention was called to statements in their affidavits materially at variance with their testimony while on the witness stand. Each of these witnesses admitted having signed the affidavits, but claimed that they did not correctly state the facts. The affidavits were offered in rebuttal for the purpose of impeaching the witnesses who made them. When offered, no objection was interposed; but, after they had been read and incorporated into the record, defendant moved to strike the same. The motion was sustained in so far as the affidavits purporting to be made by Condon, and was otherwise overruled. Manifestly, these affidavits, or at least those parts of them which contained statements at variance with the witnesses' evidence while on the stand, were properly admitted in evidence for impeaching purposes, and the motion was properly overruled. But, if wrong in this, there was no error in the ruling, for the reason that no objection was tendered when the evidence was offered, and no reason is given for not interposing the objection when the evidence was offered. *Leipold v. Stotler*, 97 Iowa, 174, 66 N. W. 47. L. R. A.

150; *State v. Marshall*, 105 Iowa, 38, 74 N. W. 785. Again, as parts of the affidavits were admissible in evidence, an objection to the whole thereof was properly overruled. *Puth v. Zimbleman*, 99 Iowa, 647, 68 N. W. 895; *Bothwell v. Farwell*, 74 Iowa, 324, 37 N. W. 392. There is no prejudicial error in the record, and the judgment is affirmed.

• Granger, Ch. J., not sitting.

G. NICHOLS

v.

Charles Woodhull EATON *et al.*, Appts.

(.....Iowa.....)

1. A communication by a principal to his agent, touching the business of the agency, is not actionable without proof that the principal is actuated by malice toward the person to whom the communication relates.
2. The presumption of malice is rebutted in case of a privileged communication, and the burden of proving malice is on the party alleging it.
3. Exceeding the privilege of a communication about a matter in which both parties have an interest does not destroy the privilege, but the excess of statement is material only as bearing on the question of malice.

(February 8, 1900.)

A PPEAL by defendants from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

Statement by Deemer, J.:

Defendant Eaton denied generally, and also pleaded that the alleged libel was privileged. The other defendant denied the allegations of the petition not expressly admitted; admitted its corporate capacity, and that defendant Eaton was its medical director. It avers that the alleged libelous publication was in a letter written by an employee to its duly authorized agent in the town where plaintiff lived; that said letter was written in good faith, and without intention to injure the plaintiff, and without malice; and that the publication was made in the discharge of a duty it owed to its agent. On the trial the action was dismissed as to defendant Eaton, and a verdict and judgment were rendered for plaintiff, as against the association, for the sum of \$2,300. The association appeals.

Messrs. A. H. Evans, Carr & Parker, and George R. Sanderson for appellants.

NOTE.—For privileged communications in line of business, see also *Missouri P. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280, and *note*; *Broughton v. McGrew* (C. Dist. Ind.) 5 L. R. A. 406; *Moore v. Manufacturers' Nat. Bank* (N. Y.) 11 L. R. A. 753, and *Rothholz v. Dunkle* (N. J.) 13 L. R. A. 655.

Messrs. Guernsey & Granger, for appellee:

Whether the communication is or is not privileged by reason of the occasion is a question for the judge alone, where there is no dispute as to the circumstances under which it was made. If the judge decides that the occasion was one of qualified privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he gives any evidence of malice sufficient to go to the jury, then it is a question for the jury whether or not the defendant was actuated by malicious motives in writing or speaking the defamatory words.

13 Am. & Eng. Enc. Law, p. 406; Newell, Defamation, Slander, & Libel, p. 478.

Good faith and belief in the truthfulness of the statement do not constitute a defense, except that they are necessary to be shown where a communication is privileged.

Ronan v. Williams, 41 Iowa, 680.

It is not sufficient that the party uttering the communication shall have an interest or duty with reference to it, to make it privileged, but there must also be a corresponding interest or duty of the person to whom it is communicated.

13 Am. & Eng. Enc. Law, p. 404.

There must be more than a confidential relation between the parties. Each party must have an interest or duty to perform with reference to the subject-matter of the communication.

If there were means at hand for ascertaining the truth of the matter, of which the defendant neglected to avail himself, and chose rather to remain in ignorance when he might have obtained information, there can be no law for any claim of privilege.

Newell, Defamation, Slander, & Libel, p. 476; *Clemmons v. Danforth*, 67 Vt. 617, 32 Atl. 626.

Where the claim of privilege is interposed as a defense in an action for libel or slander, it is not the test of privilege that the words were uttered or published on a privileged occasion, or that a part of the communication was protected by privilege. Where there are several distinct charges, some privileged and some not privileged, those not privileged are not justified by the charges that are privileged.

Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 11 L. R. A. 753, 25 N. E. 1049.

Deemer, J., delivered the opinion of the court:

Appellant is a life insurance association incorporated under the laws of Iowa, with its principal place of business at Des Moines. Defendant Eaton was its medical director, and one Dohaney was its clerk and book-keeper. W. T. Botts was soliciting agent for the association at the town of Higbee, Missouri, and plaintiff was its medical examiner at that place. The application of one A. P. Milnes for insurance was prepared by plaintiff, signed by the applicant, and turned over to the soliciting agent, Botts, after plaintiff had examined Milnes. The

application was then forwarded to the defendant company. After being received by the association, it was given to the medical director, Eaton, who made some minutes thereon, and passed it to Mr. Dohaney, to prepare and forward an answer. Dohaney prepared, addressed, and mailed the following to Botts, the soliciting agent:

Des Moines, Iowa, Jan. 11, 1896.

W. T. Botts,

Higbee, Mo.

Dear Sir:

I write you in reference to medical examiner at Higbee. I have before me the application of Adolphus P. Milnes. This application shows on the face of it to be a forgery of his signature, and it is written by Dr. Nichols instead of the applicant. He has fallen down in his undertaking to imitate the handwriting of the applicant, by his misspelling the name. We have returned the application to the doctor, and given him to understand that it must be corrected at once; and you are hereby notified that in the future no more examinations will be accepted, when made by Dr. Nichols. We will appoint another physician at that place, and will notify you of the appointment of same. We have no longer any confidence in Dr. Nichols, and, as above stated, we cannot accept any more examinations made by him.

Very resp., yours,

Chas. Woodhull Eaton,
Medical Director.

The court, after stating defendant's claim that the letter was privileged, instructed as follows: "And, as to this claim of the said defendant, you are instructed that the said letter or communication, made and published in the manner and under the circumstances under which the same was made and published, was not a privileged communication, and the circumstances under which the same was made and published did not justify the defendant in so making and publishing the same." It further instructed that the letter was libelous *per se*, and that the only matter for the jury to consider was the amount of damages. Claim is made that the instructions are erroneous, for the reason that the letter was conditionally privileged; that is to say, that the occasion was such as to rebut the presumption of malice arising from the publication, and to cast the burden on plaintiff of proving malice in fact. On the other hand, it is contended that the occasion was not privileged, and that, if privileged, the communication was in excess of the privilege. Privileged communications or publications are of two kinds: First, absolute; second, conditional or qualified. When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it was published. When qualified, however, the plaintiff may recover, if he shows that it was actuated by malice. In determining whether or not the communication was qualifiedly privileged, regard must be had of the occasion, and of the relationship of the parties. One may make

a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable. In the protection of his own interests, one may make a communication to his agent or servant without subjecting himself to liability, unless he exceeds the privilege, and does more than his duty or interest demands. Again, when one has an interest in the subject-matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged, by reason of the occasion. Generally this interest must be a pecuniary one, but it may arise out of the relationship or status of the parties. The statement must be such as the occasion warrants, and must be made in good faith to protect the interests of the publisher and the person to whom it was addressed. A communication by a principal to his agent touching the business of the agency is not actionable, without proof that the principal was actuated by malice towards the person to whom the communication relates. Now, the evidence in this case does not show very clearly whether the Milnes application was forwarded to the association by plaintiff or by the soliciting agent. From the fact that the letter regarding the application was sent to Botts, it would appear that he had sent the application. But, be this as it may, Botts, as soliciting agent, was entitled to know who was the accredited medical examiner of the association at the town where he was taking applications. The company also had the right to inform its soliciting agent of the discharge of its medical examiner in the locality where the soliciting agent was operating. The occasion was undoubtedly privileged, and it was the duty of the court to so instruct the jury. Appellee says that, conceding the occasion was privileged, defendant went beyond the privilege, and rendered itself liable. This argument presents a question that is new to this court, and one on which the authorities are in apparent conflict. Decision of the point involves a consideration of the reasons underlying the doctrine of privilege. Ordinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a prima facie case of malice in the author. But a privileged communication is an exception to the rule. In such case the presumption of malice is rebutted, and the burden of proving the existence of this element of the action is on plaintiff. In other words, actual malice must be shown. *White v. Nichols*, 3 How. 286, 11 L. ed. 600; *Briggs v. Garrett*, 111 Pa. 414, 56 Am. Rep. 274, 2 Atl. 513; *Beaure v. Bass*, 88 Me. 521, 34 Atl. 411. *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181, is an instructive and well-considered case on this point. It is there said: "The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of plaintiff, and throws upon him the onus

of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. . . . The effect, therefore, of showing that the communication was made upon privileged occasion is prima facie to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact—that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff,—and this malice in fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury."

Plaintiff relies on some expressions found in the books to the effect that, if the communication exceeds the privilege, it destroys the privilege. Thus, Mr. Odgers in his work on *Libel & Slander* (* 197), says: "But it must be remembered that, although the occasion may be privileged, it is not every communication made on such occasion that is privileged. 'It is not enough to have an interest or a duty in making a communication; the interest or duty must be shown to exist, in making the communication complained of.' (Per Dowse, B., in [*Lynam v. Gowing*] Ir. L. R. 6 C. L. at p. 269.) A communication which goes beyond the occasion 'exceeds the privilege.'" Again, at page 245, it is said: "So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out onto extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty." We have recognized some of the rules here announced. See *State v. Hoskins* (Iowa) 47 L. R. A. 223, 80 N. W. 1063. There the occasion was not privileged, because made to persons who were in no manner interested in the publication. The doctrines announced by Mr. Odgers, some of which are even stronger than we have quoted, have produced some confusion in the authorities; and we think the better rule is that if the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of statement is material only as bearing on the question of malice. Indeed, the jury may find the existence of malice from the language of the communication itself, as well as from extrinsic evidence. *Hastings v. Lusk*, 22 Wend. 410-421, 34 Am. Dec. 330; *Nevill v. Fine Arts & G. Ins. Co.* [1895] 2 Q. B. 156; *Missouri P. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384. Whether the publication is or is not privileged by reason of the occasion is a question of law, for the judge alone, where there is no dispute as to the circumstances under which it was made. If the judge decides that the occasion was one of qualified or conditional privilege only, the

plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he does give any evidence, which, as we have said, may be gathered from the publication itself, the question of bona fides becomes one of fact for the jury. [*Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96] 1 Am. Lead. Cas. 5th ed. 193; *Gray v. Pentland*, 4 Serg. & R. 420; *Hart v. Reed*, 1 B. Mon. 166, 35 Am. Dec. 179; *Newell, Defamation, Slander, & Libel*, p. 478. In *Hill v. Durham House Drainage Co.* 79 Hun, 335, 29 N. Y. Supp. 427, it is said: "In case a communication is prima facie privileged, the existence or nonexistence of malice on the part of the defendant is a question of fact; and the plaintiff, before he can recover, must affirmatively establish to the satisfaction of the jury that the publication complained of was made through malice. This may be shown by the communication, by the circumstances under which it was written, and it may be inferred from a variety of facts. The occasion was privileged. Did the publication go beyond the occasion, or, in other words, was more written than the occasion—the facts—

justified? This depends upon the terms of the communication, and the facts outside of it, and was an issue of fact for the jury." See also *Comfort v. Young*, 100 Iowa, 627, 69 N. W. 1032; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360.

The instructions given by the trial court were, for the reason stated, erroneous. We do not overlook the plaintiff's claim that the question is not raised by proper assignments of error. An examination of the record convinces us that they are sufficient.

2. Defendants contend that the answer tendered an issue as to the authority of the agent to write the letter, and that the court erred in not submitting that issue. We do not think the record sustains their claim. The writing of the letter was admitted, and we find no pleading questioning the authority of the writer to bind the company.

For the reasons pointed out, the judgment of the District Court is reversed.

Granger, Ch. J., not sitting.

GEORGIA SUPREME COURT.

J. W. BAGWELL, *Plff. in Err.*,
v.

ATLANTA CONSOLIDATED STREET
RAILWAY COMPANY.

(.....Ga.....)

*An action by a father for the loss of the services of his minor daughter, occasioned by personal injuries, should not be dismissed because she, after reaching her majority, refused to obey an order of the court in which the action was pending, requiring her to submit to a physical examination of her person by a physician.

(January 27, 1900.)

ERROR to the City Court of Atlanta to review a judgment dismissing an action brought to recover damages for personal injuries to plaintiff's daughter because of her refusal to submit to a personal examination as to the extent of the injuries. *Reversed.*

The facts are stated in the opinion.

Messrs. Dorsey, Brewster, & Howell, for plaintiff in error:

The defendant has no absolute right to have personal physical examination of plain-

tiff made; but it rests with the discretion of the court.

3 Am. St. Rep. 549; see note on page 556; *Roberts v. Ogdensburgh & L. C. R. Co.* 29 Hun, 157; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

Messrs. Goodwin & Hallman, for defendant in error:

The dismissal was a proper and reasonable disposition of the case for the refusal to be examined.

Richmond & D. R. Co. v. Childress, 82 Ga. 719, 3 L. R. A. 808, 9 S. E. 602.

Lumpkin, P. J., delivered the opinion of the court:

The record is voluminous and redundant, but, after relegating from it all save that which is really material, we find that the case, as now presented, turns upon the single question on which the ruling announced in the headnote is made. We do not think this question requires elaborate discussion. It would be going a great length to hold that such an action by a father should be defeated by the refusal of a daughter who, though not quite twenty-one years old, was practically a grown woman, to submit her person to a physician for physical examination. Certainly, if, as was alleged in this case, the

*Headnote by *LUMPKIN*, P. J.

NOTE.—As to common-law right of action for loss of services of child killed, see *Gulf, C. & S. F. R. Co. v. Beall* (Tex.) 41 L. R. A. 807, and note.

As to right of parent to sue for injury to child, see also *Baker v. Flint & P. M. R. Co.* (Mich.) 16 L. R. A. 154.

As to right to compel physical examination of party, see *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466, and note; also 47 L. R. A.

Graves v. Battle Creek (Mich.) 19 L. R. A. 641; *Carrico v. West Virginia, C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Lyon v. Manhattan R. Co.* (N. Y.) 25 L. R. A. 402; *Hall v. Manson* (Iowa) 34 L. R. A. 207; *Cleveland, C. C. & St. L. R. Co. v. Huddleston* (Ind.) 36 L. R. A. 681; *O'Brien v. La Crosse* (Wis.) 40 L. R. A. 831; *Lane v. Spokane Falls & N. R. Co.* (Wash.) 46 L. R. A. 153; and *Wanek v. Winona* (Minn.) 46 L. R. A. 448.

physician, though eminent in his profession and a thorough gentleman, was distasteful to the daughter, it would have been placing upon the father, even if she had still been under his control, a great and painful burden to coerce her to undergo an examination, or else give up his cause of action. But that is not the case with which we are now dealing, for the record shows that the refusal upon which the judge's order of dismissal was based was made by the daughter after she had become of age. At that time her father had no right or authority to control her person or her movements. His conduct would have been indefensible, if not criminal, if he had undertaken to compel her, against her will, to allow a physician to examine her. No humane father would, at any cost, attempt such a thing. It may be that, if he really desired the examination to take place, he might, by perfectly proper means, have induced his daughter to consent to it. Be this as it may, we are not prepared to hold that he was, in any event, bound to pursue such a course; and, moreover, it distinctly appears, as already remarked, that this case was dismissed solely on the ground that Miss Bagwell refused to submit to the examination which the court had ordered to take place. We have no hesitation in holding that a case should not be thrown out of court because of the conduct of one not a party to it, and who was neither

legally bound to obey the plaintiff's orders, nor subject to his custody or control. If any court in the world has ever gone so far, we are not aware of it, and we certainly are unwilling to establish such a precedent. Neither § 4047 of our Civil Code, which confers upon every court of this state the power to control, in furtherance of justice, the conduct of all persons "connected with a judicial proceeding before it," nor the decision of this court in *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 3 L. R. A. 808, 9 S. E. 602, affords any warrant for so doing. In that case, it was simply held that it was within the power of the court, in the exercise of its discretion, to compel the plaintiff to submit to an examination. Referring to a suggestion made in the argument, that the rule announced "would operate hardly upon delicate and modest females," Chief Justice Bleckley said (p. 722, 82 Ga., p. 603, 9 S. E. and p. 809, 3 L. R. A.): "We can only say that they would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely." We are quite sure the case ought not to have been dismissed.

Judgment reversed.

All the Justices concur.

INDIANA SUPREME COURT.

City of VALPARAISO, App't.,

v.

Nelson J. BOZARTH et al.

(.....Ind.....)

1. A substantially built dwelling house with a brick foundation, extending into a street, constitutes a public nuisance.
2. A notice or request to remove a building which encroaches on a street is not necessary before bringing an action to abate it as a nuisance, when brought against the person who erected the building with constructive notice of the street line by a recorded plat, although such person was only a lessee of the premises, and in good faith believed that the building was entirely outside the street line, and in fact it encroached less than other houses and improvements on the street.

(November 28, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Porter County in favor of defendants in an action brought to compel the removal of a portion of a house which had been erected in the public street. *Reversed.*

NOTE.—For municipal power over nuisances of buildings and other structures, see *Evansville v. Miller* (Ind.) 38 L. R. A. 161, and note.

As to necessity of notice and hearing before condemnation of property, see *Teass v. St. Al-* 47 L. R. A.

The facts are stated in the opinion.

Mr. A. D. Bartholomew for appellant.
Messrs. A. L. Jones and Nelson J. Bo-
zarth for appellees.

Monks, J., delivered the opinion of the court:

This action was brought by appellant against appellees to abate a nuisance. The court made a special finding of the facts, and stated conclusions of law thereon, and rendered judgment against appellant. The only error assigned calls in question the second conclusion of law. It appears from the special finding that appellee Bozarth is the owner of a part of an outlot in the city of Valparaiso, fronting on Morgan street, and that he acquired title thereto in fee simple in 1876. In 1879 said Bozarth granted to appellee Stephens, his mother, the right to erect on said real estate a two-story frame dwelling house, which house was to be and remain the property of said Stephens, and under her control, with the right on her part to collect all the rents and income thereof, and to remove the dwelling house from the premises whenever she desired to do so.

bans (W. Va.) 19 L. R. A. 802; *People ex rel. Copcutt v. Yonkers* (N. Y.) 23 L. R. A. 481; *Yonkers v. Copcutt* (N. Y.) 23 L. R. A. 485; and *Harrington v. Providence* (R. I.) 38 L. R. A. 305.

Morgan street runs north and south, and bounds said outlot on the west. Said appellee Stephens, by virtue of her interest in said real estate, in 1879 built a frame dwelling house on said lot and on Morgan street, the same extending into said street 6.1 feet. Said house is substantially built, with a brick foundation under the same, and is of the value of \$800, and at the time of the commencement of this action was occupied by appellees. At the time said house was built, there was a fence running north and south on a line four feet west of the most westerly part of said house, and across the premises, which fence had been there twelve years, and the houses and other improvements on Morgan street were on a line with the fence aforesaid; and appellee Stephens when she built said house, and down to the time of the commencement of this action, had no notice or knowledge that said fence was in the limits of Morgan street, but in good faith believed that she was erecting her said house within the boundary of the real estate described in her contract, and not in said street. The conclusions of law stated by the court were: First, that the house, in so far as it extends upon the street, is a nuisance, and should be abated; second, that said action was prematurely brought for want of notice. It is settled in this state that a permanent structure like the one erected by appellee Stephens, which encroaches upon the street, is *per se* a public nuisance. *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117, and note, p. 127; *Pettis v. Johnson*, 56 Ind. 139; *Adams v. Ohio Falls Car Co.* 131 Ind. 375, 379, 31 N. E. 57; *Sims v. Frankfort*, 79 Ind. 446, 451; *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, 116; *Bybee v. State*, 94 Ind. 443, 446, 447, 48 Am. Rep. 175. See note to *Drew v. Geneva* (Ind.) 42 L. R. A. 814, 825; note to *Hagerstown v. Witmer* (Md.) 39 L. R. A. 649, 685. It is settled that when a party creates, or is the author of, a nuisance, an action may be maintained against him to abate the nuisance without any notice or request to remove the same. 1 Hilliard, Torts, 710; Angell, Watercourses, § 403; Wood, Nuisances, 2d ed. § 838; Washb. Easem. 3d ed. 693-696; Enc. Pl. & Pr. 1110, 1111; 2 Jaggard, Torts, pp. 795-797; *Steinke v. Bentley*, 6 Ind. App. 663, 669, 34 N. E. 97; *Curtice v. Thompson*, 19 N. H. 471; *Wason v. Sanborn*, 45 N. H. 169; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201; *Brown Paper Co. v. Dean*, 123 Mass. 269; *Prentiss v. Wood*, 132 Mass. 488; *New Salem v. Eagle Mill Co.* 138 Mass. 8; *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, and note, p. 75; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333, and note, pp. 336-341; *Ray v. Sellers*, 1 Duv. 254; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476; *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Fish v. Dodge*, 4 Denio, 311; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451; *Branch v. Doane*, 17 Conn. 418; note to *Johnson v. Lewis* (Conn.) 33 Am. Dec. 407. It is held in many cases that the grantee or

lessee of real estate upon which there is an existing nuisance of a nature not essentially unlawful is liable to an action therefor only after notice to remove or abate it. *Slight v. Gutzlaff*, 35 Wis. 676, 17 Am. Rep. 476; *Pierson v. Glean*, 14 N. J. L. 36, 25 Am. Dec. 497, and note, p. 499; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201; *Plumer v. Harper*, 3 N. H. 91, 14 Am. Dec. 333-341, and note, pp. 336-341; *Woodman v. Tufts*, 9 N. H. 88; *McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, and note, p. 75; *Nichols v. Boston*, 98 Mass. 43, 93 Am. Dec. 132, and note, p. 136; *Brown Paper Co. v. Dean*, 123 Mass. 267, 269; *Prentiss v. Wood*, 132 Mass. 486, 488; *Branch v. Doane*, 17 Conn. 402, 418; *Johnson v. Lewis*, 13 Conn. 304, 33 Am. Dec. 405; *Crommelin v. Coxe*, 30 Ala. 318, 68 Am. Dec. 120, and note, p. 126; *Blunt v. Aikin*, 15 Wend. 523, 30 Am. Dec. 72; *Waggoner v. Jermaine*, 3 Denio, 309, 45 Am. Dec. 474, and note, p. 479; *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.* 51 N. Y. 573, 10 Am. Rep. 646; *Ahern v. Steele*, 115 N. Y. 203, 210, 213, 5 L. R. A. 449, 22 N. E. 193, 12 Am. St. Rep. 778, and note, pp. 800, 801; *Huckensline's Appeal*, 70 Pa. 102, 10 Am. Rep. 669; *Thornton v. Smith*, 11 Minn. 15, Gil. 1; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 658, and note, p. 661; *Pierce v. German Sav. & L. Soc.* 72 Cal. 180, 13 Pac. 478; *Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396; *Groff v. Ankenbrandt*, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342, and note, p. 345; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91, and note, p. 94; *Georgetown v. Alexandria Canal Co.* 12 Pet. 99, 9 L. ed. 1015; *Penruddock's Case*, 5 Coke, 100b; *Westbourne v. Mordant*, Cro. Eliz. 191; *Some v. Barwisth*, Cro. Jac. 231; *Brent v. Haddon*, Cro. Jac. 555. The rule requiring notice to the grantee or lessee in such cases has been seriously questioned in some cases, and denied in others. *Caldwell v. Gale*, 11 Mich. 77; *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220; *Brown v. Cayuga & S. R. Co.* 12 N. Y. 492; *Hubbard v. Russell*, 24 Barb. 404; *Conhocton Stone Co. v. Buffalo, N. Y. & E. R. Co.* 52 Barb. 390; *Morris Canal & Bkg. Co. v. Ryerson*, 27 N. J. L. 457; note to *Plumer v. Harper* (N. H.) 14 Am. Dec. 340, 341; note to *Pierson v. Glean* (N. J. L.) 25 Am. Dec. 499. It is expressly found in this case that Mrs. Stephens erected the dwelling house so that it extended 6.1 feet into the street. She was the creator of the nuisance. It is evident, therefore, that the rule that a grantee or lessee of real estate is not liable for a nuisance not created by him until after notice or request to remove the same does not apply to said appellee, because she erected the nuisance. The recorded plat of said city was constructive notice of the limits of the street and of the outlot. The boundaries of the real estate described in her contract were also constructive notice of the east line of the street. She had an equal opportunity with the city to ascertain the boundaries of said real estate. The fact that others had encroached upon the street by building fences

and houses thereon was no excuse for said appellee erecting her dwelling house in the street. It follows that the court erred in the second conclusion of law.

Judgment reversed, with instructions to restate the second conclusion of law, and render judgment in favor of appellant in accordance with this opinion.

Re Change of Name of BANK OF COMMERCE, Appt.,

v.

Charles S. WILTSIE.

(.....Ind.....)

1. Whether or not a general law can be made applicable to a subject-matter not included in Const. art. 4, § 22, is a question of legislative judgment.
2. The passage of more than fifty acts amending special charters since the adoption of Const. 1851, and the continued acquiescence of the people and other departments of the state government therein, have but little, if any, force as to the construction of the Constitution respecting the power to extend the term of corporate existence, when only four statutes have purported to do that, and no case of that kind has been passed upon by the courts.
3. The extension of an old special charter is within Const. art. 11, § 18, providing that "corporations other than banking shall not be created by special act."
4. Renewing the special privileges and immunities contained in an old special charter of a corporation is a violation of Const. art. 1, § 23, prohibiting the grant to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not belong to all citizens.

(May 28, 1899.)

A PPEAL by petitioner from a judgment of the Circuit Court for Marion County ousting it from its franchises upon its refusal to plead further after the overruling of a demurrer to an answer to its petition to change its name. *Affirmed*.

The facts are stated in the opinion.

Mr. Addison C. Harris, for appellant:

It has been settled in the case of the charter of the city of Evansville, and other charters written prior to 1851, that such may be amended either by special or general laws.

Eichels v. Evansville Street R. Co. 78 Ind. 261, 41 Am. Rep. 561; *Longworth v. Evansville*, 32 Ind. 322.

Whether a law of this class shall be general or special is a question of legislative judgment, and not subject to review by the judicial department.

Gentile v. State, 29 Ind. 409; *Mount v. State ex rel. Kichey*, 90 Ind. 29, 46 Am. Rep. 192; *Kelly v. State ex rel. First Nat. Bank*, 92 Ind. 236; *Warren v. Evansville*, 106 Ind.

NOTE.—As to the power to grant extensions to corporations by special act, see also *State ex rel. Clover v. Ladies of the Sacred Heart (Mo.)* 6 L. R. A. 84; also *Deposit Bank v. Daviess County (Ky.)* 44 L. R. A. 825. 47 L. R. A.

106, 5 N. E. 870; *Johnson v. Wells County Comrs.* 107 Ind. 15, 8 N. E. 1; *Wiley v. Bluffton*, 111 Ind. 152, 12 N. E. 165; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *Hovey v. Foster*, 118 Ind. 502, 21 N. E. 39; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Young v. Tipton County Comrs.* 137 Ind. 323, 36 N. E. 1118; *Mode v. Beasley*, 143 Ind. 315, 42 N. E. 727; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80.

A long and continuous contemporaneous construction of a constitution is conclusive.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; *Cohen v. Virginia*, 6 Wheat. 418, 5 L. ed. 294; *Cooley v. Philadelphia Port Wardens*, 12 How. 315, 13 L. ed. 1003; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 733, 28 L. ed. 1138, 5 Sup. Ct. Rep. 739; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 57, 28 L. ed. 351, 4 Sup. Ct. Rep. 279; *The Laura*, 114 U. S. 416, sub nom. *Pollock v. Bridgeport S. B. Co.* 29 L. ed. 148, 5 Sup. Ct. Rep. 881; *Schell v. Fauché*, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376; *Field v. Clark*, 143 U. S. 690, 36 L. ed. 306, 12 Sup. Ct. Rep. 495; *Rand v. United States*, 38 Fed. Rep. 667; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 203; *Fall v. Haeelrigg*, 45 Ind. 585, 15 Am. Rep. 278; *Franklin County Comrs. v. Bunting*, 111 Ind. 145, 12 N. E. 151; *Weaver v. Templin*, 113 Ind. 301, 14 N. E. 600; *State ex rel. Michener v. Harrison*, 116 Ind. 307, 19 N. E. 146; *Hovey v. State ex rel. Riley*, 119 Ind. 388, 21 N. E. 890; *Parvin v. Wimberg*, 130 Ind. 565, 15 L. R. A. 773, 30 N. E. 790; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *Sharpless v. Philadelphia*, 21 Pa. 160, 59 Am. Dec. 759.

It can hardly be thought the act of 1865, or any other herein cited, brought into existence a new and second corporation.

Southern P. R. Co. v. Orton, 6 Sawy. 157, 32 Fed. Rep. 457, Fed. Cas. No. 13,188a; *Frostburg Min. Co. v. Cumberland & P. R. Co.* 81 Md. 28, 31 Atl. 698; *St Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Black River Improv. Co. v. Holway*, 87 Wis. 584, 59 N. W. 128; *Wallace v. Loomis*, 97 U. S. 146-154, 24 L. ed. 895-898.

On rehearing.

Mr. Augustin Boice, also for appellant:

The decision in the case at bar, upon said § 13, art. 11, of our Constitution, is in conflict with *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80.

Wiley v. Bluffton, 111 Ind. 152, 12 N. E. 165.

The act of 1865 amending the 1st section of appellant's charter did not create, originate, or bring into existence a new corporate entity where none had previously existed.

The decision in the case at bar is, in effect, a judicial amendment of the Constitution of the state of Indiana, and adds to said

§ 13, art. 11, the following words: "Nor shall charters previously granted be extended or amended by special or general acts."

Indianapolis v. Navin, 151 Ind. 154, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *State ex rel. Harrison v. Menaugh*, 151 Ind. 267, 43 L. R. A. 408, 51 N. E. 117, 357.

An act extending the time of the existence of a corporation does not create a new corporation, and is not in conflict with the constitutional provision prohibiting the creation of a corporation by special act.

Cotton v. Mississippi & R. River Boom Co. 22 Minn. 372; *Black River Improv. Co. v. Holway*, 87 Wis. 584, 59 N. W. 126.

Said amendatory act was approved December 20, 1865.

From that date to this, appellant has exercised its rights, powers, and privileges under said amendatory act.

The manifest intention of this act was to refer back to the date of the creation of appellant, and to reaffirm and continue its existence indefinitely from that date. After the passage and acceptance of said act it superseded the original section of the law, and referred back to the original creation of said company, and all the powers and privileges originally granted to appellant were thereafter exercised through said amendatory act.

Blakemore v. Dolan, 50 Ind. 194; *Walsh v. State ex rel. Soules*, 142 Ind. 357, 33 L. R. A. 392, 41 N. E. 65; *Thomas v. Butler*, 139 Ind. 245, 38 N. E. 808.

"The extension of corporate existence" and the "creation of corporate existence" are not synonymous terms.

Frostburg Min. Co. v. Cumberland & P. R. Co. 81 Md. 28, 31 Atl. 698; *Taggart ex rel. Mason v. Perkins*, 73 Mich. 303, 41 N. W. 426.

A corporation has the capacity to receive more life or a greater length of existence after it is once created.

People ex rel. Stickney v. Marshall, 6 Ill. 672; *Ogden v. Saunders*, 12 Wheat. 270, 6 L. ed. 625; *Moers v. Reading*, 21 Pa. 188.

This court erred in holding that said amendatory act of 1865 is in conflict with § 23, art. 1, of the Constitution.

If this provision applies to corporations as such, or to stockholders of corporations, then it certainly does apply, or should apply, to all classes of corporations and to their stockholders, for its language is unlimited.

As all rights and powers granted to any corporation or its stockholders are privileges which belong to it or them alone, so far as they relate to the corporation, it would follow as a necessary consequence that said section prohibits all legislation in regard to such corporations.

Indianapolis v. Navin, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360.

The decision in the case at bar is in conflict with each of the following provisions of the Constitution of the United States; to wit:

1. Section 10 of article 1 of said Constitution. 47 L. R. A.

tution: "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

2. Section 1 of the 14th Amendment.

3. The following part of article 6 of said Constitution; to wit: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in very state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

If the contract, when made, was valid by the laws of the state as then expounded by all the departments of the government and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts altering the construction of the law. *Gelpcke v. Dubuque*, 1 Wall. 206, 17 L. ed. 525.

Messrs. Harding & Hovey and Charles S. Wiltse for appellee.

Baker, J., delivered the opinion of the court:

"An Act to Incorporate the Indianapolis Insurance Company" was passed on February 8, 1836. In § 1 it was provided that the company should be "a body politic and corporate with perpetual succession . . . for the period of fifty years from and after the passage of this law." Section 2 gave the corporation power to insure all kinds of property, to make all kinds of insurance upon life, to lend money, etc. Section 3, among other things, made its office one of discount and deposit. Acts 1836, p. 191. The corporation was duly organized, and began operations. At the special session in 1865, § 1 was amended by striking out the limitation on corporate duration, so that the company should be "a body corporate, with perpetual succession." Acts 1865 (Sp. Sess.) p. 110. This amendment was accepted at once by the stockholders and directors. Through proceedings in the Marion circuit court, the name of the company was changed to the "Bank of Commerce," on December 7, 1875. An act was passed on April 2, 1881, recognizing the change of name, and amending certain sections of the act of 1836 relating to liability of stockholders. On March 6, 1883, the legislature passed "An Act Establishing Provisions Respecting Private Corporations Created and Existing at and before November 1, 1851." This statute enacts "that each and every private corporation now existing and which was created and organized by and under a special act or charter passed before the present Constitution of the state took effect shall be and continue a corporation thirty years after the passage of this act: provided, that where the special act by and under which any such corporation was created, or any amendment of or supplement to such act, gives the right to continue and exist for a longer period or perpetually, such corporation shall continue

for such longer period or perpetually, as so given." The provisions of this act were accepted by the stockholders and directors. In January, 1898, the company determined to devote its attention to building up a business of writing "old-line" life insurance, and concluded that the name "Columbia Life Insurance Company" was preferable to the "Bank of Commerce." On February 7, 1898, the company accordingly filed in the Marion circuit court its application for change of name, setting out the foregoing facts. The law requires prosecuting attorneys to resist the granting of applications of this kind. Rev. Stat. 1881, § 5864; Horner's Rev. Stat. 1897, § 5864; Burns's Rev. Stat. 1894, § 7812. The prosecutor answered that the acts of 1865 and 1883, under which the applicant claimed a perpetual special charter, were in conflict with the following provisions of the present Constitution in force since November 1, 1851: Article 1, § 23: "The general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not belong to all citizens. Article 4, § 23: "In all the cases enumerated in the preceding section and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Article 11, § 13: "Corporations other than banking shall not be created, by special act, but may be formed under general laws." Demurrer to answer was overruled, and judgment of ouster followed the bank's refusal to plead further.

If it would have been possible, in view of the change that was sought and the declared purpose of the company, for the applicant to have separated in its petition, and the proceedings based thereon, the banking from the insurance features of the charter, the right has been waived; and the only question assigned and discussed pertains to the power of the legislature, under the present Constitution, to grant a new term of existence to an insurance company organized under a special charter prior to November 1, 1851, and existing by virtue thereof on and after that date. Whether or not a general law can be made applicable to a subject-matter not included in section 22 of article 4 is held to be a question of legislative judgment. *Gentile v. State*, 29 Ind. 409; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, and 51 N. E. 80, and cases collated on page 155, 151 Ind., page 343, 41 L. R. A., and page 529, 47 N. E. But neither a general nor a special law can stand that involves the exercise of a power withdrawn from the general assembly by the Constitution. So it is not necessary to consider whether or not the act of 1883 was in reality an aggravated form of special legislation, and the question remains, as stated, to be determined from § 13 of article 11, and § 23 of article 1. There is this difference in the rules of construction of the Federal and the state Constitutions: The Congress may do nothing that is not permitted expressly or by clear implication; the legislature may do anything that is not

forbidden expressly or by clear implication. *State ex rel. Harrison v. Menaugh*, 151 Ind. 260, 43 L. R. A. 408, 51 N. E. 117, 357; *Sharpless v. Philadelphia*, 21 Pa. 160, 59 Am. Dec. 759; *Bourland v. Hildreth*, 26 Cal. 183; *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. Rep. 457, Fed. Cas. No. 13,188a.

Attention is called to the fact that since November 1, 1851, fifty-two acts have been passed amendatory of special charters granted under the old Constitution; and the contention is made that this practical construction of the Constitution by the legislature is conclusive, by reason of the continued acquiescence of the people and the other departments of the state government. It is not conclusive, but it may be highly influential, depending in degree upon the similarity of the question presented to the court to the one acted upon by the legislature consistently, repeatedly, and throughout a long period of time, with such acquiescence. *Indianapolis v. Navin*, 151 Ind. 147, 41 L. R. A. 337, 47 N. E. 525, and 51 N. E. 80; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 186, 37 L. R. A. 189, 46 N. E. 77. Nearly all of those amendatory acts relate to the powers of corporations to be exercised during the term of existence originally granted. Only four of them purport to grant a new term of existence. Questions concerning the legislature's right to regulate by amendment the exercise of powers of existing corporations would naturally arise the moment the corporations undertook to exercise their powers as amended upon other persons, and cases of the kind have been before this court. But questions concerning the legislature's right to grant by amendment a term of corporate existence beyond the term originally granted would naturally not arise during the unquestionable term, and no case of the kind has been before this court until now. The legislative action and the alleged acquiescence can be allowed herein but little, if any, force.

The bank contends that the case of *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, and 51 N. E. 80, is controlling in principle. The question involved was the constitutionality of the act of March 6, 1897 (Acts 1897, p. 201), regulating the fares to be charged by certain street-railway companies that had been, or might be, organized under the act of 1861 (Rev. Stat. 1881, chap. 41; Horner's Rev. Stat. 1897, chap. 41; Burns's Rev. Stat. 1894, chap. 44). It was in reference to that question only that the court said (page 147, 151 Ind., page 341, 41 L. R. A., and page 527, 47 N. E.): "Section 13 of article 11 of the Constitution means that after it took effect on November 1, 1851, the legislature should have no power or authority to create, originate, or bring into existence, by special act, a new corporation, where none had previously existed.

... It is one thing to create a corporation—bring it into existence—and quite another, as an existing corporation, to regulate its conduct and relations as to other corporations and persons." The court was

concerned, not with the right to grant a new term of corporate life, but merely with the right to regulate the exercise of powers during the original term; and, after reviewing many decisions, the court approved Morawetz's limitation upon the legislative right to confer new corporate franchises under the guise of regulation (page 153, 151 Ind., page 343, 41 L. R. A., and page 529, 47 N. E.): "It was, however, correctly said in Morawetz, Priv. Corp. § 12: 'But it is plain that a constitutional provision cannot be avoided and practically annulled by a subterfuge. A special law, altering the charter of an existing corporation and practically changing it, must therefore be deemed a violation of a constitutional prohibition against the creation of corporations by special act. If this were not so, organizations formed under the general laws might be treated merely as the rough material out of which corporations might afterwards be fashioned at pleasure, under special acts of the legislature, and the constitutional provision would become an empty form.'" To the same effect is Thomp. Corp. § 585: "There is no doubt that such a constitutional provision ought to be construed as restraining the power of the legislature to amend existing special charters in any way so as to enlarge the powers or privileges thereby conferred. It has been held that they do not [it does not] prohibit the legislature from passing special acts regulating existing corporations, in the exercise of the powers already conferred upon them by special laws."

The bank further relies upon the cases of *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. Rep. 457, Fed. Cas. No. 13,188a; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Taggart ex rel. Mason v. Perkins*, 73 Mich. 303, 41 N. W. 426; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *Frostburg Min. Co. v. Cumberland & P. R. Co.* 81 Md. 28, 31 Atl. 698; *Black River Improv. Co. v. Holway*, 87 Wis. 584, 59 N. W. 126.

In *Southern P. R. Co. v. Orton*, the facts sufficiently appear in this quotation from page 185, 6 Sawy., and page 472, 32 Fed. Rep.: "But it is insisted that this act was passed in violation of the provisions of § 31 of article 4 of the Constitution of California, which reads: 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.' After a careful consideration of the question, I am myself unable to perceive wherein that portion of the act, at least, which authorizes the company to change the line of its road, and to accept the grant made by, and to build the road provided for in, the act of Congress, is in contravention of this provision of the Constitution. It is unnecessary to consider the provision of this act authorizing the corporation to file amended articles of association, for, if that be conceded to be in excess of the legislative power, it can be separated from the others, and does not vitiate the other provisions. I do not perceive that any amendment of the 47 L. R. A.

articles was necessary, for the corporation was already formed or created,—was already in existence, with all the essential faculties that go to make up a corporation for building a railroad; and the act authorizing the change of line and acceptance of the congressional grant, with its conditions, only granted to an existing person permission to do a thing which had no necessary relation to the corporate grantee, and was not at all essential to the legal entity created by law, or to any other person, natural or artificial." It was in reference to a condition that "was not at all essential to the legal entity created by law" that Sawyer, Circuit J., said: "The only prohibitory words are that corporations of the class in question 'shall not be created by special act.' The word 'create' has a clear, well-settled, and well-understood signification. It means to bring into being, to cause to exist, to produce, to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity,—a person,—after it is created, by regulating its intercourse, relations, and acts as to other existing persons, natural or artificial." The circuit judge proceeds to consider what is "essential to the legal entity" (page 188, 6 Sawy., and page 474, 32 Fed. Rep.): "The right to be a corporation is itself a separate, distinct, and independent franchise, complete within itself. And a corporation having been created, enjoying this franchise, may receive a grant, and enjoy other distinct and independent franchises, such as may be granted to, and enjoyed by, natural persons: but, because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise,—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself,—not of the essence of the corporation."

St. Joseph & I. R. Co. v. Shambaugh: The Missouri Constitution of 1865 forbade the revival or re-enactment of special charters, except under certain circumstances. In regard to the alleged violation of this provision, the court said: "On this record the company was an existing one, with perpetual succession at the date of the alleged reviving act. Again, there is nothing to show that the company was not organized, and did not commence business, within the time specified in the above section of the Constitution." The Constitution also prohibited the creation of private corporations by special acts. An act of 1866, amending the railway company's special chartering act of 1857, by extending the time for the construction of the road, was held not to be in contravention of the constitutional prohibition.

The question under consideration in this appeal was not involved in *Wallace v. Loomis*. It was held that the inhibition of the Alabama Constitution against the creation of corporations by special acts does not forbid the legislature from passing a special act changing the name of an existing railroad corporation, and giving it power to

purchase additional property. "We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision cannot, surely, be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property; and this was all that it did in this case. No new corporate powers or franchises were created."

Taggart ex rel. Mason v. Perkins: Perkins and others were claiming the right to act as a corporation, the Pewabic Mining Company. The attorney general filed an information in the nature of quo warranto. The Constitution of Michigan, which took effect January 1, 1851, contains these provisions: Article 15, § 1: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." Article 15, § 8: "The legislature shall pass no law altering or amending any act of incorporation heretofore granted without the assent of two thirds of the members elected to each house, nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations." Article 15, § 10: "No corporation, except for municipal purposes, or for the construction of railroads, plankroads, and canals, shall be created for a longer time than thirty years." Article 19, § 9: "The charters of the several mining corporations may be modified by the legislature in regard to the term limited for subscribing to stock, and in relation to the quantity of land which a corporation shall hold, but the capital shall not be increased, nor the time for the existence of charters extended." In 1853 the legislature passed a general law for the organization of mining and manufacturing companies, the term of existence not to exceed thirty years. The Pewabic Company was organized under this act on April 4, 1853. In 1882 the legislature passed "An Act to Provide for Renewing the Incorporation of Companies Organized for Mining and Manufacturing Purposes" for a term not exceeding thirty years, by a vote of two thirds of its capital stock, at a regular or special meeting to be held within one year immediately preceding the expiration of the original term. The respondents, in 1888, claimed corporate existence by virtue of proceedings of the stockholders under the act of 1882. It was held that § 9 of article 19, and § 8 of article 15, of the Constitution, did not apply to the construction of the act of 1882, because the Pewabic Company was organized under the general law of 1853; that the act of 1882, in terms, related to the renewal of the incorporation of existing companies, and not to the creation of new companies, and therefore § 1 of article 15 was inapplicable; and, finally, that the act of 1882, providing for the renewal of existing corporations for a second term of thirty years, was in contravention of § 10 of article 15 of the Constitution, which forbade the creation of corporations for a longer time than thirty years. Whether or not the last holding, that an extension of life is a creative act, overthrows 47 L. R. A.

the preliminary assertion to the contrary, it may not be profitable to discuss. Benefit, however, may be derived from noting the grounds upon which the final determination was reached, and upon which the decision was based. "As grants of power to the legislature may be found from implications arising from express grants, so limitations upon legislative power may be found from implications arising from express limitations in the Constitution. . . . Such declaration that 'no corporation, except,' etc., 'shall be created for a longer time than thirty years,' is equivalent to a mandate that thus long, and for no longer time, shall any corporation be created. Is not such mandate a direct and positive limitation upon the power of the legislature to extend the time or renew the corporate existence beyond that term?" The respondents were contending that an extension of time was not a creation; that the legislature was merely prevented from creating corporations with a term of life exceeding thirty years; that the Pewabic Company was already created and in existence in 1882; that the legislature was not forbidden to amend a governing law in relation to the powers of existing corporations; that it is one thing to create a corporation, and quite another to deal with an existing corporation, etc. And the court answered: "Is not the constitutional provision rendered nugatory by such construction? Is not the corporation created for a longer period than thirty years, and really for an indefinite period? Does the public know, does a corporation or stockholder know, the time when the corporation will cease to exist and its business be wound up? The limitation upon the legislative power would be useless as well as purposeless, unless it acts as a limitation upon the power to renew the corporation, and extend its term of existence beyond the thirty years." In § 8 of article 15 of the Michigan Constitution, the clear distinction between the legislature's right to regulate by amendment the exercise of powers of existing corporations during their originally granted terms and the legislature's right to grant by amendment a term of corporate existence beyond the term originally granted plainly appears in the antithesis that permits the "alteration or amendment" of the pre-existing special charters, and forbids the "renewal or extension" thereof. If the people of Michigan understood the use of words, the renewal or extension of an old charter could not pass muster as an alteration or amendment.

In *Colton v. Mississippi & R. River Boom Co.* the company's original charter was granted in 1857, "for the period of fifteen years." The Minnesota Constitution of 1857 [art. 10, § 2] provided: "No corporation shall be formed under special acts except for municipal purposes." In 1867 the original charter was amended by striking out the words, "for the period of fifteen years," so as to leave the term of corporate existence unlimited, and was also amended so as to change the form of procedure in appropriation of lands. Both points were disposed of in these

words: "In making these amendments the legislature did not, as plaintiff contends, exceed its authority, since neither of the amendments falls within that provision of our Constitution which prohibits the formation of corporations under special acts." No distinction in character between the amendments was made.

Frostburg Min. Co. v. Cumberland & P. R. Co.: The Withers Mining Company was chartered in 1848 for a period of thirty years. Its name was afterwards changed to the "Frostburg Mining Company." In 1878 the legislature passed an act extending the charter for thirty years. The Maryland Constitution of 1867 [art. 2, § 48] provided: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporations proposed to be created." The Withers Company was not within the exceptions. After examining the act, the court said: "It is clear, therefore, that the object of the act of 1878 was merely to revive and extend the charter of the Withers Company for a period of thirty years, and by no fair rule of construction can it be said to have created a new corporation." The primary meaning of "revive" is to "give life to again." If it is a creative act to give life to dead matter once, it is no less a creative act to give life again to the same matter when it becomes dead. In the word "revive" the syllable "re" indicates the use of old matter, and the syllable "vive" means "to give life to," which is one of the primary meanings of the word "create." The quality of the act inheres in the giving of life, not in the material that is vivified. Nor is the quality of the act changed by repetition. It is the court, not the Constitution, that speaks of the vivification of new material.

In *Black River Improv. Co. v. Holway* the company was chartered March 1, 1864, for twenty-five years. In 1866 the charter was amended to give the company existence for twenty-five years from May 25, 1866. In 1882 the legislature passed an act to continue the life of the company for twenty-five years from March 1, 1889. The Wisconsin Constitution of 1848 [art. 11, § 1] provided: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where in the judgment of the legislature the objects of the corporation cannot be attained under general laws." In the original charter the legislature stated that the objects of the corporation could not be attained under general laws. In 1871 the Constitution was amended so as to prohibit the legislature from enacting any special or private laws "for granting corporate powers or privileges except to cities [art. 4, § 31, subsec. 7]." The court said: "The original charter, as it had been amended, was in full force at the time chapter 263, Laws of 1882, was enacted. 47 L. R. A.

That act did not create a new corporation in any sense. It merely prolonged the life of an existing corporation, which then had nine years more to run. It, in effect, amended the existing charter by striking out the date at which it was to expire, and in its place inserting a different date. Under the power reserved in the Constitution itself, the legislature were expressly authorized to alter or repeal that charter. Manifestly, they made no attempt to repeal it nor to cut down its powers. They did undertake to alter it by providing that it should not expire until a more remote date. We cannot say that they did anything more than to alter it. Its name and identity and corporate powers continued after the enactment of chapter 263, Laws of 1882, substantially the same as before. By it there was no granting of corporate powers or privileges *de novo*. It was a mere alteration or change in existing powers." The court said: "That act did not create a new corporation in any sense,"—which was true as to material, because the old was used. But what was the quality of the act? Did it not give life to a corporation? The court apparently gives weight to the fact that at the time the act in question was passed the corporation "had nine years to run." Whether the act was passed nine years or nine seconds before the expiration, or breathing-out, of life originally given by the creative power, the act of giving life could not operate, by the very force of the term, until there was dead matter to give life to. The court further upholds the act by virtue of the legislature's reserved power of altering charters. The powers of the corporation—that is, all of its capacities for dealing with others—were unchanged. The only grant in the act was the privilege to certain persons to do business as a corporation after the termination of their present privilege.

The four cases last above referred to are the only ones cited by counsel on either side that go to the question of the legislature's right, under the constitutional prohibition of the creation of corporations by special acts, to extend the life of companies specially chartered before the limitation existed; and the numerous cases collated by the prosecutor, dealing with the question of the legislature's right, under the guise of regulation, to confer powers different from or additional to those originally granted, are not sufficiently germane to the issue to warrant a discussion of them.

To determine whether or not the extension of an old special charter is violative of the present Constitution, it is necessary to ascertain exactly what a legislature does in creating business corporations by special laws. If the action in granting a new special charter and in extending an old special charter is found to be identical in essence, and if the mischief intended to be remedied is the same, the cases are equally offensive. The legislature cannot produce a corporation out of nothingness, in the Genesis sense of creating the heavens and the earth; nor bring a

corporation into being in the generative sense; nor give life to a corporation in the sense in which life is contradistinguished from matter; nor make, produce, be the cause or occasion of,—in short, “create,” strictly within the lexicographical definitions,—any private corporation for gain. For, although Webster gives “renew” as one of the secondary significations of “create,” the active agencies in the formation or renewal of the private corporation for business purposes are the persons who desire to conduct their gainful enterprises through the corporate form; and the legislature can do nothing towards the creation or extension of the corporation beyond granting the state’s permission to the interested persons to carry on their proposed business through the agency of a corporation. The granting of leave to do business as a corporation is an essential thing; the nature of the business and the mode of doing it are incidental. As long as the license lasts, the interested persons do not need another. When the license ends, the special privilege ends. To grant leave to certain persons to act as a corporation, who have not conducted business together before, and to grant leave to certain persons to act as a corporation, who have been or are conducting business together through a corporate organization, are identical in essence. Prior to 1851 the legislature granted numerous special charters. The citizens were not on an equality in doing business. That was one of the vices the new

Constitution was intended to put an end to. It would but intensify the wrong if citizens who have no old charters may not go before the legislature and secure special privileges, while persons who have may. The trafficking in old charters illuminates the evil.

Legislation granting a new term of life to corporations organized under old special charters is also repugnant to § 23 of article 1 of the Constitution. The legislature would be granting to particular citizens privileges and immunities which, upon the same terms, would not belong to all citizens. It is necessary that legislation be classified, but the basis of the classification must inhere in the subject-matter. The legislature may not grant one set of men the privilege of discounting commercial paper at 12 per cent interest, while bankers in general are restricted to 8; and it may not confer upon particular citizens the privilege (private right) of writing any and all sorts of insurance upon property and life without supervision or safeguard, while insurance companies in general are impeded by legal limitations from doing likewise. If it were not for the special privileges and immunities contained in the old charter, it is to be presumed that the persons interested in this appeal would have been content to conduct their insurance business under the general laws.

Judgment affirmed.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ohannes ASLANIAN

v.

Hagop DOSTUMIAN et al.

(.....Mass.....)

There is no presumption that the law merchant as to the protest of a draft prevails in Asiatic Turkey.

(October 18, 1899.)

EXCEPTIONS by defendants to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover the price of a draft which plaintiff had purchased from defendants and which proved to be uncollectible, which resulted in a verdict in plaintiff’s favor. *Overruled.*

The facts are stated in the opinion.

Messrs. **W. S. B. Hopkins, George S. Taft, and E. J. Melanefy**, for defendants: This being a foreign bill, it was necessary,

in order to charge the drawer, to show that it was duly and regularly protested; and the fact of nonpayment could only be proved by protest.

Phania Bank v. Hussey, 12 Pick. 483; *Ocean Nat. Bank v. Williams*, 102 Mass. 141.

The question of the defendants’ liability is the same, regardless of the form of action, whether it be upon the draft as the drawer, or, as here, upon a money count.

State Bank v. Hurd, 12 Mass. 172; *Ellsworth v. Brewer*, 11 Pick. 316.

Assuming that the law of Turkey, and not of Massachusetts, would be the controlling law as to all questions of the necessity of protest and of notice, it was not necessary for the defendants to offer proof that the law merchant there prevailed. If the plaintiff would excuse himself from the necessity of protest and notice, as required by the *lex fori*, he must show that they were not required by the law of Turkey.

Randolph, Com. Paper, § 34; *Flato v. Mul-*

NOTE.—For presumption as to the law of a sister state, see *Brown v. Wright* (Ark.) 21 L. R. A. 467, and note; also *Scroggin v. McClelland* (Neb.) 22 L. R. A. 110; *Vanderpool v. Gorman* (N. Y.) 24 L. R. A. 548; *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 25 L. R. A. 81; *Kelley v. Kelley* (Mass.) 25 L. R. A. 806; *Burdick v. Missouri P. R. Co.* (Mo.) 26 L. R. A. 384; *Pattillo v. Alexander* (Ga.) 29 L. R. A. 47 L. R. A.

616; *Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 32 L. R. A. 473; *Cushing v. Perot* (Pa.) 34 L. R. A. 737; *Gooch v. Faucette* (N. C.) 39 L. R. A. 835; *First Nat. Bank v. National Broadway Bank* (N. Y.) 42 L. R. A. 139; *Stewart v. Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147; *Fisher v. Donovan* (Neb.) 44 L. R. A. 383; and *Loud v. Hamilton* (Tenn.) 45 L. R. A. 400.

hall, 72 Mo. 522; *Donegan v. Wood*, 49 Ala. 242; *Reed v. Wilson*, 41 N. J. L. 29; *Lucas v. Ladew*, 28 Mo. 342; *Wood v. Oort*, 4 Met. 203; *Cribbs v. Adams*, 13 Gray, 597; *Dubois v. Mason*, 127 Mass. 37; *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

The law controlling the case at bar, however, was the law of Massachusetts, and not that of Turkey, and the liability of the defendant did not depend upon whether the law merchant prevailed in Turkey or not.

While the law of the place where the bill is payable governs the formalities of the protest, the law of the place where the bill is drawn or indorsed governs the notice required.

The English rule may put the question of notice upon the same footing with the formalities of protest.

Rothschild v. Currie, 1 Q. B. 43; *Hirschfeld v. Smith*, L. R. 1 C. P. 340; *Rouquette v. Overmann*, L. R. 10 Q. B. Div. 525; *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514.

But by the American authorities the notice must conform to the law of the place where the bill is drawn or indorsed.

Story, Bills, §§ 176, 177, 285, 296, 336, 391; *Randolph*, Com. Paper, § 52; *Chitty*, Bills, p. 456; *Aymar v. Sheldon*, 12 Wend. 439; *Wallace v. Agry*, 4 Mass. 336, Fed. Cas. No. 17,096; *Powers v. Lynch*, 3 Mass. 77; *Musson v. Lake*, 4 How. 262, 11 L. ed. 967; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Short v. Trabue*, 4 Met. (Ky.) 299; *Carlisle v. Chambers*, 4 Bush, 273, 96 Am. Dec. 304.

Mr. Jerry R. Kane, for plaintiff:

As substantial justice has been done by the verdict, and sufficiently within the forms of law to warrant a judgment thereon, the exceptions ought not to be sustained.

Brazier v. Clap, 5 Mass. 10; *Blanchard v. Page*, 8 Gray, 284; *Nichols v. Goldsmith*, 7 Wend. 160.

That defendants might have been prejudiced by the judge's charge is not enough to enable them to sustain their exceptions; they should cause it to appear both that the ruling of the judge was erroneous and that they were harmed by the error.

Buswell & W. Prac. p. 374; *Eastman v. Crosby*, 8 Allen, 206; *Fuller v. Ruby*, 10 Gray, 285; *Smith v. Jagoe*, 172 Mass. 538, 52 N. E. 1088.

The drawer of check or bill cannot be prejudiced by failure on part of the payee to protest an instrument drawn upon a drawee who has no money in his hands belonging to the drawer, unless he has reasonable grounds to expect it will be honored.

Kinsley v. Robinson, 21 Pick. 327.

The common law of a foreign country must be proved as a fact.

Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143; *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190.

Holmes, Ch. J., delivered the opinion of the court:

This is an action to recover the equivalent 47 L. R. A.

of money paid by the plaintiff to the defendants for a draft in favor of a third person, payable at Harpoot, in Turkey, in Asia. The plaintiff's testimony was that it was agreed orally at the time when the draft was purchased that, if it was not paid, the money should be returned. The drawees refused to pay, but the draft was not protested. In his charge to the jury the judge stated that he could not say whether or not the law merchant prevailed in Turkey; that there was no evidence whether it did or not; and that it would not necessarily govern, unless the jury found that the parties expressly agreed that it should. To these statements the defendants excepted.

The plaintiff was a stranger to the draft. He based his rights upon a collateral agreement. Whether that agreement was an out and out promise to refund if the draft was not paid, or only a promise to do so if all steps were taken to charge the drawers which are customary in this part of the world, depended on what the parties saw fit to say. There was no presumption about it one way or the other. This seems to have been the judge's view; for, after the remarks excepted to, he went on to say that the plaintiff put his case upon the theory that the contract was entirely inconsistent with the notion that his rights were dependent upon protest or the law merchant, and he left it to the jury whether the plaintiff had proved such a contract.

In view of the nature of the case, it may be that the judge meant no more than to make a collateral remark, which he regarded as immaterial, that he did not know whether the law merchant did or did not prevail in Turkey, in Asia, as a preliminary to telling the jury that the question before them was what kind of a contract, if any, the parties had made in fact. There was no evidence that anything was said about protest or notice, and if the jury found a contract, as they did, it would be going pretty far to let them read into the simple words, "If the Dr. Bagdasarian won't pay in Harpoot, you bring those checks; we give you the money back again,"—a limitation which made the plaintiff's rights in Worcester dependent upon the conduct of a stranger, an Armenian, who was in a remote and disturbed part of Asia, and over whom the plaintiff had no control. The very fact that the drawers contemplated the possibility of a refusal to pay looks the other way. If the ground of refusal was true, that the drawers had no assets in the drawees' hands, it may be that they were not entitled to proof of demand and notice. *Kinsley v. Robinson*, 21 Pick. 327; *Pierce v. Indseth*, 106 U. S. 546, 551, 27 L. ed. 254, 256, 1 Sup. Ct. Rep. 418. And, upon the whole, the natural interpretation would be that, if the drawees refused to pay, the plaintiff was to have his money back without further condition than the surrender of the draft. The draft was tendered to the defendants by the plaintiff.

At all events, it is clear that, under the instructions, the jury could not have found for the plaintiff unless they found such a

simple, unqualified promise; and therefore the question does not arise whether the remarks excepted to would have been correct if the promise had been only to be liable to the plaintiff according to the tenor of the draft.

If, however, in view of the contract having been voluntarily proposed by the defendants as incident to the sale of the draft, it should be argued that the jury would have been warranted in finding that the contract did not purport to enlarge the extent of the defendants' liability, and that from that point of view their finding conceivably might have been affected by the consideration that our law of protest did or did not prevail at Harpoot, and so that what the judge said was material in this aspect of the case, it is to be noticed that no such suggestion was made, even in the argument before us, and that it is evident that no such suggestion was in the mind of anyone at the trial. It rather looks, on the contrary, as if no one had kept in mind distinctly that the suit was neither upon the draft nor by a party to it.

If, notwithstanding the foregoing consideration, we come to the correctness of the judge's statement, and treat it as implying what he did not say,—that the jury had no right to presume that the law of Harpoot was similar to ours,—we are not prepared to say that he was wrong. It will be observed that the question is not whether the drawer in Massachusetts, by implication, stipulated in his draft for notice of nonpayment, or any question as to notice, but a naked question whether it could be presumed that in Harpoot the custom as to protest was the same as ours, as bearing on the probable construction of the collateral contract with the plaintiff.

No doubt devices for the transfer of debts or values without an actual transport of money or goods may have been contrived at different places and at different times. They may be as old as commerce. But it cannot be assumed that they have always taken the same form. There is a presumption that the common law, as we understand it, is the common law, and often, if not always, that it is

the law of other common-law states, but there is no presumption that it prevails all over the world. *Savage v. O'Neil*, 44 N. Y. 298, 300, 301; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Flato v. Mulhall*, 72 Mo. 522; 2 Starkie, Ev. 4th Am. ed. 568; Whart. Ev. §§ 314, 315, 1292. There is no such presumption as to the so-called "law merchant," taken as meaning substantive law. The "law merchant," in this sense, is merely a vaguely defined portion of the common law, or, in its widest interpretation, of the law of European countries, having the Roman and the Frankish law for its parents. See Smith, *Mercantile Law*, 10th ed. Introduction; 2 Seld. Soc. Pub. 132 *et seq.*; Gundermann, *Eng. Privatrechts*, 84. Our law of negotiable paper has no orthodox sanction of having been accepted *semper ubique et ab omnibus*. Like the rest of our law, it has had a strictly European origin and history, which are tolerably well known. See Brunner, *Forschungen*, 524, 631; 1 Hensler, *Inst. des Deutsch Privatrechts*, 212, 213, 375; 9 Law Quart. Rev. 70. It is not to be presumed that either the Roman or Frankish law shaped the native law of Turkey. Still less is it to be presumed that Massachusetts modes of dealing with details prevail there, when they notoriously vary even in European countries. In Spain, if we may trust *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514, no notice of dishonor is necessary in order to enable the holder to have recourse to an indorser.

There is no need to multiply illustrations. If, as would seem from some of the textbooks and encyclopedias, the European law of negotiable paper is known in Turkey, it is by recent legislative adoption or imitation of the French Code de Commerce, and the fact ought to be proved by the party who wishes to profit by it. Whether protest is necessary upon such an instrument as the draft in this case, and even whether an acceptance of it would be recognized as valid under the supposed Turkish Code, is to be settled, not by presumption, but by proof.

Exceptions overruled.

MICHIGAN SUPREME COURT.

Oscar WYANT

v.

CENTRAL TELEPHONE COMPANY, *Plff.*
in *Err.*

(.....Mich.....)

1. A telephone company which has the

NOTE.—As to ownership and control of trees in highway, see *Chase v. Oakkosh* (Wis.) 15 L. R. A. 553; and *note*; *State, Avia, Prosecutor, v. Vineland* (N. J.) 23 L. R. A. 685; *Tate v. Greensboro* (N. C.) 24 L. R. A. 671; *Mt. Carmel v. Shaw* (Ill.) 27 L. R. A. 580; and *Vanderhurst v. Tholcke* (Cal.) 85 L. R. A. 267.

For cutting of trees to make way for telephone wire, see also *Bradley v. Southern New England Teleph. Co.* (Conn.) 32 L. R. A. 280; and *Southern Bell Teleph. & Teleg. Co. v. Francis* (Ala.) 31 L. R. A. 193.

47 L. R. A.

right to string wires in a highway has a right to do the necessary trimming of trees in the highway in a proper manner, without first giving the landowner an opportunity to do it, being answerable for any unnecessary, improper, or excessive cutting.

2. Judicial notice will be taken that telephone poles in a highway must be set near the side, outside the curb or ditch line, and therefore necessarily in line with trees in the highway.

(February 20, 1900.)

ERROR to the Circuit Court for Berrien County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful cutting of

plaintiff's trees in the stringing of defendant's wires. *Reversed.*

The facts are stated in the opinion.

Messrs. Howard, Roos, & Howard, for plaintiff in error:

The law gives defendant a right to trim the trees in a reasonable manner in order to permit the passage of its wires.

Crowwell, Electricity, § 209; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145.

Private interests must yield to public accommodation.

Pontiac v. Carter, 32 Mich. 164.

The dedication of land for a street must be understood to have been made with the expectation that it may be required for other purposes than those of passage and travel merely.

Warren v. Grand Haven, 30 Mich. 24.

Mr. Charles E. White, for defendant in error:

If any special damage is done to the property of the abutting owner, then he is entitled to recover a suitable compensation for such damage. Then the setting of such poles in the highway becomes an additional servitude.

Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; *Dean v. Ann Arbor Street R. Co.* 93 Mich. 330, 53 N. W. 396; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Magee v. Overshiner*, 64 Am. R. 358 [50 Ind. 127, 40 L. R. A. 370, 49 N. E. 951, 65 Am. St. Rep. 358].

Defendant's privilege to remove obstructions in the highway is governed by the same limitations and restrictions as that of private persons.

Clark v. Dasso, 34 Mich. 85.

Hooker, J., delivered the opinion of the court:

The plaintiff commenced this action before a justice of the peace by summons, requiring it to answer a plea of trespass on the case. The declaration was trespass for breaking and entering plaintiff's close, and cutting and trimming trees growing in the close and in the highway adjacent thereto. The case was tried at circuit, on appeal, before the court, who filed written findings of fact and law. The record does not show whether or not a plea was filed. The finding shows that the defendant's servants, when constructing its telephone line along the highway, trimmed out some branches of trees (some standing within the highway, and some in plaintiff's close), so that the wires might not come in contact with the branches, thereby becoming broken or grounded; that it was done in a reasonable manner, and that no more cutting or trimming was done than was necessary; and that, to do this, its servants took down the road fence, and with a team and heavily loaded wagon, drove upon plaintiff's growing wheat "inside [probably meaning "outside"] the highway" and at the same time cut off certain limbs from all of said trees. The court found, as a conclusion of law, that, while the defendant might place poles in the highway without proceed-

ings for condemnation, it had no right to cut, injure, or mutilate trees, without compensation to the owner for any special damage occasioned thereby. A judgment for \$25 was rendered in favor of the plaintiff, and the defendant has appealed.

It was admitted by plaintiff's counsel that the erection of a telephone line along the highway does not create an additional servitude upon abutting lands, and we need not cite authorities in support of that proposition. The right being given to erect the poles and wires, the company must of necessity have the right to remove obstructions, as the highway officers have authority to do when engaged in highway work within their jurisdiction. We may take judicial notice that poles must be set near the sides of the street or road, and that they are generally outside of the curb or ditch line, and therefore necessarily in line with the trees. Unless they are to be so high as to clear all of them, the wires must go through the trees. In cities and villages this may require the removal of large portions of the trees, if they are to go through them, and in such case it is possible that the company should use poles sufficiently high to avoid or minimize the injury to the trees, but that question is not before us under the findings. The plaintiff cites several authorities in support of his contention. *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, is referred to, which, in the opinion of Mr. Justice Grant, says that "it may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. . . . So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint." This opinion is concurred in by Mr. Justice Long, while Mr. Chief Justice Champlin said that "if in any case it is such an invasion of private rights as to cause damage to the owner of the fee of the soil or abutting proprietors, I think they have a legal remedy to recover such damage in a suit at law. And so with regard to the setting of poles to aid the propulsion of cars by electricity. I do not think, ordinarily, it is such a taking of private property as requires condemnation and compensation before the poles can be set; but I think, if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage." *Dean v. Ann Arbor Street R. Co.* 93 Mich. 330, 53 N. W. 396, is cited as implying that, if one of the abutting owners has suffered any special damages, he may have an action at law; but this case does no more than to decide that the remedy for special injury to property is at law. It affirms the holding of the *Mills Case*, 85 Mich. 634, 48 N. W. 1007, that a

new servitude is not created by a street railroad, but does not undertake to decide that a right of action existed. The case of *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461, held that "the construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land; and they are not entitled to a compensation therefor, except when some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby." It also held that "the owner of a store has no such right to use the street in front thereof, by having drays and wagons, with teams attached, stand transversely upon the street while discharging goods, as will entitle him to recover against a horse-railway company which has so constructed its track (under authority from the city) as to interfere with such use of the street; but he may be compelled, if public convenience requires it, to discharge the goods from wagons or drays standing lengthwise of the street." The case is not in point. It vindicates the landowner's right of access to the street, and at the same time sustains the paramount right of the public to a proper use of the highway. It is in harmony with the *Mills Case*. The case of *Tissot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 998, 3 So. 261, is not at variance with the other authorities, as it only sustains a right of action for invading plaintiff's premises, and so cutting branches overhanging the street as to leave an open space, from 25 to 40 feet in circumference, for the purpose of the passing of an almost imperceptible wire, and when the posts and wires could have been, with less or no inconvenience, located elsewhere. *Memphis Bell Teleph. Co. v. Hunt*, 16 Lea, 456, 57 Am. Rep. 237, 1 S. W. 159, only holds that there is no right to enter private premises for the purpose of cutting branches. This is elementary. The case of *Magee v. Overshiner*, said to be reported in 64 Am. P. R. 358 [150 Ind. 127, 40 L. R. A. 370, 49 N. E. 951, 65 Am. St. Rep. 358], is cited upon the question, but we have been unable to find the case. None of these cases, unless it be the last mentioned, sustains plaintiff's principal contention, and we think it is not the law in this state. It might well be the law in a state where a telephone is an additional servitude in the absence of condemnatory proceedings.

It is said that the telephone company had no right to cut these branches without first giving the landowner an opportunity to do so himself. This claim is based on the case of *Clark v. Dasso*, 34 Mich. 86, in which it was held that a highway commissioner could not sell trees upon the highway, and intimating that, before he could remove trees that were a public obstruction, he must give the owner the opportunity. The case rested on a statute (Comp. Laws 1871, § 1317) which authorized the cutting and removal of trees and shrubs obstructing or injuring a highway, by order of the highway commissioners. Plainly, this case does not

come within the statute, because the statute refers only to the cutting down or removal of trees and shrubs, not the trimming of trees; and, again, it is not a statute that purports to impose a duty upon commissioners, but was intended to exempt them from the penalty prescribed by statute, recognizing the possible necessity of removing trees in highways. Moreover, we do not discover that this statute is still in force, except in a modified form. Comp. Laws, § 4159. If the telephone company has the right to have the branches cut, to admit stringing and operating its wires, the legislature has committed to no one, unless it be the company, the authority to do this. No one could do this satisfactorily until the wires should be strung, and, until the legislature provides otherwise, we must think that the companies may do it, being answerable for any unnecessary, improper, or excessive cutting. We are convinced that it is the right of the company to cut branches in a proper case and manner, and in such case there is no liability to the abutting proprietor, who has no right to obstruct the public use of the highway.

The case is reversed, and, as the findings show that a trespass upon the close may have been committed, a new trial is ordered.

The other Justices concur.

Gideon THOMAS

v.

City of FLINT, Plff. in Err.

(.....Mich.....)

Constructive notice which will render a city liable for injury caused by a defect in a bridge under Pub. Acts 1887, p. 345, § 2, which creates a right of action against a city for such a defect only when it has knowledge or notice thereof, does not arise from the mere existence of such a defect for two or three days only.

(*Montgomery and Moore, JJ., dissent.*)

(February 20, 1900.)

ERROR to the Circuit Court for Genesee County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinions.

Messrs. E. S. Lee and J. S. Parker, for plaintiff in error:

Notice to the proper officers of a city that a sidewalk is out of repair cannot be inferred unless the defect is open and notorious, of long standing, and of such a character as

NOTE.—As to constructive notice of defect in bridge, see also *Moore v. Kenockee* (Mich.) 4 L. R. A. 555; and *Tyler v. Williston* (Vt.) 9 L. R. A. 338.

As to liability for injury caused by defects in bridge, see also *Wabash v. Carver* (Ind.) 13 L. R. A. 851, and *note*; and *Gibney v. State* (N. Y.) 19 L. R. A. 865.

would naturally arrest the attention of the passer-by.

Tice v. Bay City, 84 Mich. 465, 47 N. W. 1002; *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

The inspection of the bridge, prior to the accident, was all that could reasonably be expected of the city; and the care exercised by the city to keep it in good repair is all that the statute requires.

3 How. Anno. Stat. § 1446e.

The inspector when going over the bridge, prior to the accident, which he did very often, found that the planks were all securely nailed. And the evidence does not disclose how, or in what manner, the plank that left the opening was removed.

This court in *Welch v. Lansing*, 111 Mich. 589, 70 N. W. 129, held that the city was not liable to one who fell into an excavation by reason of a barrier being removed in some way, that was put up as a protection.

Walker v. Ann Arbor, 111 Mich. 1, 69 N. W. 87.

Messrs. Johnson & Stevens, for defendant in error:

When Nichols knew that at the places where the planks were pieced the joists would naturally be decayed, and when Todd considered that the bridge was not safe at such places, it was their duty to make some inspection or examination, either by taking up plank or in some other just as effective manner calculated to discover the defect.

When the court submitted this question to the jury, the defendant was accorded all the rights to which it was entitled in respect of the question, under the decisions of this court.

Medina Twp. v. Perkins, 48 Mich. 67, 11 N. W. 810; *Stebbins v. Keene Twp.* 55 Mich. 552, 22 N. W. 37; *Moore v. Kenoskee Twp.* 75 Mich. 332, 4 L. R. A. 555, 42 N. W. 944; *Converse v. Blumrich*, 14 Mich. 120, 90 Am. Dec. 230; *McKeller v. Monitor Twp.* 78 Mich. 487, 44 N. W. 412; *Campbell v. Kalamazoo*, 80 Mich. 655, 45 N. W. 652; *Moon v. Ionia*, 81 Mich. 635, 46 N. W. 25; *Blank v. Livonia Twp.* 95 Mich. 229, 54 N. W. 877; *Randall v. Southfield Twp.* 116 Mich. 501, 74 N. W. 716; *Atherton v. Bancroft*, 114 Mich. 241, 72 N. W. 208.

The court properly submitted the question to the jury, whether or not the alleged inspection and examination of the bridge was reasonable and well calculated to discover the defect.

McKeller v. Monitor Twp. 78 Mich. 490, 44 N. W. 412.

Hooker, J., delivered the opinion of the court:

The plaintiff was injured upon a Tuesday night, through the absence of a short board or plank forming part of a bridge floor, which was first noticed to be loose on the Saturday night previous. On that occasion it was laid back in place by the observer. On Monday or Tuesday evening the witness who first discovered that it was loose found that it was gone, and laid a piece of sewer crock over the place where the missing board had

been. The evidence showed that the city employed a man to walk over its walks and bridges, including this bridge, with a view to the immediate repair of defects. Apparently his duty was not to tear up boards to examine the joists below, but merely to inspect by looking at and trying the walks and planks, by stepping upon them, and noticing any outward signs of weakness or danger. The circuit court permitted the jury to find a verdict against the defendant upon the ground that it did not make a reasonable inspection of the bridge, and that it was the duty of the city to make such inspection. The court's charge contained the following: "Under the statute which I have read to you, the notice mentioned therein may be either actual or constructive,—actual, where some officer of the city, forming a part of that branch of the city government having some authority in respect to sidewalks of said city, is directly called to such defect; constructive, where the defect is of such a character, and has existed for such a period, that the city is guilty of negligence in not being aware of such defect; and in such case the law presumes that the city actually knew of such defect. But, in order to make the law in regard to constructive notice apply, you must be able to find from a preponderance of the evidence that at the very place where it is claimed the injury was received the bridge was not in good repair and in a condition reasonably safe and fit for travel, and that the city was guilty of negligence in not informing itself of such condition, and that sufficient time had elapsed after the city, by the exercise of ordinary care, could have informed itself of such defect, and have had a reasonable opportunity to make such repairs. I will also state to you that, in order to make the city liable, you must be able to find from a preponderance of the evidence that the city was negligent in not ascertaining the existence of the unsafe condition; and that, had it performed its duty in that respect, it would have had reasonable opportunity to put it in a condition required by law." Previous to the year 1879 those who suffered injury through accidents due to the neglect of municipalities to keep the highways in a reasonably safe condition had no right of action against such municipalities. See *Merkle v. Bennington Twp.* 58 Mich. 158, 55 Am. Rep. 606, 24 N. W. 776, and cases cited. In that year an act was passed creating a liability in such cases. In 1887 a new act was passed, much like that of 1879, which it superseded, and plaintiff's action rests upon the later act. Pub. Acts 1887, p. 345. Section 1 gives a right of action for damages to any person sustaining bodily injury by reason of neglect to keep highways, sidewalks, and bridges in reasonable repair and in condition reasonably safe and fit for travel, by the township whose authority extends over the same. Section 2 is as follows: "If any horse or other animal, or any cart, carriage, or vehicle, or other property, shall receive any injury or damage by reason of neglect by any township, village, city, or corpora-

tion to keep in repair any public highway, street, bridge, sidewalk, crosswalk, or culvert, the township, village, city, or corporation whose duty it is to keep such public highway, street, bridge, sidewalk, crosswalk, or culvert in repair shall be liable to and shall pay the owner thereof just damages, which may be recovered in an action of trespass on the case before any court of common jurisdiction: provided, that in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity after knowledge by or notice to such township, village, or city that such highways, streets, bridges, sidewalks, crosswalk, or culvert have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice." The defense in this case is that the plaintiff has failed to show that the township had knowledge or notice that the bridge was unsafe or unfit for travel, as required by the proviso. It is not claimed that the defendant's officers had actual notice that the plank was loose, or that the bridge was in any way unsafe, or likely to become so in the near future; but it is contended that the stringer had begun to decay, and that the township had constructive notice of that fact through its alleged neglected duty of a proper inspection, and we are cited to the case of *Moore v. Kenosha* 75 Mich. 332, 4 L. R. A. 555, 42 N. W. 944, as an authority supporting the contention. In that case contention was made that recovery could not be had in the absence of express notice, but the court held that such would be a too strict construction of the act, and that the circumstances might justify the jury in finding that the township had what was called "constructive notice." The language which counsel urge so forcibly is used in that case [*Medina Twp. v. Perkins*, 48 Mich. 71, 11 N. W. 811] as it had been in others, viz.: "A defect may exist and be unknown, and the town still be liable on the ground that the prime fault consists in being ignorant, it being a clear principle that a want of knowledge may, in given circumstances, imply a want of care." Upon this and similar language is based the argument that the township is chargeable with constructive notice of all things which the proper performance of the alleged neglected routine duty of inspection would have disclosed, and it is said that, although no officer supposed the bridge was in any respect weak, or had any reason to believe or even suspect it, yet the failure to ascertain the fact is due to neglect; hence the township is chargeable with the notice that the statute makes essential to a right recovery. It seems obvious that such a rule is equivalent to charging the town for neglect to keep its bridge in safe condition, and that the declaration might as well charge such neglect directly as through the circumlocution of constructive notice, and that the result is the practical nullification of the proviso requiring notice; but it is urged that the decisions admit of no other interpretation, and have 47 L. R. A.

settled the question in accordance with the contention of the plaintiff's counsel. We will review the history of this question.

The case of *Medina Twp. v. Perkins*, 48 Mich. 67, 11 N. W. 810, is the rock upon which plaintiff bases his claim. It arose under the earlier statute, which did not contain the requirement that knowledge or notice should be shown. It was there said that, while "township officers are only required to exercise ordinary care and prudence and reasonable intelligence in performing their duty of supervising the condition of roads and bridges and keeping them in repair," "want of knowledge sometimes implies a want of due care; as, where township officers, whose duty it is to keep bridges in a safe condition, do not know of defects which an examination would readily disclose." In the case of *Stebbins v. Keene Twp.* 55 Mich. 552, 22 N. W. 37, the language of *Medina Twp. v. Perkins* was repeated, viz.: "A defect may exist and be unknown, and the town still be liable, on the ground that the prime fault consists in being ignorant; it being a clear principle that a want of knowledge may, in given circumstances, imply a want of care [i. e., negligence]. . . . The general duty of a township is to exercise through its officers a reasonable supervision over its ways and bridges, and within fairly practicable limits to be watchful of their condition and trustworthiness, and see that they are kept in a reasonably safe condition for public travel. Its officers may not ignore the dictates of common sense and the lessons of ordinary experience, and refuse to see or refuse to heed what others see and others understand. When it is generally known that a bridge has become decrepit, or when a bridge has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed by these circumstances, and think to excuse their neglect to take action on the ground of having had no actual notice of a dangerous infirmity." See also *Woodbury v. Owosso*, 64 Mich. 248, 31 N. W. 130. In the year 1887 a radical change was made in the law. See Pub. Acts 1887, No. 264. The act will be found in chapter 91, Comp. Laws, where copious notes give the history of this legislation and its judicial interpretation. The important change is found in the proviso to § 3442. It reads as follows: "Provided, that in all actions brought under this act it must be shown that such township, village, or city has had reasonable time and opportunity after knowledge by or notice to such township, village, or city, that such highways, streets, bridges, sidewalks, crosswalk, or culvert have become unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein after such knowledge or notice." It will be observed that this language implies that a municipality can only be held liable for injuries through defects of which it had notice or knowledge. As this was the substantial change made, we must conclude that mere neglect was not thereafter to be enough to create a liability, and that the

new act required, not only proof of negligence in permitting the defect to exist, but also knowledge or notice of its existence, and an opportunity to remedy the defect after such notice or knowledge. The pointed language of the act forbids any other construction, and we should expect to find that thereafter proof of notice or knowledge was held indispensable. We will examine subsequent cases.

At the June, 1889, term of this court, the case of *Moore v. Kenoskee Twp.* was heard. See 75 Mich. 332, 4 L. R. A. 555, 42 N. W. 944. That case arose under the law of 1879, and it was contended that the plaintiff's cause of action was destroyed by the repeal of the earlier by the later act. The court held otherwise, however. That being settled, the court proceeded to ascertain whether the case had been brought within the restrictions of the amendatory act as to notice. It is observable that the court did not say that the cause of action would be proved by showing a defect long existing, and a failure to inspect or to discover it, or that no notice was necessary, as might, perhaps, be supposed from the case of *Carver v. Detroit & S. Pl. Road Co.* 61 Mich. 585, 28 N. W. 721, but proceeded to determine what would be sufficient notice, denying the contention of the defendant that proof of actual knowledge or express notice was essential. It quoted the testimony, which showed that the stringers were rotten, and that such fact was open to casual observation; that they were very old, which tended to corroborate the statement as to condition; that at least three different officers of the township were notified of the fact; and that one of them removed the planking, and put on new, thereby necessarily having an opportunity to observe the rotten condition of the stringers, patent to observation, and seen by others. Upon this proof the court instructed the jury that: "In regard to the information claimed to have been given to the commissioner by the witness Shulter, you will determine from the evidence what was said, and whether it was sufficient to fairly apprise the commissioner that the bridge was unsafe. . . . If you believe that to be the fact from the evidence,—that is, that it was unsafe, and that the town officers, namely, the commissioners or overseers of highways, had actual notice thereof, and they had unreasonably neglected to repair the bridge, and make it reasonably safe for travel, having sufficient time to do so,—the defendant would be liable: . . . provided, that you find that the engine of plaintiff was not of such weight as to be unreasonable to be transported over the bridge, and the plaintiff himself was not guilty of want of ordinary care and caution in crossing it. It is the duty of a township, through its officers, to exercise reasonable supervision over its roads and bridges,—to see, within practicable limits, that they are kept in reasonably safe condition for public travel. Its officers may not ignore the dictates of common sense and the lessons of ordinary experience, or refuse to see or refuse to heed what others see

and others understand. When it is generally known that a bridge has become decrepit, or when a bridge has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed to take action on the ground of having no actual notice of the dangerous infirmity. This is substantially the rule laid down by the supreme court of this state in another case on this subject, and I think it also applicable to this case. So that, if no actual notice of the bridge being unsafe was given to the township officers, still, if they, by the exercise of reasonable care, such as men possessed of ordinary and reasonable intelligence might exercise, would have known of such condition, or if through any other means they had actual knowledge that the bridge was unsafe, this would answer the requirements of the statute as to notice or knowledge on the part of the defendant." After some quotations from cases which arise under the law of 1879, which the court said were pertinent as aids to construction, it was added that the defendant's counsel contended that under the later act proof was required that the defects existed, and that the township had reasonable time and opportunity to put the bridge in repair, after express (italicized) knowledge or information of such defects, and that: "The language of the statute is, 'after knowledge by or notice to such township.' The word 'notice' is not used as synonymous with the word 'knowledge.' Whatever fairly puts a party upon inquiry is sufficient notice, where the means of knowledge are at hand; and if a party omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained." This was, in effect, holding that notice of facts which would lead an ordinarily prudent man to make an examination, which, if made, would disclose the defects which caused the injury, was sufficient notice. As the term "constructive notice" is given prominence in the discussion of the case before us, we remark that it is used in the case under discussion as it occurs in a quotation, where Mr. Justice Cooley is said to have laid down a rule that justified the statement in the *Kenoskee Case* that "whatever fairly puts a party on inquiry is sufficient notice." The quotation was as follows: "In *Converse v. Blumrich*, 14 Mich. 120, 90 Am. Dec. 230, Mr. Justice Cooley laid down the rule as follows: 'A person is chargeable with constructive notice where, having the means of knowledge, he does not use them.'" A reference to that case will show the connection in which Mr. Justice Cooley used that language. He continued as follows: "If he has knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, and does not make, but, on the contrary, studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained. *Whitbread v. Boulnois*, 1 Younge & C. Exch. 303. But he cannot be bound to

do more than to apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sources of information." We see from this that it falls short of the claim that notice is to be presumed, because of a failure to inspect or inquire in the performance of routine duty, but does hold that it may be predicated on some information which should lead the mind to suspect danger, and therefore inquire. And in such case it is not a conclusive presumption of law, as it is necessary for a jury to determine the extent of his information and of his duty to inquire. It may be said that the following language in the charge covers the plaintiff's contention, and that by affirming the case this court adopted it, *viz.*: "So that, if no actual notice of the bridge being unsafe was given to the township officers, still, if they, by the exercise of reasonable care such as men possessed of ordinary and reasonable intelligence might exercise, would have known of such condition." But this must be read in the light of what precedes and follows. The whole paragraph of the charge is as follows: "When it is generally known that a bridge has become decrepit, or when a bridge has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed to take action on the ground of having no actual notice of the dangerous infirmity. This is substantially the rule laid down by the supreme court of this state in another case on this subject, and I think it also applicable to this case. So that, if no actual notice of the bridge being unsafe was given to the township officers, still, if they, by the exercise of reasonable care, such as men possessed of ordinary and reasonable intelligence might exercise, would have known of such condition, or if through any other means they had actual knowledge that the bridge was unsafe, this would answer the requirements of the statute as to notice or knowledge on the part of defendant." The court so understood it, and approved of the charge as a whole, in the following language: "We think the charge of the court, taken as a whole, was within the rule, even if the testimony did not show the township had knowledge of the unsafe condition of the bridge; but there was some evidence to go to the jury that the township officers whose duty it was to repair the bridge had knowledge of its unsafe condition, and that question was fairly left for their consideration, under the charge of the court. Brown was commissioner of highways, and was advised in 1886 that certain bridges were out of repair,—this bridge among the number,—and there is no claim that he made or attempted to make any examination of them. In the same year the overseer of highways of that district was also notified, and the only repair made was the putting on of new planks. It is contended, however, that notice to the overseer of highways was not notice to the township. How. Anno. Stat. § 1445, provided that highway commissioners, street commissioners, and all other officers having charge of bridges, etc., and the care and repair thereof, are hereby made and declared to be the officers of the township, etc., wherein they are elected; and by section 1379 it is further provided: 'The overseer shall have the care of all bridges within his district, and shall see that the same are kept in repair, and, when the cost of repairing any bridge shall exceed twenty dollars he shall report to the commissioner the condition of such bridge, and the necessity for such repairs.' Under the circumstances here stated the court very properly refused the instructions asked by counsel for defendant, and we find no error in the charge as given. It is conceded that this testimony would have sustained the general verdict under the act of 1879. We think it equally clear that it sustains the verdict under the act of 1887." The foregoing discussion shows the actual questions decided in the *Kenockee Case*, and, unless we are to give technical effect to some of the language, to the exclusion of other portions and without regard to what was really in issue, we may reasonably say that the case did not commit the court to the doctrine for which the plaintiff contends. In the case of *Carroll v. Carroll*, 16 How. 287, 14 L. ed. 941, the Supreme Court of the United States, through Mr. Chief Justice Marshall, condemns such practice in the following language: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which will serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of *Ex parte Christy*, 3 How. 292, 11 L. ed. 603, and *Jenness v. Peck*, 7 How. 612, 12 L. ed. 841, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains." This court has announced the same doctrine repeatedly. We feel justified in saying, therefore, that the *Kenockee Case* does not settle the question raised against the defendant's contention.

The *Kenockee Case* was followed in point of time by two cases which were decided the same day. They were *McKeller v. Monitor Twp.* 78 Mich. 485, 44 N. W. 412, and *Blank v. Livonia Twp.* 79 Mich. 1, 44 N. W. 157. Both opinions are written by Mr. Justice Champlin. In the former of these a stringer broke under a steam boiler filled with hot water, and plaintiff's horses were injured by steam. The defect alleged and proved was an internally rotten stringer. The overseer

vides that highway commissioners, street commissioners, and all other officers having charge of bridges, etc., and the care and repair thereof, are hereby made and declared to be the officers of the township, etc., wherein they are elected; and by section 1379 it is further provided: 'The overseer shall have the care of all bridges within his district, and shall see that the same are kept in repair, and, when the cost of repairing any bridge shall exceed twenty dollars he shall report to the commissioner the condition of such bridge, and the necessity for such repairs.' Under the circumstances here stated the court very properly refused the instructions asked by counsel for defendant, and we find no error in the charge as given. It is conceded that this testimony would have sustained the general verdict under the act of 1879. We think it equally clear that it sustains the verdict under the act of 1887." The foregoing discussion shows the actual questions decided in the *Kenockee Case*, and, unless we are to give technical effect to some of the language, to the exclusion of other portions and without regard to what was really in issue, we may reasonably say that the case did not commit the court to the doctrine for which the plaintiff contends. In the case of *Carroll v. Carroll*, 16 How. 287, 14 L. ed. 941, the Supreme Court of the United States, through Mr. Chief Justice Marshall, condemns such practice in the following language: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which will serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of *Ex parte Christy*, 3 How. 292, 11 L. ed. 603, and *Jenness v. Peck*, 7 How. 612, 12 L. ed. 841, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains." This court has announced the same doctrine repeatedly. We feel justified in saying, therefore, that the *Kenockee Case* does not settle the question raised against the defendant's contention.

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testified that he inspected that stringer two weeks before the accident, and that it appeared to be sound. The circuit judge charged as follows: "But another witness, who was the overseer of highways of the township, says that at a certain time he examined the bridge, and examined this particular stringer, and he has told you what he found. I do not recollect myself the exact time that he says he made this examination, but you will probably recollect it. In your judgment, did that overseer then find the bridge to be reasonably safe and fit for travel? If not, he then and there had notice; that is, if the bridge was then unsafe and unfit for travel, and he was there for the purpose of making an examination, and did make an examination, as he says, of course the township then and there had notice that it was unsafe and unfit for travel. I say, if that was so, and he was making that examination, he had that notice, and so the town had. If this timber was so rotten as to be unsafe at the time of the accident, then was it probably safe and sound at the time he saw it? Was it possible for the timber to be as safe as he says it was when he saw it, and then to be as rotten as the other witnesses say it was when it broke? Is it possible that the stick was then rotten, or that it was then sound? Was his examination careful and thorough? If you come to the conclusion that the stick was sound when he saw it, then it follows, of course, that from that examination he got no knowledge or notice that would bind the township,—no notice or knowledge of any unsoundness. But if it was then rotten he ought to have found it out, and it was negligence in him, and it was negligence in the township, not to find it out. If the stick was rotten, and he examined it for rot, he and the township had notice of its rottenness, whether he found it or not. If an oak log of that size and exposure to view is so rotten as to be unsafe for use, anybody that exercises ordinary prudence and care and good judgment can find it out if he tries." This did not receive the approval of this court, which said: "The circuit judge, in this portion of his charge, pretty effectually impeached this witness, and, we think, lost sight of the other testimony that, to appearances, the stringer was sound upon the surface. If the jury believed that it did so appear upon the surface, then, in the absence of actual knowledge or notice, the question would be whether they had used due diligence in discovering the defect, and neglected to do that which common prudence and caution required them to do to ascertain the condition of the timber." It is contended that this implies a liability resting upon a duty to inspect, but the most that it can justly be said to imply is that the jury might find that the inspection actually made should have put him on inquiry, and it was held that the judge was wrong in saying that even this was notice of a latent defect. It certainly does not say that, had no inspection been made, the township would have been chargeable with notice. If it were, all of the reasoning about notice

would be a work of supererogation, for the court might as well have said that the township was liable for its failure to inspect properly, under its duty to keep the highways in repair. That would have been, as to claimant, tantamount to saying that the amendatory act really made no change in the law theretofore existing. We ought not to put such a construction upon this case unless it is unavoidable; and it is not, for we can as well say that what was meant was that the inspection of the bridge actually made, considering the proved condition of the bridge, of necessity conveyed information which should have put the officer on inquiry, as any other information of the facts discovered would have done, and therefore that the jury might say it was notice, under the *Kenoskee Case*.

The case of *Blank v. Livonia Twp.* 79 Mich. 1, 44 N. W. 157, was a similar case of internal rotting. Actual notice was proved, given by a bridge builder to the commissioner. He pronounced the bridge defective, and offered to build a new one. The commissioner replied that "it needed only a new stringer," and this was put in. The commissioner at this time examined one stringer, and, finding no visible defect, concluded that the bridge was all right. The opinion says: "The main question in controversy was whether the defendant knew, or ought to have known, of the existence of the defect in the west stringer of the bridge. No actual notice of the particular defect was shown. The members of the township board and the highway commissioner after October, 1887, never heard of the bridge being out of repair, and had no knowledge and no notice of the defect in the west stringer until after the accident. The question was, therefore, narrowed down to whether they ought to have known it, and that resolved itself into whether they had used due diligence in inspecting the bridge, and due caution and prudence to ascertain and discover defects therein. The care and caution required in ascertaining whether timbers in a bridge are sound must necessarily depend in a measure upon the length of time the bridge has been built; especially is this so in respect to the soundness or unsoundness of the timber from internal decay or 'dry rot.' The kind of timber also has a bearing upon the subject, and whether round or square. In this case both pieces of timber of which the stringers were made were taken from the same tree, and were swamp oak. Seven months before the accident the east stringer was removed, and replaced by a new one. The timber was sound, but it had split, which made it defective. With this fact before him, there was nothing to lead him to suspect that the other stringer was decayed internally. Nevertheless, he inspected it, and tested it in such manner as he could without boring into it. The length of time such timber, in such position and use, usually remained sound, had an important bearing upon the extent and manner of inspection required of the commissioner. It is common knowledge that some kinds of

timber remain sound longer than others, when exposed to the elements; and as bearing upon the care and prudence of the commissioner in making the inspection in October, 1887, the testimony of the bridge builder, as an expert, ought to have been received. This doubtless would have involved the inquiry and elicited the fact as to the length of time occupied in sapping the vitality of timber which is inflicted with an internal decay or dry rot, and the necessary and proper means of discovering its existence. It seems to have been assumed that because the stringer broke from dry rot in May, 1888, it was equally defective from that cause in October, 1887. But there is no such presumption. A state of facts once existing is sometimes and usually presumed to continue, but they are not presumed to have always existed. Because the condition of the stringer in May, 1888, was that of a piece of timber in which the center was decayed or rotten, did not authorize the presumption that it was always rotten from the time it was placed in the bridge. On the contrary, it being sound then, it would be presumed to remain sound for such length of time as such timber usually remains sound when exposed as that was. Townships are not insurers of the safety of the bridges and highways within their limits. The statute imposes upon them the duty of keeping the highways and bridges in repair, and in a condition reasonably safe and fit for the public travel. But they are liable for a neglect of this duty only when it is shown that such township has had reasonable time and opportunity, after knowledge or notice to such township that such highway or bridge has become unsafe or unfit for travel, to put the same in proper condition for use, and has not used reasonable diligence therein after such knowledge or notice. Pub. Acts 1887, No. 264, § 2. When the defects are open to view, or apparent to persons traveling over the bridge or along a highway, and have existed such a length of time that the proper officers whose duty it is to see that the highway is kept in repair would be considered negligent in not seeing such defects, then the jury may presume notice or knowledge of such defects; but this presumption cannot arise from latent defects not open to view." This case was reversed, yet it is now claimed to be authority for the proposition that a liability can exist for the want of an inspection, notwithstanding the fact that the case holds that there was no liability, though an inspection was actually made. Stress is laid upon some language used, which is as follows: "When the defects are open to view, or apparent to persons traveling over the bridge or along a highway, and have existed such a length of time that the proper officers whose duty it is to see that the highway is kept in repair would be considered negligent in not seeing such defects, then the jury may presume notice or knowledge of such defects, but this presumption cannot arise from latent defects not open to view. In respect to latent defects in the timbers of a bridge, it is the duty of the highway com-

missioner to make proper and seasonable inspection to ascertain its condition as to safety for the public travel, and to exercise due care and caution in so doing to find defects; and the kind of inspection and the amount of care and caution required of him, upon which to predicate negligence in the performance of the required duty, will depend upon all the facts and circumstances of the particular case, and the particular neglect of duty must be pointed out. In this case there was no defect apparent, and no actual knowledge by or notice to defendant of the defect which existed, and through which the accident was caused. And it was not pointed out or shown what the commissioner of highways ought to have done which he did not do to discover the defect in the stringer complained of." This language can as well be held to apply to the question, "Was the condition of the bridge such as to put upon inquiry one actually inspecting it?" If a township is liable for the existence of latent defects, because of a neglected duty of inspection, why did the court say "that a presumption of notice cannot arise from latent defects, not open to view;" and again, "It was not pointed out or shown what the commissioner ought to have done which he did not do to discover the defect . . . complained of" (and it might have been added, "after having his attention called to the defective condition of the bridge)?"

This *Livonia Case* was before the court again (95 Mich. 229, 54 N. W. 877); the opinion being written by Mr. Justice Long, who also wrote the *Kenookes Case*. On this trial the case turned on a different defect; viz., it was said: "The whole strength of the bridge depended upon the good condition of these parts of the stringers. Against the shoulders formed by these notches rested the foot of each brace, and the whole weight of the bridge, and whatever it carried rested against these shoulders, so that a defect in one of them was dangerous to the whole structure. It would seem that it was one of the places that an ordinarily prudent man would have examined when he found that one was defective. At least, it was a question for the jury to determine whether there was not sufficient notice to the commissioner to put him upon inquiry as to the condition of the other stringer at that place, when he found the east one so defective that it had to be removed. If this examination had been made, it might then have been discovered that the west stringer was also defective. Though the defect was latent, the question was a proper one, under the circumstances shown, for the jury to determine whether the officers of the township used the diligence necessary in ascertaining the condition of the bridge." There was the recognition of the same rule, viz., that the circumstances actually brought home to the knowledge of the officer were such as to permit a jury to say that they should have put him upon inquiry, which would have led to the discovery of the defect, and that this was sufficient notice. It was therefore

proper to use the language upon which the changes are rung,—that “a defect may exist and be unknown, and the town still be liable, on the ground that the prime fault consists in being ignorant; it being a clear principle that the want of knowledge may, in given circumstances, imply a want of due care.” We have thus seen that all of these cases turn upon the questions: “What is sufficient notice?” “What will authorize the submission of the question of notice to the jury?”—and none of them purport to decide the question raised here, viz.: “Whether notice can be predicated upon a mere failure to perform the alleged duty of inspection, when nothing has occurred, or been brought to the officers’ knowledge or attention, that a defect is even suspected.”

There are other cases to which attention will be called in this connection. In the case of *Wakeham v. St. Clair Twp.* 91 Mich. 19, 51 N. W. 696, a horse stepped in a hole in an embankment, in which such holes were frequently caused by the action of water. The court held that, if there was nothing upon the surface of the highway at that point to give notice that a hole was being eaten away, the plaintiff could not recover, although the township knew that such breaks were liable to occur in that embankment, and notwithstanding its duty to keep the way in a safe condition. In *Hembling v. Grand Rapids*, 99 Mich. 292, 58 N. W. 310, a sidewalk was out of repair. The trial court again gave the instruction: “The defect may exist and be unknown, and the city still be liable, on the ground that the prime fault may consist in being ignorant; it being a clear principle that a want of knowledge may, under certain circumstances, imply want of due care. The general duty of the city is to exercise, through its officers, a reasonable supervision over its streets and sidewalks, and, within fairly practicable limits, to be watchful of their condition and trustworthiness, and to see that they are kept in a reasonably safe condition for public travel. Its officers cannot ignore the dictates of common sense and lessons of ordinary experience, and refuse to see and refuse to heed what others see and what others understand. Such means should be employed by the officers from time to time, in making their examinations, as usually disclose the defects to be expected.” This was held erroneous, because it “assumed that it was the duty of the municipality to make such an inspection of sidewalks as would disclose latent defects, if they existed. Respecting the ordinary sidewalks, there is no such duty of substructure inspection as is imposed in case of bridges or other elevated ways. In the absence of actual notice, municipalities are only liable for such defects in sidewalks as are apparent or are suggested by appearances, or which are disclosed by a test in the nature of the ordinary use of such walks.” Here, again, is some language which can with some plausibility be said to support the plaintiff’s contention; but the fact remains that it clearly limits the liability to the question of notice, either actual, 47 L. R. A.

or such as should put a prudent man on inquiry and of itself create a duty to examine. The statute makes no distinction between sidewalks and bridges. In *Aben v. Goorse Twp.* 113 Mich. 9, 71 N. W. 329, an examination was made, and Mr. Justice Moore held that there was a question for the jury as to notice. In *Snyder v. Albion*, 113 Mich. 280, 71 N. W. 476, Mr. Justice Montgomery’s opinion is in line. He said: “It is argued in the brief of defendant’s counsel that, upon the whole case, the verdict should have been directed for defendant; the principal claim being that there was no evidence that the defendant had actual notice, or that the defect was of such long standing and of such character that the defendant could be charged with constructive notice, of the defect. But, without going at length into the testimony, we think that sufficient appeared by the testimony of defendant’s witnesses to warrant the jury in drawing the inference that the committee of the council had sufficient notice of the decayed condition of the timbers supporting the bridge to have called for action on the part of the city. There was evidence showing conditions which indicated that an inspection would have disclosed the condition of these timbers, and whether such inspection was timely made was a question for the jury under the testimony in this case. The court charged the jury that notice to the city might be either actual or constructive, and that, if the condition of the bridge was such that by reasonable diligence the city should have known of its defective condition, that would be constructive notice, but that such notice could not be presumed, unless of such long standing and of such a character as to actually arrest the attention of passers-by or of persons inspecting the bridge, and that the burden of showing these facts was upon the plaintiff. We think this instruction sufficiently favorable to defendant.” The case of *Menard v. Bay City*, 114 Mich. 540, 72 N. W. 231, went off on the point that a loose, split plank, which had existed for a month before the accident, was an obvious defect, of sufficiently long standing to justify submission to the jury. Two of the justices dissented. This they could not have consistently done if a failure to inspect was of itself a ground of action, or a fact from which notice should have been inferred. The case of *Bettys v. Denver Twp.* 115 Mich. 228, 73 N. W. 138, shows that the distinction has not been overlooked. That case raised this point; that is to say, it was claimed that the court erroneously instructed the jury that a failure to inspect in the ordinary course of duty, and without reference to any notice or information of defects, was such negligence as would support an action. The charge, as quoted in the report, is open to such construction. But it appeared that, as given, it was not; and the case was affirmed by a unanimous court, upon the distinct proposition that an inspection actually made might be sufficient to put an officer upon inquiry, and therefore might be notice.

The last case to be noticed is *Randall v. Southfield Twp.* 116 Mich. 501, 74 N. W. 716. Mr. Justice Montgomery said of the questions in the case: "The questions involved were whether the stringers in question were in fact defective (and of this, as to one of them, there was abundant proof). Whether the defect was of such an obvious character that the officers of the defendant charged with the care of its bridges should, in the exercise of due care, have known of the defect and repaired it, and on this point the evidence was conflicting." There was evidence that a decayed spot was visible on a stringer, and that it was noticed by passers-by. The judge charged that: "It is his [plaintiff's] theory that the bridge, or south stringer of the bridge, was decayed and broke, or, as one of the witnesses states it, that it had a decayed spot, and that they noticed it some months previous to the 27th day of September. I refer more especially to the testimony of witnesses Cook and Prince. And that being true, the township is chargeable with constructive notice. I think I ought to say to you, and it is my duty to say to you, that if you believe the testimony of witnesses Cook and Prince—more especially the testimony of Prince—that such a decayed spot was existing in that stringer as described, and that the plaintiff did not, by his own negligence, contribute to the injury, he is entitled to recover from the township." This court said: "We think these instructions were error. The instructions amounted to holding that, as matter of law, such a decayed spot as described by either of these witnesses was enough, in and of itself, to amount to notice that the sleeper was unsafe. That this question was competent to be considered by the jury cannot be gainsaid; but it was insisted by counsel for the defendant, and we think rightly, that the effect of these defects as notice should be determined by the jury. The cross-examination of Cook leaves it doubtful whether the discoloration was perceptible in dry weather, and the question of the extent of the discoloration, the appearance of the spot, its location, and what it would suggest to those having charge of the bridges of the town, were questions for the jury; the test being whether the appearances were such as to suggest to a person of ordinary skill and judgment the fact of unsafety or the necessity of further investigation, and whether such defective appearances existed for such a length of time as that their inspection at reasonable intervals would have disclosed their appearance to the inspectors." The only thing in this opinion that can be said to sustain plaintiff's contention is the language used in stating the test to be applied, viz., the words "at reasonable intervals." Had they been left out, the language would have been susceptible of application to inspections induced by information of defects of which the case speaks, and would have been in exact accord with the other cases. Here, again, is an expression in an opinion, not necessarily involved in the point upon which the 47 L. R. A.

case turned, which by implication supports plaintiff's theory, and this is all.

The case of *Woodbury v. Owosso* is not conclusive of this question, when the whole charge of the court passed upon is considered. It quotes from many of the earlier cases. It says that the township is not an insurer, but that the city could not be oblivious to matters of general knowledge and common observation. It concludes with a requirement that a want of reasonable diligence be found, and that it could not be found in the absence of express notice, unless the defective condition was of such long standing as to be regarded as negligence; i. e., presumptively notice. To hold in accordance with plaintiff's contention is to disregard the numerous cases which have said that there can be no constructive notice of latent defects, even where an inspection is actually made, where there is nothing in the circumstances to cause the officers to suspect danger. *Blank v. Livonia Twp.* 79 Mich. 1, 44 N. W. 157; *McKeller v. Monitor Twp.* 78 Mich. 485, 44 N. W. 412; *Blank v. Livonia Twp.* 95 Mich. 229, 54 N. W. 877; *Hembling v. Grand Rapids*, 99 Mich. 292, 58 N. W. 310; *Menard v. Bay City*, 114 Mich. 450, 72 N. W. 231.

We are, however, confronted by the construction placed upon these statutes in the *Kenockee Case*, contained in the following words: "The words of the act of 1879 would seem to have made the township liable without regard to the question of notice; but the act has always been construed by this court that it was only liable in case of negligence, and it could not be held to be negligent until after notice, actual or constructive, that the highways or bridges were out of repair; and the act of 1887 evidently was framed to meet this view, and not to impose new conditions." It is strenuously insisted that this was equivalent to saying that the law of 1887 must have the same interpretation that the plaintiff gives to that of 1879. The principal force that this language has arises out of the fact that, if the law was changed substantially in the matter of rights conferred (and it was in the matter of right, if it was changed at all), the court could not have held that the plaintiff's right of action was preserved. The difficulty is really imaginary, however, if we are able to conclude, not that the law of 1887 gives the same broad right ascribed to that of 1879, but that the law of 1879 had always been limited by construction to the terms of the law of 1887. The latter is exactly what is said by Mr. Justice Long. Finally, whatever we may conclude from the earlier opinions themselves, Mr. Justice Long in the *Kenockee Case* has put a construction upon the law of 1887, and the cases decided after its passage, to the effect that "townships cannot be held to be negligent until after notice, actual or constructive, that the bridges are out of repair." We will examine the earlier cases, and see if they do not limit the liability to cases where there is actual notice, or circumstances brought home to the officers which should arouse the

suspicion of unsafety and cause a prudent man to ascertain the truth, not from a neglect of the performance of a routine duty of supervision, but as a result of knowledge or information indicating danger and necessity of investigation.

The earliest case is *Medina Twp. v. Perkins*, 48 Mich. 67, 11 N. W. 812. While it mentions the duty of inspection, the case turns upon the facts, *viz.*: "But the present case requires reference to a special matter. When the act of 1879 began to operate, it found the highway commissioner of Medina already well acquainted with this bridge. He held in his mind the knowledge of the repairing done the year before. He also held in his mind the facts concerning the inspections then made, and the judgments formed, that the bridge was then in good condition and safe; and no inquiry bearing on his duty or that of the township to inspect in the short interval between the time the act took effect and that when the bridge fell can be perfect, unless it embraces these facts. Now, considering the age and character of the bridge, the fact of the repairing a year before, the fact of the inspections then made and their results, the appearance of the bridge, and likewise considering all the incidents affecting the question, was the failure, during the space between the time the statute began to operate and the time when the bridge fell, to examine and discover the rotten spot in the needle beam, a failure to use reasonable intelligence and ordinary care and prudence, under the explanations which have been given?" This was under the rule there laid down, not that, if the defendant had regularly inspected, it would have discovered the defect, but that it disregarded the warnings within the knowledge of the township officers, that the bridge was old and decrepit, and had been long suspected as unsafe by the public. Interpreting *Medina Twp. v. Perkins* in the light of Mr. Justice Campbell's opinion in *Fulton Iron & Engine Works v. Kimball Twp.* 52 Mich. 148, 17 N. W. 733, this limitation becomes still more apparent: "In order to recover, it became necessary for plaintiff to show, not only damage from defects in the bridge, but fault in defendant in having a bridge in such condition; and such fault could only exist where there had been failure to repair injuries which defendant either knew, or had such notice of as should have led to the removal of the mischief." *Merkle v. Bennington Twp.* 58 Mich. 157, 55 Am. Rep. 666, 24 N. W. 776, throws no light upon the question. In *Stebbins v. Keene Twp.* 55 Mich. 554, 22 N. W. 38, it was said by Mr. Justice Sherwood: "There does not seem to be any serious contest as to how the injury occurred, nor as to the duty of the township in a case where its officers have in their charge and care the construction and maintenance of bridges, nor as to the liability of the township if the proper officers carelessly or negligently omit or fail to perform such duty after having sufficient knowledge or notice of the defective condition of a bridge, if injury ensues." *Medina* 47 L. R. A.

Twp. v. Perkins is cited and approved, and the language quoted, not excepting the portion which gives prominence to the necessity of notice which shall move a prudent officer to make immediate search for the defect which causes an obvious condition of danger.

It is strenuously urged that we must make a liberal, or at least logical, application of the term "constructive notice;" that constructive notice is found when the facts are such as to give rise to a conclusive presumption of notice, and therefore not subject to dispute. As it has been said that a township will be charged with notice when the defects are obvious and observed by the public, by reason of its "duty to see what others see," it is argued that the same conclusive presumption of notice arises where the township has neglected the alleged duty of inspection, if inspection would have disclosed it. In other words, by applying the doctrine of constructive notice to these cases the force of the proviso in the statute is nullified, and again, we must hold that the proviso meant express notice or no notice. That would be to make a solemn legislative act yield to a rigid application of a technical term, when it is apparent that such could not have been the legislative intention. The legislature may impose such limitations upon the term "constructive notice," or any other technical language, as it may please, expressly or by necessary implication. What is "constructive notice?" In the case of *Jordan v. Pollock*, 14 Ga. 156, it was said: "Notice is actual when it is directly and personally given to the party to be notified; and constructive, when the party, by circumstances, is put upon inquiry and must be presumed to have had notice, or by judgment of law is held to have had notice." *Powell, Mortg.* 561, 562; 16 Vin. Abr. 2; 4 Kent, Com. 172. Again, in *Chesapeake & O. R. Co. v. Mullins*, 94 Ky. 357, 22 S. W. 558, it was said: "Actual notice is such notice as is required to be given in some particular way to each owner. Constructive notice is such as results from some public act required to be done, and in a particular manner, and of which the owners of the property upon which the burdens are imposed are required to take notice." And in *Williamson v. Brown*, 15 N. Y. 359, it is said: "Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute. 'Constructive notice,' says Judge Story, 'is in its nature no more than the evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.' Story, Eq. Jur. § 399." "Constructive notice is a legal inference from established facts; and

when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument, and is a matter of ocular inspection, the question is one for the court. Whether, under a conceded state of facts, the law will impute notice to the purchaser, is not a question for the jury." *Birdsall v. Russell*, 29 N. Y. 220. In *Kennedy v. Green*, 3 Myl. & K. 719, it was said: "The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not; and, next, that the policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while this agent know, and himself, perhaps, profit by that knowledge." In *Townsend v. Little*, 109 U. S. 512, 27 L. ed. 1015, 3 Sup. Ct. Rep. 361, it was said: "Constructive notice is defined to be, in its nature, no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted;" citing *Plumb v. Fluit*, 2 Anstr. 438; and *Kennedy v. Green*, 3 Myl. & K. 699. In *Jones v. Smith*, 1 Hare, 43, Mr. Vice Chancellor Wigram said: "The cases in which constructive notice has been established resolve themselves into two classes: First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. How reluctantly the court has applied, and within what strict limits it has confined, the latter class of cases, I shall presently consider. The proposition of law upon which the former class of cases proceeds is not that the party charged had notice of a fact or instrument which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge,—a purpose which, if proved, would clearly show that he had a suspicion of the truth and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution,

as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a bona fide purchaser without notice. This is clearly Sir Edward Sugden's opinion (3 Sugden, Vendors, 10th ed. pp. 471, 472), and with that sanction I have no hesitation in saying it is mine also." This language was approved by the Federal Supreme Court in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1062, 12 Sup. Ct. Rep. 239.

From the foregoing we may note a distinction between cases where notice is to be found as matter of law from certain relations and those where the question to be determined is whether the facts disclosed were such as to put a prudent man upon inquiry which would have resulted in notice of the hazardous conditions. In the former the constructive notice may necessarily follow from the mere omission of a duty as a matter of law, while in the latter it depends, first, on information brought home to the officer which should directly or indirectly suggest a fact; and, second, the use made of such information. We have seen that the authorities make a distinction between constructive notice (technically speaking) and that presumptive notice which may be found from circumstances having a tendency to arouse suspicion, which often goes by the same name, and which is constructive in a sense, inasmuch as it will be imputed from facts which should arouse suspicion of the defective condition. We think it cannot be found when this element is lacking, upon the mere neglect to know of a condition, unaccompanied by any circumstances which should have given rise to a suspicion of danger calling for investigation.

From this review of the cases it seems manifest that the plain provisions of the law of 1887 have been kept in view by the court, and that while some allusions to the case of *Medina v. Perkins* may, at first blush, appear to have committed the court to a broader rule of liability than the language of the statute contemplated, an examination of the questions at issue and decided in the respective cases will show that this is not so. The law undoubtedly makes it the duty of municipalities to keep the streets, etc., in good repair, but it does not follow that there is a liability for a neglect of that duty. That duty has existed ever since Michigan has been a state, but, as already shown, there was no such liability for many years. Legislation was necessary to create it, and it follows that the liability extends no further than the statute requires. The act plainly limits liability to a case arising after knowledge or notice of the defect causing the injury, whether such defect exists by reason of the negligence of the municipality, or not. There was doubtless abundant reason for such a proviso in the statute in the well-recognized facility with which injured persons shift the responsibility for accidents upon the public through the medium of char-

itably inclined juries. At all events, the law is plain, and we should not hold that a city or township is liable because it negligently omitted an inspection, when the legislative intention to limit recovery to cases arising from known defects is clear.

We do not mean to be understood as saying that notice or knowledge may not be inferred from circumstances such as the existence of an obvious defect for a period which renders a want of knowledge improbable. It has often been said that the law will presume that the municipality has notice of defects which common observation for a long time has made notorious. This has been called "constructive notice," but it has often been said that the rule does not extend to latent defects, as I have shown. To say that a neglect to inspect is actionable is to nullify the statute. In this case the defect was latent until two or three days before the accident, and then very few discovered it. The bridge was an iron one, and apparently a good one, and if the joist was rotten and would not hold a nail, that fact could be known only by an inspection. For aught that appears, the joist did hold the nails until Saturday night before the accident. Then the plank was put back in place by the man who discovered that it was loose, and when that was done it would give no sign of the defect. Monday or Tuesday night it was gone, and the sewer crock was laid over it. But nothing shows that it was brought to the knowledge of the city before the accident happened.

We are of the opinion there was no evidence from which notice could be properly inferred, and that the judgment should be reversed, and a new trial ordered.

Grant, Ch. J., and Long, J., concurred.

Montgomery, J., dissenting:

In my opinion, the reasoning and conclusions of my Brother Hooker overrule three cases decided by this court. This being so, I do not deem it necessary to attempt to construe this statute as would be proper if the question were not *stare decisis*.

Moore, J., dissenting:

Plaintiff, about 9 o'clock in the evening of June 28, 1898, fell into a hole upon the sidewalk over a bridge of the defendant city. This hole was 9 inches wide and 18 inches long. The bridge was constructed of iron, with two driveways 17 feet wide, and a footwalk on each side 8 feet wide, with an iron railing on the outside. It was about 10 feet from the floor of the bridge, where the plaintiff fell, to the water below. The hole was caused by the removal of a plank. The plank and the wooden stringers underneath had been in use fifteen years. There is no testimony to show that any defect was apparent upon the surface of the bridge until the Saturday night previous to the accident, which was the following Tuesday. On that night a witness stood at the outer edge of the walk, leaning upon the railing. He inserted part of his foot under the railing, whereupon

the plank upon which he was standing flew up. The inside end of this plank and the end of the next plank were nailed to the same stringer. The witness put the plank back in place as well as he could with his foot. In some manner the plank had again become removed before Tuesday night, and someone had taken a part of a sewer crock and placed it over the hole. If the crock covered the hole, it had evidently become misplaced on the night of the accident. The plaintiff, according to one witness, said he saw something as he was walking along, and supposing it to be a piece of brown paper, attempted to push it aside. Failing in this, he stepped over it, and stepped into the hole. An examination of the stringer disclosed the fact that it was decayed where the plank was nailed on, as were also other stringers at similar places. Plaintiff recovered verdict and judgment.

The principal question arises from the refusal of the court to direct a verdict for the defendant. It is urged that there was no actual or constructive notice, such as is required by § 2, No. 264, Pub. Acts 1887. The case was submitted to the jury upon the theory that it was the duty of the defendant to exercise reasonable care in the examination and inspection of the bridge. The record discloses that the officials of the defendant did no more than to look at the roadbed and sidewalks as they passed over them, and that no inspection or examination was made to determine whether the stringers were sound, although they had been in use for fifteen years. Was it the duty of the defendant to make a reasonable inspection and examination, from time to time, to determine the soundness and safety of the bridge?

The statute alone imposes a liability upon municipal corporations for injuries resulting from defects in their public highways, and courts cannot enlarge that liability. Under defendant's contention a municipality owes no duty to inspect, but, after erecting a bridge, is required to do nothing more until it has actual knowledge or notice, or the appearance of the bridge is such as to indicate to the common observer that it is out of repair. An examination of the authorities convinces us that this question has been settled by the repeated adjudications of this court against the contention of the defendant. It was before the court in *Medina Twp. v. Perkins*, 48 Mich. 71, 11 N. W. 811, wherein it was said: "On the other hand, a defect may exist and be unknown, and the town still be liable, on the ground that the prime fault consists in being ignorant; it being a clear principle that a want of knowledge may, in given circumstances, imply a want of due care. The general duty of a township is to exercise, through its officers, a reasonable supervision over its ways and bridges, and, within fairly practicable limits, to be watchful of their condition and trustworthiness, and see that they are kept in a reasonably safe condition for public travel." That decision was under the law of 1897, which did not contain the words, "aft-

er knowledge by, or notice to," etc., contained in the act of 1887. That case has been cited with approval in nearly every case since, under the act of 1887.

It is said the law undoubtedly makes it the duty of a municipality to keep its streets, etc., in good repair, but it does not follow that there is any liability for a neglect of that duty. It is also said it has often been held the law will presume that the municipality has notice of defects which common observation for a long time has made notorious. This has been called "constructive notice." It has been repeatedly held, since the law of 1887 was enacted, that constructive notice is sufficient to create liability. The proviso contained in the law of 1887 does not say constructive notice shall be sufficient. How, then, can the decisions holding constructive notice is sufficient be justified? If it is the duty of the municipality to keep the streets in good repair, does it not follow that it must make such reasonable inspection as is necessary to decide whether repairs are needed? Should the highway officers live in one corner of the township, and the defective bridge be in the furthest corner from them, and the evidence should disclose they had never passed over the bridge, and no actual notice had ever been given them, the cases hold that, if the defect was so open and notorious as to be apparent generally to those who had occasion to go over the bridge, and continued for a considerable time, the town would have what is known in the law as "constructive notice." The township acts only through its officers. Why should it be deemed to have constructive notice when its officers have had no actual notice? Can it be said that constructive notice shall be deemed notice to the township, unless it is upon the theory that, if the officers of the municipality had made the reasonable inspection which it is their duty to make, the defect which was apparent to others would be apparent to them? If it is now to be held that there is no liability for a failure to reasonably inspect when such inspection would disclose the defect, it seems to me that, logically, the doctrine of constructive notice must fall with such holding.

The precise question now before the court was fully considered in *Moore v. Kenockee Twp.* 75 Mich. 332, 4 L. R. A. 555, 42 N. W. 949, and several authorities cited. The contention there made was precisely the same as that now made. The following instruction of the trial court was sustained: "If no actual notice of the bridge being unsafe was given to the township officers, still if they, by the exercise of reasonable care, such as men possessed of ordinary and reasonable intelligence might exercise, . . . this would answer the requirement of the statute as to notice or knowledge on the part of the defendant." It is said the case of *Moore v. Kenockee Twp.* arose under the law of 1879, which was expressly held to rule it, and therefore the case is not authority in this case. I cannot agree with this view. The injury occurred in August, 1886. Suit was

commenced in November, 1886. The law of 1887 took effect in June of that year, while judgment was entered in the circuit court in June, 1888. The judge was asked to charge the jury that actual notice was required, and that constructive notice would not do. The court refused to so charge, and held that, if there was constructive notice, there might be liability. In discussing this feature of the case, the court cites *Medina Twp. v. Perkins*, 48 Mich. 71, 11 N. W. 810, and *Stebbins v. Keene Twp.* 55 Mich. 557, 22 N. W. 37, and quotes from them at length. It is then said by Justice Long: "The construction of this proviso in § 2 of the act of 1887, for which defendant's counsel now contend, is that proof must be made by the plaintiff that such defects exist, and that the township has had reasonable time and opportunity to put the same in repair, after express knowledge or information of such defects. The language of the statute is, 'after knowledge by or notice to such township.' The word 'notice' is not used as synonymous with the word 'knowledge.' Whatever fairly puts a party upon inquiry is sufficient notice, where the means of knowledge are at hand, and, if a party omits to inquire, he is then chargeable with all the facts which by a proper inquiry he might have ascertained. The rule has long been established, and is well settled in this state. In *Converse v. Blumrich*, 14 Mich. 120, Mr. Justice Cooley laid down the rule as follows: 'A person is chargeable with constructive notice where, having the means of knowledge, he does not use them.' The words of the act of 1879 would seem to have made the township liable without regard to the question of notice, but the act has always been construed by this court that it was only liable in case of negligence, and it could not be held to be negligent, until after notice, actual or constructive, that the highways or bridges were out of repair; and the act of 1887 evidently was framed to meet this view, and not to impose new conditions." I cannot avoid the conclusion that this is a construction of the proviso in § 2 of the act of 1887, and that it is a construction according to the contention of the defendant. In *Blank v. Livonia Twp.* 79 Mich. 1, 44 N. W. 157, Justice Champlin, after discussing the liability of the township for apparent defects, uses this language: "In respect to latent defects in the timbers of a bridge, it is the duty of the highway commissioner to make proper and reasonable inspection to ascertain its condition as to safety for the public travel, and to exercise due care and caution in so doing to find defects; and the kind of inspection, and the amount of care and caution required of him, upon which to predicate negligence in the performance of the required duty, will depend upon all the facts and circumstances of the particular case, and the particular neglect of duty must be pointed out." In *Hembling v. Grand Rapids*, 99 Mich. 292, 58 N. W. 310, which was a sidewalk case, Justice McGrath, speaking for the court, held that as to sidewalks, in the absence of actual notice, municipalities were liable only

for apparent defects, and that as to ordinary sidewalks there is no duty of substructure inspection as is imposed in case of bridges or other elevated ways; thus clearly recognizing the duty of inspection. See also *Snyder v. Albion*, 113 Mich. 275, 71 N. W. 475; *Bettys v. Denver Twp.* 116 Mich. 228, 73 N. W. 138; *Randall v. Southfield Twp.* 116

Mich. 501, 74 N. W. 716. There was evidence from which it may be fairly inferred that a reasonable inspection by the proper authorities would have disclosed the defect. The case was properly submitted to the jury. I think there was no error in the admission and rejection of testimony. Judgment should be affirmed.

LOUISIANA SUPREME COURT.

STATE *ex rel.* NEW ORLEANS CANAL & BANKING COMPANY *et al.*

v.

W. W. HEARD, State Auditor, *et al.*, *Appts.*

(47 La. Ann. 1679.)

- *1. Executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution.
2. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established.
3. Under our system of government it was certainly never intended by its founders that an executive officer should nullify a law by neglecting or refusing to act under it.

(December 16, 1895.)

NOTE.—Unconstitutionality of statute as defense against mandamus to compel its enforcement.

Introductory statement.

STATE *ex rel.* NEW ORLEANS CANAL & BKG. CO. v. HEARD and Van Horn v. State *ex rel.* Abbott, 46 Neb. 62, 64 N. W. 365, fairly represent the opposite views which the courts have taken of this question. In the former case the court holds that laws are presumed to be, and must be, treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially established.

In the latter case it is held that ministerial officers upon whom the legislature has sought to impose a duty by statute may assert the unconstitutionality of the statute as a defense to an application for a mandamus to require him to perform the supposed duty. The court says: "We had thought it settled, at least since the decision of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, that the Constitution is the supreme law [of the land] binding upon the legislature as well as upon every citizen, and that no act of the legislature repugnant to the Constitution can become a law for any purpose. A different doctrine has of late been revived, and it would even seem has received acceptance in a modified form in some courts. There can, however, in our mind be no escape from these fundamental propositions that the Constitution is the fundamental law, that an act of the legislature repugnant thereto is not merely voidable by the courts, but is absolutely void and of no effect whatever. It is no law and binds no one to observe it. The officers of this state are sworn to support the Constitution. Where a supposed act of the legislature and the Constitution con-

47 L. R. A.

APPEAL by defendants from a judgment of the Civil District Court for the Parish of Orleans in favor of relators in a mandamus proceeding to compel defendants to audit and pay a claim which relators held against the state, in accordance with a resolution of the legislature. *Affirmed.*

The facts are stated in the opinion.

Mr. M. J. Cunningham, Attorney General, for appellants:

Under article 233 of the Constitution, the bonds belonging to the seminary fund and those belonging to the Agricultural & Mechanical College fund became null and void, and the legislature was prohibited from ever making any provision for their payment. Under the debt ordinance of 1879 and act 121 of 1880, the consolidated bonds received in exchange for constitutional bonds were extinguished by the exchange,

and the Constitution must be obeyed and the statute disregarded. Ministerial officers are therefore not bound to obey an unconstitutional statute, and the courts sworn to support the Constitution will not by mandamus compel them to do so. It is, therefore, a complete answer to an application for such a writ that the statute seeking to impose the duty is violative of the Constitution. But . . . the peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts. They always disregard them at their peril; but when they do disregard them, and the question is presented to the courts as to whether or not obedience will be compelled, the question of the validity of the act is presented, and obedience will not be compelled if the act is unconstitutional, because in that case it is no law, and imposes upon no one any duty. Van Horn v. State *ex rel.* Abbott, 46 Neb. 62, 64 N. W. 365.

This conflict, like most others, arises from the different points from which the view is taken. On the one hand, it must be admitted that an unconstitutional law is no law, and binds no one. On the other hand, the doctrine is firmly established that statutes are presumed by the courts to be constitutional until the contrary is made plainly to appear. The courts are the properly constituted tribunals to pass upon the question, and if they exercise such extreme caution before declaring the statute void it would seem that nothing would justify a mere ministerial officer who has no judicial power to assume that the statute is unconstitutional, and act accordingly. Moreover, to uphold a contempt for the laws is a proceeding exceedingly pregnant with mischief. The doctrine of the Nebraska court makes every petty officer a judge, and permits him to ignore any law which

should have been destroyed, could not be legally reissued, and their fraudulent reissue did not create any obligation against the state.

The coupons constitute part of the bonds to which they are attached, and evidence no greater or better claim than the bonds from which they were clipped.

The legislature cannot appropriate money to pay coupons clipped from bonds not due by the state.

The appropriation to pay the interest coupons of the year is intended solely to pay valid coupons, and does not cover an appropriation to pay invalid coupons when no such legislative intent is manifested by the language used.

Pickett v. Southern Athletic Club, 47 La. Ann. 1605, 18 So. 634.

He thinks may conflict with the Constitution. Surely such a doctrine cannot be tolerated. That court says its doctrine should be applied "only in clear cases of unconstitutionality." That furnishes no definite rule, for who is to say what cases are clear? Manifestly the courts. So that until the courts have said that the law is unconstitutional the officer's duty is to execute it. Such conclusion leaves only the question, Has the officer a right to present the matter to the courts? That question is more difficult, and will require an examination of what the courts have decided.

Upon the question of the right to ignore the statute, some decisions agree with the Nebraska court, but the trend of judicial thought appears to be with the Louisiana doctrine.

Where a statute requires an officer to perform a ministerial act he will not be permitted in a mandamus proceeding to plead, in justification of nonperformance, that the act would violate the Constitution. The court says the decision of the constitutional question was an exercise of a judicial function. No such judicial power was conferred upon the officer. He had no greater personal interest in the matter than any other citizen of the state. To allow ministerial officers who have no direct personal interest in the matter to refuse to perform their duty on the ground that the performance of the act would violate the Constitution would be establishing a very dangerous precedent. It would be deciding a constitutional question affecting the rights of third persons at the instance of an officer whose duties are merely ministerial, and who has no direct interest in the question, and cannot in any event be made responsible. *Thoreson v. State Bd. of Examiners*, 19 Utah, 18, 57 Pac. 175.

In *State ex rel. Morton v. Stevenson*, 18 Neb. 421, 25 N. W. 585, it is said that it may well be doubted if the incumbent of a ministerial office created by, and whose current duties rest solely upon, legislative authority, may invoke the provisions of the Constitution as a justification of his refusal to discharge his plain statutory duty. Under our present system law suits may be prosecuted or defended only by the real party in interest. Such party alone has a right to make a record which will render the question litigated *res judicata*. The respondent can have no greater or different interest from that of any other citizen in the constitutional question which he invokes.

In *Huntington v. Worthen*, 120 U. S. 97, 80 L. ed. 588, 7 Sup. Ct. Rep. 469, which was not a mandamus proceeding, the court said it may not be a wise thing as a rule for subordinate, executive, or ministerial officers to undertake to pass on the constitutionality of legislation

Mr. Branch K. Miller, for appellees:

Where an agent, in pursuance of his mandate, does an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such loss or damage as results from such execution of the agency.

Mechem, Agency, § 653, p. 479; *Drummond v. Humphreys*, 39 Me. 347; *Nelson v. Cook*, 17 Ill. 443; *Searing v. Butler*, 69 Ill. 575.

Relators were fiscal agents of the state, their contracts requiring them to take up interest coupons of bonds of the state maturing July 1, 1889. Under this mandate they paid out to take up such coupons \$2,616. The coupons so paid were, about two months afterwards, discovered to have been clipped from bonds of the state which had

prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public, but still the determination of judicial tribunals can alone settle the legality of their action. An unconstitutional act is not a law; it blinds no one and protects no one.

Constitutional change or judicial declaration of invalidity.

If the court has declared the law invalid, of course the officer is not bound to follow it.

Mandamus will not issue to compel obedience to an act which has been declared by the courts to be null and void. *State ex rel. Shiver v. Comptroller General*, 4 S. C. N. S. 185.

A state auditor will not be compelled by mandamus to levy a tax as required by a statute which has been pronounced by the court to be unconstitutional. *State ex rel. School Directors v. Jumel*, 32 La. Ann. 60.

So, the adoption of a Constitution may change the law so that a mandamus will not issue to compel its enforcement. *People ex rel. Breckenridge v. Brooks*, 57 Ill. 142.

In *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128, where after the passage of an act providing for a tax to pay bonds, a constitutional amendment was adopted which prevented the levying of the tax and required the application of money on hand to other purposes, a mandamus on behalf of bondholders to compel state officials to levy the tax was denied on the ground that it would subvert the entire financial basis of the state, and that the matter could not be adjudicated without calling the state to the bar of the court. The supreme court in affirming the judgment does not discuss directly the right of the officer to set up the unconstitutionality of the statute, but places its affirmance upon the ground that the suit was in fact one to compel the state to perform its contract, which the court had no jurisdiction to do.

Ministerial duties.

There are some ministerial duties of a nature so subordinate that it seems clear to all that the officers charged with them cannot raise the question of constitutionality of the statute to avoid performing them.

In a mandamus proceeding to require county commissioners to comply with a statute requiring them to receive and keep election returns, they cannot raise the question of the constitutionality of the statute as a ground for not per-

been retired, and which it was the duty of certain officers of the state to cancel and destroy, after such retirement. Relators had no knowledge or notice of the character of the coupons, nor was the same within the knowledge of defendants. Plaintiffs exercised due care and diligence. The state is bound to relators for such payment, notwithstanding the invalidity of the bonds from which the coupons had been taken.

Maitland v. Martin, 86 Pa. 120.

Watkins, J., delivered the opinion of the court:

Relators seek by mandamus to compel the respondents to comply with and perform their plain ministerial duties, which are designated in the concurrent resolution of the general assembly known as "Act 182 of 1894," directing the auditor to warrant, and

forming their duty. The court says the court will not listen to any objection made to the constitutionality of the statute by a party whose rights are not affected by it, and who has therefore no interest in defeating it. A party who seeks to have a statute declared unconstitutional must not only show that he will be injured by it, but he must also show how. The court further says, the duty of the commissioners being merely to receive and keep in their official custody the returns, such duty involves no consideration by them of the legality of the election, nor does it permit them to raise the question of the legality as a reason for not performing their stated functions; nor does its performance decide anything as to the legality of the election, but merely preserves evidence of the result. As county commissioners they are not charged with the duty of raising the question in behalf of those who may have personal interests which the enforcement of the Constitution may affect. The county commissioners as such have no right that will be affected by the performance of the duty imposed by the statute; but it is further said: "Nor will their performance of such duty injure any person's rights that may be affected by an enforcement of the article of the Constitution." *Franklin County Comrs. v. State ex rel. Patton*, 24 Fla. 55, 3 So. 471.

In *Com. v. James*, 135 Pa. 480, 19 Atl. 950, the defense of unconstitutionality of a statute was made to a mandamus proceeding to compel a county clerk to act under the provisions of a statute forming school districts, and it was held that he had no right to make such defense. The court said it is too plain for argument that the defendants had no right to decline to receive and record the resolutions accepting the provisions of the act. The act requires them to receive and record these papers; such duties are purely ministerial, and the court below properly awarded the peremptory writ. His act in refusing does not appear to have been one of insubordination, but was intended to test the constitutionality of the act. We are of opinion that the constitutional question cannot be raised in this way.

In *Maynard v. First Representative Dist. Bd. of Canvassers*, 84 Mich. 228, 11 L. R. A. 832, 47 N. W. 756, a mandamus was sought to compel election officers to declare petitioner elected to office under a statute providing for cumulative voting, and the question of the validity of the statute was attacked, and it was held unconstitutional, and the writ was denied; but there is no discussion of the right to raise the question in that manner in the prevailing opinion. Judge Grant, however, says: "At the thresh-

old of this controversy is an insurmountable objection to the position taken by the respondent if it were insisted upon. The sole duty of the canvassers under the law is to examine the original statements certified to them, . . . to ascertain the number of votes cast . . . and issue certificates accordingly. . . . It was never contemplated by the legislature that the board of canvassers should possess any other power than to canvass the returns and declare the result." The judge continues: "It is said that constitutional questions have often been raised and decided by this court in mandamus proceedings. This is true where personal and property rights are involved, and great inconvenience and damage would result if prompt action were not taken. In such case the public officer or body charged with the performance of duty may either decline to act, on the ground of the alleged unconstitutionality of the law, or may proceed. In either event, mandamus will lie, to set him in motion in the one case, or to restrain him in the other. But this does not apply to cases where the duty of the officer is only clerical or ministerial, and the law provides an ample remedy afterwards to test the validity of his action, and that, too, without any inconvenience or damage. In such case the officer must perform his duty and leave the parties interested to contest the result in the proper forum and by the proper proceeding. He should not in such case be heard to plead the unconstitutionality of the law as an excuse for his refusal."

To compel tax.

The duty of manipulating the machinery for the collection of a tax is usually held to be so far ministerial as to give the officer no right to question the constitutionality of the statute.

In *Wright v. Kelly* (Idaho) 43 Pac. 565, it is stated by way of argument that delinquent tax officers cannot defend against a writ of mandamus to compel them to perform their duty as required by statute on the ground that the act of the legislature authorizing the tax was unconstitutional, since it is not within the province of such officers to determine the constitutionality of laws; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes fixing the rights of third persons not parties to the suit.

A ministerial officer, intrusted with the collection and disbursement of revenues in any of the departments of government, has no right to withhold a performance of his ministerial duties prescribed by law, merely because he apprehends that the law may be unconstitutional.

of Louisiana, for whose benefit and account the said sums were paid." They further aver that there remains in the hands of the respondent state treasurer an unexpended balance, exceeding \$10,000, of the amount of the appropriation made by the general revenue act of the year 1888, being act 48 of that year, to pay interest coupons of the state of Louisiana which became due on the 1st of January, and the 1st of July, 1889; that such unexpended balance is, in law, applicable to the reimbursement of the aforesaid sums by them paid, as fiscal agents of the state; that there is no other appropriation of said balance; that by Concurrent Resolution No. 182 of the General Assembly of 1894 the respondent auditor is directed to warrant for, and the respondent treasurer is directed to pay, them, respectively, the aforesaid sums, and, in violation

and disregard of their duties therein specified, said respondents have refused and declined, the one to issue his warrant, and the other to make payment to them, of the aforesaid sums, as it is their plain ministerial duty to do. Therefore relators complain, and pray for a peremptory mandamus to compel respondents' performance of duty.

Respondents, represented by the attorney general, represent that the claims of relators are for the payment of certain coupons, No. 31, due July, 1889, as shown by the list thereof furnished by relators to the auditor. That said coupons were clipped from consolidated bonds which the state did not owe, which are null and void, and which should have been destroyed by the direction of the Constitution and the law, but which were fraudulently and illegally put upon the market by a former treasurer of the state.

The court, however, says that if it is manifest that in case the mandamus was issued the taxpayers would have a remedy for restitution of the tax thereby required to be collected, the court will not grant the process to enforce a collection that would be fruitless and oppressive. But with reference to the question of the unconstitutionality of the statute, the court said it does not lie with the respondent as a ministerial officer to make this objection. He is not authorized or required to adjudicate the law. On a summary hearing, on a petition for mandamus this court will not determine the question of the constitutionality of the law involving the rights of third persons, but will leave the question to be settled when properly presented by parties to an action. For the hearing of the mandamus suit the constitutionality of the act will be assumed. *Smyth v. Titcomb*, 31 Me. 272.

In *Bassett v. Barbin*, 11 La. Ann. 672, which sought to compel the sheriff to levy a special tax, the defense was that the act authorizing it was unconstitutional, and the court says the right of this executive officer to raise this constitutional question is by no means clear. Such a discussion would be much more appropriate in the mouth of one of those from whom the tax might be exacted. The law became such before he became sheriff, and the duty imposed by it appertained to his office when he was elected. He accepted his office with all the functions belonging to it by law, and he has no business to question the validity of those legislative enactments which constitute his official rule of action. As well might he, if called upon to fulfil that sternest of his duties, the execution of a capital sentence, question the constitutionality of the particular law under which the conviction had been procured. However, the law was held constitutional and the writ awarded.

In *People ex rel. Miner v. Salomon*, 46 Ill. 333, a county clerk defended against a writ of mandamus to compel him to comply with the terms of a statute prescribing duties as to the extension of tax assessments on the ground that the act was unconstitutional, but the act was held valid, and the mandamus awarded.

Defendant in that case refused to comply with his duty to extend the taxes at the rate fixed by the board of equalization, and delivered the books to the collector, which fact he neglected to disclose to the court in the mandamus proceedings to compel him to make the extension, and the court punished him for contempt in refusing to obey its writ, saying that he was endeavoring to excuse his disobedience to the writ by setting up his previous disobedience to a 47 L. R. A.

command of the legislature. This species of defense is forbidden by the universal principle of law which forbids a party to avail himself of his own wrong. The court, addressing itself to him, said: "The law . . . had passed the legislature under all the forms of the Constitution, and had received executive sanction, and became by its own intrinsic force the law to you, to every public officer in the state, and to all the people. You assumed the responsibility of declaring the law unconstitutional, and at once determined to disregard it, to set up your own judgment as superior to the expressed will of the legislature, asserting, in fact, an entire independence thereof. . . . To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government. . . . Your only duty was obedience." *People ex rel. Atty. Gen. v. Salomon*, 54 Ill. 39.

In Wisconsin, however, it has been held that where a statute requiring a tax is void, any ministerial officer whose duty it would otherwise be to enforce the statute may refuse to do so, and mandamus will not lie to compel him to do so. The court says, the act being void, it binds no one, and any person may assert its true character and refuse to obey it. *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

So in *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562, a mandamus was refused which sought to enforce the levying of a tax by the commissioners of a levee district for the payment of bonds on the ground that the statute requiring it was unconstitutional. It was insisted that the defendants would not be permitted to set up the unconstitutionality of the law under which the district was organized for the purpose of defeating the proceeding. But the court says the question is, Was there no law whatever under which a corporation similar to the so-called levee district could be organized? If there is no such law then there is neither fund, commissioner, nor corporation, and a void law is no law.

In *People ex rel. Scott v. Chenango Suprs.* 8 N. Y. 317, supervisors were permitted to raise the question of the constitutionality of a statute requiring them to collect a tax in a proceeding by mandamus to compel its enforcement, although there is no discussion of their right to do so, and the statute was upheld.

In *State ex rel. Monroe Gravel Road Co. v. Stout*, 61 Ind. 143, a petition for mandamus to compel the placing of certain assessments upon the tax duplicates was held insufficient because the law authorizing the collection of the assessments was unconstitutional; but this decision

That the bonds from which said coupons were clipped, belonged, some to the Agricultural and Mechanical College, and some to the seminary fund; and some had been received in exchange for constitutional bonds. That the said bonds belonging to the agricultural and mechanical college fund were declared null and void after the 1st of January, 1880, and the general assembly was prohibited from ever making any provision for payment, and was ordered to destroy the same by article 233 of the Constitution. That, as the coupon is a part of the bond, the state does not owe it, and the legislature is prohibited from paying it, and therefore Concurrent Resolution 182 of 1894 is null and void, as in violation of the Constitution, as well as act 48 of 1888, in so far as it may be held to make appropriation to pay those invalid coupons. That the obligation of the

state evidenced by those bonds was extinguished by that exchange, and neither the treasurer nor any other person had or has the legal power to revive that obligation by an illegal reissue of the bonds. That therefore the state does not owe said bonds or coupons, and the legislature is without power to pay them, and respondents have no right to pay them. That the appropriation made by act 48 of 1888 to pay interest coupons was only to pay coupons clipped from valid and legally outstanding bonds, and not from bonds illegally and fraudulently issued or put in circulation. That the surplus fund remaining in the treasury, left from said appropriation after paying all valid coupons of the year, must be used by the board of liquidation in buying up valid consolidated bonds, and cannot be used to pay interest on fraudulent bonds. That, as

was reversed on the ground that the statute was not unconstitutional.

The payment of public money.

There is a tendency, with some reason to support it, to hold that officers charged with the control of public funds are by the nature of their office required to question the constitutionality of all statutes appropriating the public funds.

In a proceeding to compel drawing of a warrant for payment of a member of a board of election commissioners, defendant resisted because of alleged unconstitutionality of the act, and the court says, we see no force in the point that respondent has no interest in the question here involved. The act under which petitioner claims being unconstitutional and void, there is no law authorizing the respondent to draw the warrant; and to do the act demanded of him would be to violate his official duty and oath, and subject himself to liability to punishment. *Denman v. Broderick*, 111 Cal. 97, 43 Pac. 516.

A state auditor has the right, when called upon to issue his warrant for money appropriated by act of the legislature, to question the validity of the act making the appropriation. The court says that although the court will not listen to one who says the legislative act is unconstitutional unless his rights are involved or he has a right to question it, yet, since the Constitution provides that no money shall be drawn from the treasury except in pursuance of appropriations made by law, if the act was not passed in the manner required by the Constitution it was not a law, and the auditor is vested with such power, and occupies such a position, that it is not only his right, but his duty, whenever he is called upon to order the payment of money out of the treasury, to inquire whether it is being drawn legally. He is in a certain sense a trustee, and the public interest requires that his office should give him the right to question the validity of a legislative act under which by means of warrant the public money is to be expended. *Norman v. Kentucky Bd. of Managers of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901.

In an application for a mandamus to compel the payment of the salary of a judge from the funds of a city, defendants may raise the question of the constitutionality of the statute requiring the payment, since the writ cannot be invoked to compel an officer to do an unlawful act. *McDermont v. Dinale*, 6 N. D. 278, 69 N. W. 294.

But a state comptroller cannot allege fraud in the procurement of an act to defeat mandamus to compel him to allow an appropriation 47 L. R. A.

made thereby. *Angle v. Runyon*, 38 N. J. L. 403.

And in *State ex rel. Sayre v. Moore*, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 755, a mandamus was sought to compel the auditor to draw his warrant for appropriation, and he defended on the ground that the statute was unconstitutional. The law was held constitutional, and the auditor then alleged that under the Constitution he had authority to examine the validity of claims against the state; but the court held that under the appropriation in question the only question left for the auditor was a ministerial one, and that he could not supervise the action of the legislature.

Judicial officers.

In accordance with the theory that an officer cannot raise the question of the constitutionality of a statute unless he has a personal interest in it, or his duty requires him to do so, it has been held that even judges whose duty was to interpret the laws could not initiate an objection to a statute, but must permit the objection to come from the person to be affected by it.

The question of the constitutionality of a statute under which an information is sought to be filed, cannot be raised by the judge in a mandamus proceeding to compel him to permit the filing of the information. The court says the unconstitutionality of the statute made the basis of the prosecution is a matter of defense exclusively within the discretion of the accused, and that such a defense cannot be anticipated or supplied by the judge so as to justify his refusal to the filing of the information. *State ex rel. Hall v. Tenth Judicial Dist. Judge*, 33 La. Ann. 1222.

Where a judge defended a mandamus suit to compel him to permit removal to another court of a suit on trial before him, because of the unconstitutionality of the statute authorizing the removal, the court said: "Nor do we comprehend the force or admissibility of the argument or assertion of the unconstitutionality of the act." *Danville v. Blackwell*, 80 Va. 38.

Since the people are interested in the question whether or not a statute prescribing the jurisdiction of a court is constitutional, the question will not be determined by an application for mandamus to compel the court to proceed with the trial of an action." *Davis v. San Francisco City & County Super. Ct.* 63 Cal. 581. But in that case the proceeding sought to avoid the statute rather than enforce it, so that the question of the right of the officer to raise the question was not involved.

However, in *People ex rel. Smith v. Twelfth*

the state does not owe interest on these bonds, the payment of these coupons would be a gratuity, which the legislature cannot make. That the concurrent resolution (act 182 of 1894) is a disguised appropriation, and the legislature cannot appropriate money by concurrent resolution; but such an appropriation as this, if within the legislative power, would have to be made by two separate bills, introduced after thirty days' proper advertisement, and passed in the regular way, and after all constitutional delays and requirements had been complied with, whereas the concurrent resolution (182 of 1894) was passed as a single resolution, without any of these formalities or delays.

On the trial, the evidence showed that relators had paid and expended the sums of money claimed in satisfaction and discharge

of coupons clipped from that species of bonds known as "Agricultural and Mechanical College Bonds," in greater part, and that same were those falling due on the 1st of July, 1889, and which were duly presented to them, as fiscal agents of the state of Louisiana, for payment, by the holders thereof, in the due course of business, and in pursuance of their contract with the state. It was admitted by the attorney general, on behalf of the respondents, that there is money enough in the interest fund of 1889, appropriated by act 48 of 1888, to cover the amounts claimed by the relators. It is shown that due and proper demand was made of respondents for compliance with the provisions of Concurrent Resolution 182 of 1894, without avail. The attorney general introduced in evidence the joint report of the auditor and treasurer, containing a

Dist. Judge, 17 Cal. 547, a trial justice refused to comply with a law requiring the transfer of a case to another court for trial upon the ground that the statute was unconstitutional, and the supreme court said there is no question of the power of the courts to pronounce unconstitutional acts invalid, for their power results from the duty of the courts to give effect to the laws,—of which the Constitution is the highest,—and which will not be administered at all if nullified at the will or by the acts of the legislature. But in that case it was held that the law was constitutional, and that there was no discretion in the judge to obey or refuse to obey the law. It was, however, held that mandamus was not a proper remedy in the case.

In *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767, a trial justice was permitted to defend a mandamus suit brought to compel him to take jurisdiction of an action arising in territory recently added to his district, on the ground that the act making the addition was unconstitutional; but there is no discussion of the right of the judge to raise such question, and the statute was held valid and the writ awarded.

In *State ex rel. Tod v. Fairfield County C. P. Court*, 15 Ohio St. 377, a trial judge set up the invalidity of an act of Congress under which a removal of a cause on trial before him to the Federal court was sought as a defense to a mandamus to compel him to allow it, and the court considered the question of the constitutionality of the statute without considering his right to raise the question.

In *State v. Fifth Judicial Dist. Judge*, 5 La. Ann. 756, which sought to compel a judge of one district to hold the court in another because of the incapacity of the judge belonging there, the validity of the law permitting such a proceeding was questioned, but it was upheld, and the court did not discuss the right of the judge to raise the question.

Other decisions.

In a proceeding to compel the mayor of a city to carry out a statute providing for the creation of a police board the defense was the unconstitutionality of the statute, and the court says the mayor erred in refusing to carry out the act. A government whose laws can be ignored by those whose duty is to execute them is feeble, weak, and inert, and is wanting in that vigor, strength, and energy that will insure its perpetuity. The officers of a municipality cannot defy the law, constitute themselves the judges of its constitutionality, and pronounce upon its validity when they are charged

with its execution, in advance of the judicial tribunal whose sole prerogative it is to pass upon its constitutionality. It is their duty to obey the law until its constitutionality has been passed upon by the judicial department. But the court proceeds to consider the question of the constitutionality of the law in that action. *State ex rel. Nicholls v. Shakespeare*, 41 La. Ann. 156, 6 So. 592.

In *Com. v. Sheehan*, 81* Pa. 132, the unconstitutionality of the statute was set up as a defense to a mandamus to compel proceedings under a statute authorizing the construction of a bridge, and the commonwealth set up that the defendants, being ministerial officers, are bound by provisions of the act, and cannot set up the matters stated in their return. The mandamus was issued, but there is no discussion of the merits of this contention on the part of the commonwealth.

In New Jersey it has been held that a municipal council may interpose the question of the constitutionality of the statute in defense of a mandamus suit to compel them to comply with a statute for the alteration of the ward lines of the municipality which legislates them out of office. The court says if they should execute the act in question there might be, and probably would be, two distinct bodies in existence, each claiming to be the lawfully constituted legislative body of the city. Consequences which would follow from such a state of things will impel the court to hear defendants, and refuse a mandamus to enforce obedience to the act, if it can be shown to be without authority. *State ex rel. Pell v. Newark*, 40 N. J. L. 71.

And that ruling was followed in *Lakewood Twp. Committee v. Brick Twp. Committee*, 55 N. J. L. 275, 26 Atl. 91, where the defense to a mandamus suit to compel performance of duties respecting the division of a township was the unconstitutionality of the statute, and the court upheld the defense, saying such an objection may be considered on an application for mandamus.

In *State ex rel. Miller v. Buchanan*, 24 W. Va. 362, it is held that subordinate, executive officers cannot question the interpretation put upon the law by their superior officers.

Practice matters.

In *Auditor v. Haycraft*, 14 Bush, 284, it was held that if the officer was entitled to make the defense that the act was not passed as required by the Constitution, the facts must be pleaded, and that the court will not take judicial notice as to the votes cast by the legislature at the mere suggestion of counsel.

list of consolidated and constitutional bonds, as classified by the New Orleans stock exchange, and other evidence conforming to the averments of the respondents' answer,—particularly extracts from the published journals of the senate and house of representatives of the session of 1894, showing the course of legislative proceedings in the introduction and passage of House Concurrent Resolution No. 27, and which bears the number 182 in the published Acts of 1894. The record contains the following admissions of counsel pro and con, viz.: "It is hereby admitted that the coupons sued upon were clipped from the bonds illegally issued by the treasurer. That they became due on July 1, 1889, and were paid on that date by the relators' banks, without any notice or knowledge that they were fraudulent,—[they being] fiscal agents of the state,—on

date of their presentation. That similar coupons clipped from same bonds had been paid on presentation by the fiscal agents, on the 1st of January and July of each year from the time they were put in circulation, up to and including the coupon due 1st of July, 1889; up to that time there having been no suspicion of fraud, and all of said payments having been allowed by the auditor and treasurer in settlements made with the fiscal agents. That, after these coupons were paid by relators, the fraudulent issue of the bonds was discovered, in September, 1889, and they were not allowed credit therefor in their settlement with the treasurer."

The language of the concurrent resolution (182 of 1894) is as follows, viz.:

No. 182. CONCURRENT RESOLUTION.

Authorizing and directing the auditor to

But in *People ex rel. Argyle & Ft. E. Pl. Road Co. v. Fort Edward Highway Comrs.* 11 How. Pr. 89, it is held that the unconstitutionality of the statute under which the relief is claimed is not a fact, but an argument, and is not properly inserted in the return to the alternative writ.

If a mandamus is sought to compel the election officers to ignore a later statute and act under an earlier one on the ground that the later one is unconstitutional, the question of the constitutionality of the earlier one is also open. *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 807.

Cases in which defense was made without any discussion.

There have been very many cases before the courts in which the defense of unconstitutionality has been made to a mandamus suit to compel enforcement of a statute, where the court passed upon the validity of the statute without considering the right to raise the question. These cases throw little light on the matter under consideration in this note, but a number of them are collected here for the purpose of showing the variety of cases in which the defense has been made.

In *State ex rel. Hunt v. Meadows*, 1 Kan. 90, a register of deeds alleged the unconstitutionality of the statute dividing a county in a mandamus proceeding to compel him to furnish a transcript of the records relating to the portion of the county cut off, and that question was decided, although his right to raise the question was not considered, and the writ was granted on the ground that the law was valid.

In *Williams v. Taylor*, 83 Tex. 670, 19 S. W. 156, the defense of unconstitutionality was raised to a proceeding to compel a clerk of court to recognize a statute creating a term to begin at a certain day, and the court considered the question without considering the right to raise it.

In *Morton v. Comptroller General*, 4 S. C. N. S. 430, the court passed upon the constitutionality of a statute requiring the payment of a state bond when the question was raised as a defense to a mandamus proceeding to compel compliance with it, but there is no discussion of the right to raise the question.

In *State ex rel. Hooten v. McKinney*, 5 Nev. 194, mandamus was sought to compel compliance with a statute providing for the transference of pending actions from one county to a new one formed from a portion of the old one, and the defense was that the statute was unconstitutional. The court did not consider the right to raise that question, but held the act constitutional, and issued the writ.

47 L. R. A.

In *Public Schools Comrs. v. Allegany County Comrs.* 20 Md. 449, which sought to compel the levying of a tax, the defense was that the act authorizing it was unconstitutional, and, although this defense was not sustained, the mandamus was refused on other grounds, and there is no discussion of the right of defendant to raise that question.

In *People ex rel. Becker v. Miner*, 46 Ill. 384, defendant in a mandamus proceeding set up the unconstitutionality of a statute which he was asked to enforce as a defense to the suit, but the statute was held valid as to a sufficient portion to require the issuance of the writ.

In *State ex rel. La Valle v. Sauk County Suprs.* 62 Wis. 376, 22 N. W. 572, county commissioners set up the invalidity of a statute requiring them to aid in the construction of a bridge in a mandamus proceeding to enforce it.

Under the New York laws the intention of which was to do complete justice in the proceeding itself without resort to any other, the court permitted the question of the constitutionality of the statute to be raised in *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480, although there is no discussion of the right to raise it. The statute, however, was held to be invalid, and the writ denied.

In *Citizens' Bank v. Wright*, 6 Ohio St. 318, the court considered the constitutionality of a law governing bank circulation upon the defense of the state auditor to a mandamus to compel him to deliver notes to a bank that the law was unconstitutional, although there is no discussion of his right to raise that question.

In *Humboldt County v. Churchill County Comrs.* 6 Nev. 30, mandamus was sought to compel compliance with a statute requiring the payment of a certain sum to one county from the revenues of another, and the defense was the unconstitutionality of the statute. The court did not consider the right to raise this question, but held the statute valid and issued the writ.

In *State ex rel. Anderson v. Harris*, 17 Ohio St. 608, the unconstitutionality of the act was set up as a defense to a mandamus proceeding to compel county commissioners to proceed under an act to provide for the payment of bounties to volunteer soldiers, and the act was held constitutional, and the writ awarded without any consideration of their right to raise the question.

In *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77, which was an application for a writ of mandamus to compel the issuance of bonds, the defense was the unconstitutionality of the statute authorizing them,

warrant for, in favor of the Louisiana National Bank and the New Orleans Canal and Banking Company, both of the city of New Orleans, and the treasurer to pay said banks, the amount of certain interest coupons, paid by the said banks as fiscal agents of the state of Louisiana, on July 1, 1889.

Whereas, in the year 1889 the Louisiana National Bank and New Orleans Canal and Banking Company, both of the city of New Orleans, were fiscal agents of the state of Louisiana; and

Whereas, in such capacity as fiscal agents the said banks paid to the holders thereof certain interest coupons of certain consolidated bonds of the state of Louisiana, maturing July 1st, 1889; and

Whereas, the bonds from which said coupons had been detached were subsequently ascertained to be the property of the state of

Louisiana, and which had fraudulently been put in circulation by E. A. Burke, then treasurer of the state of Louisiana; and

Whereas, there remains in the hands of the state treasurer a balance of appropriations made by the legislature of 1888, to pay the interest upon the consolidated bonds of the state of Louisiana:

Therefore, be it resolved by the senate of the state of Louisiana, the house of representatives concurring therein, that the auditor is authorized and the New Orleans Canal Bank directed to warrant in favor of the said Louisiana National Bank for the sum of \$2,616.00 and the said New Orleans Canal and Banking Company for the sum of \$2,616.00, being the respective sums paid by them as fiscal agents as aforesaid, upon any unexpended

and the court considered that question without considering the question of the right to raise it.

In *State ex rel. Webster v. Baltimore County Comrs.* 29 Md. 516, a mandamus was sought to compel county commissioners to give effect to a law relating to public roads which was resisted because the law was unconstitutional. The court considered the question of the constitutionality of the law, which was upheld, and the writ directed to issue. But there is no discussion of the right to make the defense, although the court does say with respect to one objection against the statute that it will be time enough to examine and determine that question when it properly arises in the execution of the law.

In *State ex rel. Eastman v. Warren County Comrs.* 17 Ohio St. 558, county commissioners set up the unconstitutionality of a statute providing for the construction of roads in defense to a mandamus to compel them to act under it, and the statute was upheld and the writ awarded without any consideration of their right to raise the question.

In *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 502, street improvement commissioners set up the unconstitutionality of the act in defense to a mandamus proceeding to compel them to proceed with the improvement of certain streets, and the act was held unconstitutional, although there is no discussion of their right to raise that question.

In *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 30 S. C. 579, 3 L. R. A. 777, 9 S. E. 661, the question of the constitutionality of an act providing for the payment of township bonds was considered in a mandamus proceeding for the purpose of enforcing compliance with the act.

In *State ex rel. Gaines v. Whitworth*, 8 Lea, 594, the constitutionality of the statute upon which the proceeding was based was attacked by respondent and passed upon by the court, although the question of the right to raise the question in that way was not considered.

In *Madison County Ct. v. People ex rel. Toledo, W. & W. R. Co.* 58 Ill. 456, a mandamus to compel county officers to issue bonds in aid of a railroad was denied on the ground that the statute was in violation of the Constitution; but there is no discussion of the right of the official to raise that question.

In *Police Comrs. v. Louisville*, 3 Bush, 597, a mayor who was required by mandamus to turn over the police property of the city to commissioners defended on the ground that the statute was unconstitutional, but the law was upheld, and the mandamus awarded without 47 L. R. A.

any consideration of the question of his right to raise such question.

In *People ex rel. Murphy v. Kelly*, 5 Abb. N. C. 383, which sought a mandamus to compel the borrowing of money to aid in the construction of a bridge, the validity of the statute authorizing it was denied; but the statute was upheld and the writ awarded.

In *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371, it was suggested that the act sought to be enforced was void for uncertainty, and that for that reason the application for mandamus should be refused. But the court held that the uncertain part of the act was separable from the remainder, and that the entire act was not void, so that the question of the invalidity of the act as a defense to the suit was not passed upon.

In *Stevenson v. Colgan*, 91 Cal. 649, 14 L. R. A. 459, 27 Pac. 1089, an action to compel performance by officer refusing to draw a warrant for an appropriation, because the statute authorizing it was unconstitutional, prevailed because it was held that there was no evidence that the statute was unconstitutional.

In *Rankin v. Colgan*, 92 Cal. 605, 28 Pac. 673, the unconstitutionality of the act was set up as a defense to the action, but the act was held constitutional so that the writ issued.

Conclusion.

From the above decisions it is apparent that there is no theory which will reconcile all the conflict.

There is running through the decisions, however, a thread which would furnish a logical and satisfactory rule upon the question if finally adopted. That is that statutes are generally presumed valid, and ministerial officers must treat them as such until their invalidity is established, but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a mandamus proceeding brought to enforce it. In other cases he must perform his duty as the statute requires, and leave those whose rights are affected by it to take steps to annul it.

The question whether or not the officer has a right to offer evidence for the purpose of showing that the act is unconstitutional when it does not appear to be so upon its face is not within the scope of this note, but upon that question reference is made to the *notes* to *Stevenson v. Colgan* (Cal.) 14 L. R. A. 459, and *State ex rel. Reed v. Jones* (Wash.) 23 L. R. A. 340.

H. P. F.

balance in the hands of the state treasurer, of the appropriation made for the payment of interest upon the consolidated bonds of the state of Louisiana, by the legislature of 1888; and the treasurer is hereby authorized and directed to pay said banks the said sums in the usual course.

G. W. Bolton,
Speaker of the House of Representatives.
H. R. Lott,
President pro Tempore of the Senate.

On this statement of the issues raised, we have three questions for consideration, to wit: First. Whether it was within the competency of the legislature to appropriate or apply money from the state treasury to the reimbursement of the relators' claims for money expended in the payment of the interest coupons taken from consolidated bonds, of the denomination of "Mechanical and Agricultural College Bonds," and from constitutional bonds, which matured on the 1st of July, 1889. Second. Whether, in fact, Concurrent Resolution 182 of 1894 was not an act of appropriation, in disguise, and enacted without observance of constitutional forms and legal requirements, and therefore absolutely null and without legal effect. Third. Whether the unexpended balance in the state treasury, resulting from the general appropriation act of 1888, can be reached and controlled by Concurrent Resolution 182 of 1894, or is same, by law, dedicated to the board of liquidation for the purchase of outstanding valid constitutional bonds of the state.

1. This is not a suit against the state. It is a mandamus proceeding undertaken by relators, as the quondam fiscal agents of the state, for the purpose of coercing the performance of an alleged ministerial duty which a concurrent resolution of the general assembly has imposed upon the respondents as executive officers of the state government. In such a proceeding the state cannot be said to have been sued. She could not be sued without special legislative permission. In *State ex rel. McEnergy v. Nicholls*, 42 La. Ann. 209, 7 So. 738, we said that "a mandamus proceeding against the register of the state land office, to coerce his performance of duties purely ministerial, is not a suit against the state. Mandamus will go to the auditor, treasurer, or register of the land office of the state, in appropriate cases." In *State ex rel. Collins v. Jumel*, 30 La. Ann. 863, our predecessors said: "The state is a sovereign and cannot be sued by her citizens, in her own courts, without her permission; but a civil proceeding, by which one officer of the state seeks to compel another officer of the same state to perform a ministerial duty, is not, in the proper sense of the words, a suit against the state. Nothing is more common than for a party who has a claim against the state, whether for salary as an officer or for money due on other accounts, to have his right to payment adjudicated through and by means of a mandamus against the auditing officer. It is recognized by us continually as a legitimate mode of as-

certaining what are the rights of persons who have or who prefer claims against the state." *State ex rel. Ecuyer v. Burke*, 33 La. Ann. 969; *State ex rel. Campbell v. Steele*, 37 La. Ann. 353; *State ex rel. Ments v. Clinton*, 28 La. Ann. 47; *State ex rel. New Orleans Republican Print Co. v. Clinton*, 28 La. Ann. 72. Those decisions are in line with those of the Supreme Court of the United States: *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Kendall v. United States ex rel. Stokes*, 12 Pet. 608, 9 L. ed. 1214; *Board of Liquidation v. McComb*, 92 U. S. 541, 23 L. ed. 628. The principles announced in those decisions are in strict keeping with the relief demanded by the relators in the instant case. Exactly the converse of the foregoing proposition is announced in *State ex rel. Hope v. Board of Liquidation*, 42 La. Ann. 647, 7 So. 760, and 8 So. 577. In that case we held: "Whenever, by the Constitution and laws of a state, officers of the executive branch of the government are vested with discretionary powers and functions in the performance of civil duties, or when political powers and responsibilities are devolved upon them, they are not amenable to judicial process. In such case their acts are only politically examinable." The relators have brought themselves strictly within the principles announced in the *Collins Case*, their demands being predicated upon claims for moneys expended for account, and in pursuance of their contract with the board of liquidation, and their right to mandamus depending upon the terms of act 182 of 1894.

In *State ex rel. Campbell v. Steele*, 37 La. Ann. 353, relator asserted a claim against the state, to meet which the legislature had made an appropriation, directing its payment out of any money in the treasury not appropriated, and complained that the auditor had declined to issue his warrant on the treasury therefor; the latter denying his right to issue such warrant, and offering relator his warrant on the general fund. The court, in speaking of the legislative act, said: "It was passed while there was enough money in the treasury to pay it, and before any appropriation of it to any other object to prevent or impair its payment. The general assembly most probably understood the exact condition of this fund then, and employed the language used in the act to cause its application to the admitted indebtedness. The words of the act are entirely sufficient to accomplish this end, by charging that fund and any other fund in existence with a reserve for that purpose. The legislature did not propose to postpone the payment of the claim. They contemplated to have it paid from any money in the treasury which had not been previously specifically destined, set apart, or appropriated for another object." While it is made the general duty of the auditor to examine, audit, and settle all claims which are presented against the state, and payable out of the treasury, and to that end it is made his duty to examine all the

evidence in support thereof, before issuing his warrant therefor, yet the act on which relators' suit is predicated in terms declares that they, respectively, paid and expended the sums claimed while acting in the capacity of fiscal agents of the state, in pursuance of their respective contracts, in paying "coupons of certain consolidated bonds of the state of Louisiana, maturing July 1, 1889," and that "the bonds from which said coupons had been detached were subsequently ascertained to be the property of the state of Louisiana, and which had fraudulently been put in circulation by E. A. Burke, then treasurer of the state of Louisiana." And, having made this statement of fact, the act further declares "that the auditor is hereby authorized and directed to warrant" in their favor, for said sums, "upon any unexpended balance in the hands of the state treasurer, of the appropriation made for the payment of interest upon the consolidated bonds of the state of Louisiana by the legislature of 1888; and the treasurer is hereby authorized and directed to pay said bonds the said sums in the usual course." So it is clear that the facts are found, and the duty is imposed, by the legislature, thus dispensing the auditor from the performance of the general duty of examining the facts upon which relators' claims are founded. In *People ex rel. Crowell v. Lawrence*, 36 Barb. 177, it was held "that the courts have nothing to do with the correctness or incorrectness of this legislative opinion, and must assume the fact to be as the legislature assume or declare it" to be. In *Vcazie Bank v. Fenno*, 8 Wall. 553, 19 L. ed. 489, it was said that the motive of the legislature in passing a law cannot be inquired into by the courts. Judge Cooley declares it to be the consensus of the best judicial opinion "that a statute is assumed to be valid until someone complains whose rights it invades." Cooley, Const. Lim. pp. 103, 188. In *Lusher v. Scites*, 4 W. Va. 11, it was decided that the courts cannot go into an inquiry as to the truth or falsity of facts upon which an act of the legislature is predicated. It becomes manifest, therefore, that the discretion of the auditor in the premises was eliminated from the case, and the purely ministerial function of issuing his warrant preserved (High, Extr. Legal Rem. §§ 101, 104); that, in this respect, the ministerial duty which is imposed upon the auditor is likewise imposed upon the treasurer. Now, in *Hommerich v. Hunter*, 14 La. Ann. 225, it was stated that the respondent "refused to pay these warrants, on this ground, among others, that from his construction of Act No. 143 [of 1858] the money claimed by these warrants was not due" the relator; but the court held that he had no such power under the law, and said that "the payment of these warrants was a ministerial duty imposed upon the treasurer." (Our italics.) And, in the course of their argument on the respondents' pretensions, they said: "Such an argument, if legitimate, would justify the interference of public officers with peculiar functions appropriate to each, and would produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of government."

sions in the administration of public affairs as to materially impede the proper and necessary operations of government."

Accepting this as the true doctrine applicable to executive officers of the state government, is it not applicable with much greater force to an attempted invasion of the prerogatives of the legislature? If an act of the legislature has formally and in terms declared that certain claims against the state are just and well founded, and ordered the auditor to warrant on the treasury therefor, and the treasurer to pay same, can either question the authority of the general assembly, or go behind the act and inquire into the evidence on which such claims are based, or the constitutionality of the act? While, under the peculiar circumstances of the case, we entertained the charge of unconstitutionality in the act of the legislature which was raised by the secretary of state, as relator in the case of *State ex rel. Morris v. Mason*, 43 La. Ann., at page 647, 9 So. 776, yet we safeguarded it in this way: "We may state, as a preliminary to the discussion of the remaining issues in the return, that the right of the secretary of state to raise such issues for judicial determination, as prerequisite to granting relator relief by mandamus compelling him to publish the proposed amendment, is very questionable indeed. But we are indisposed to hamper and circumscribe any remedies the respondent thinks himself entitled to, and will undertake the investigation of the issues raised, only for the purpose of determining whether the alleged invalidities in the confaction of the proposed amendment, and its alleged illegal and unconstitutional features, are so glaring and patent as to furnish the secretary of state just ground of refusal to publish it." From the foregoing, it is quite clear that this charge of unconstitutionality and illegality of an act of the legislature cannot be regarded as a precedent justifying its application in ordinary cases like this. In *State ex rel. Nicholls v. Shakespeare*, 41 La. Ann. 156, 6 So. 592, this question arose, and was expressly decided, the court holding that "laws are presumed to be constitutional until the contrary is judicially established; and they must be executed by the officers upon whom they impose the duty of doing so, who have no authority to resist the execution thereof on the ground that they contravene the Constitution." Again: "Therefore, when the judiciary, whose duties are to pass upon the constitutionality of an act, is so careful and conservative in its deliberations before passing judgment as to its validity, it seems but reasonable to require, in a well-constituted government, obedience to it by officers who are to execute it until its constitutionality is passed upon by the judiciary." In *Bassett v. Barbin*, 11 La. Ann. 672, the old court said: "It was probably in the contemplation of the legislature that the duty would be performed by the sheriff in office at the time of the promulgation of the law, but it surely was never intended that that functionary could nullify the law by neglecting or refusing to execute it." In

State ex rel. Hall v. Tenth Judicial Dist. Judge, 33 La. Ann. 1222, it was held that the judge of the district court has no right to refuse leave to the district attorney to file an information on the ground that, in his opinion, the statute under which the prosecution is instituted is unconstitutional; that it was "a matter of defense, exclusively within the discretion of the accused, who can urge it in arrest of judgment." In *Fisher v. Steele*, 39 La. Ann. 347, 1 So. 882, the court, after quoting from Cooley, Const. Lim. one of the extracts made below, said: "That principle is suggestive of a grave doubt of the right of plaintiff in this case to assail the constitutionality of the statute under discussion," etc. In *State ex rel. School Directors v. Jumel*, 32 La. Ann. 60, it was held that the auditor cannot be compelled by a mandamus to levy a certain tax, even though an act of the legislature made it his express duty to do so, when it appears that his doing so would be in disregard of a final decision of the supreme court pronouncing the act unconstitutional, and in direct contravention of a subsequent act of the legislature. In *State ex rel. Macaulay v. Clinton*, 27 La. Ann. 429, it was held that, in a mandamus proceeding, the question whether the state, by her legislation on the subject, has impaired the obligations of her contract with the relator, is a matter that cannot be decided in this controversy, because the state is not a party to the suit, and the auditor has no interest in the solution of the question. The same observation is applicable to other constitutional objections raised by the relator. This decision, and others of its kind, is well illustrated by that in *State v. Fifth Judicial Dist. Judge*, 5 La. Ann. 756, where the act of the legislature providing for the trial of causes in which a district judge shall be recused by the judge of an adjoining district was alleged to be unconstitutional by the respondent, and held to be valid by the court, it being a question in which the judge had an interest, and which was a necessary issue to be disposed of. In that case, the judge was called upon to test the constitutionality of the law as a matter of defense.

We have thought it advisable, owing to the great importance of the question, to go over the jurisprudence of other states; and we have examined all the cases within our reach, and have made the following extracts therefrom as the result of that examination. In *State ex rel. Bloxham v. Gibbs*, 13 Fla. 55, it was held that, an act of the legislature repealing the law imposing the duty on respondent, pending trial, without saving the proceedings, having been called to the attention of the court, the power was gone, and the proceedings must be dismissed. In *State ex rel. Moody v. Barnes*, 25 Fla. 298, 5 So. 722, it was said that, while it is not ordinarily a case calling for mandamus, "because respondent went out of the way to exercise his discretion on any question not properly within it, or because he gave a reason, if a wrong one, for his decision on a question to which his discretion did not

reach," yet, "in either case, we have seen that mandamus has been allowed." In *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 221, the writ was granted against the county court, to give relief against abuse and oppression. In *Nelson v. Edwards*, 55 Tex. 389, it was held that mandamus should go "because the commissioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office." In *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49, the writ was granted on the ground that the clerk whose duty it was to approve sheriff's bonds, refused "because another was in the office, claiming it." The situation was the same in *Case of Prickett*, 20 N. J. L. 134; also, in *Beck v. Jackson*, 43 Mo. 117. In *Daniels v. Miller*, 8 Colo. 542, 9 Pac. 18, the writ went to the clerk of court, "because he refused to approve an appeal bond, on the ground the court held that appeal did not lie." In *State ex rel. Epler v. Lewis*, 10 Ohio St. 128, the writ issued because "the officers to approve sheriff's bond refused because, in their opinion, the bond was not presented within the time for approval required by law." In *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321, it was issued to the clerk because "he refused to approve an attachment bond, because the sureties were non-residents of the county, the law not requiring sureties to be residents of the county," etc. In *State ex rel. Moody v. Barnes*, 25 Fla. 298, 5 So. 722, the court, after reviewing and analyzing many cases, said: These "cases resting on mistake of law, it is important to observe that it was law not connected with the sufficiency of the bond, as to its form, legality, and sureties, and therefore law outside of the discretion given for the approval of bonds. . . . They [courts] only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion." Page 308, 25 Fla., and page 722, 5 So. In *Franklin County Comrs. v. State ex rel. Patton*, 24 Fla. 55, 3 So. 471, the Florida court says: "Not only is it true that a court will not, as a general rule, pass upon a constitutional question, and decide a statute to be invalid unless a decision upon that very point becomes necessary, but it is also a rule that a court will not listen to an objection made to the constitutionality of a statute by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." In *Jones v. Black*, 48 Ala. 540, the court says: "A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is, or will be, injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be presumed. It must be shown." In *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County*, 6 Allen, 360, the Massachusetts court held that the validity of a statute can be called in question only by those having a direct interest in the rights supposed to be injuriously affected by its provisions. In

People v. Rensselaer & S. R. Co. 15 Wend. 113, where the attorney general filed an information in the nature of a quo warranto, to contest respondents' right to build a bridge across the Hudson river, it was held that the constitutionality of the legislative act authorizing its construction "cannot be called in question by the people, but that individuals alleging themselves to be injured thereby can alone raise the question." *Smith v. McCarthy*, 56 Pa. 359; *Marshall v. Donovan*, 10 Bush, 681; *Williamson v. Carlton*, 51 Me. 449; *Dejarnett v. Haynes*, 23 Miss. 400; *State ex rel. Townsend v. Hill*, 10 Neb. 58, 4 N. W. 514; *Howard v. McDiarmid*, 26 Ark. 100. In *Van Horn v. State ex rel. Abbott*, 46 Neb. 62, 64 N. W. 365, the Nebraska court said: "But the courts themselves will enforce a statute, unless it is clearly repugnant to the Constitution; and in discharging the functions of their offices, ministerial officers should, of course, exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it. The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts. They always disregard them at their peril." In *State ex rel. Lytle v. Douglas County Comrs.* 18 Neb. 506, 26 N. W. 315, it was held that on an application for mandamus against county commissioners to compel them to call an election, "the court would not, in that proceeding, determine whether or not the act was in contravention of the Constitution." *State ex rel. Morton v. Stevenson*, 18 Neb. 416, 25 N. W. 585; *State ex rel. Sayre v. Moore*, 40 Neb. 854, 25 L. R. A. 774, 59 N. W. 55. In *People ex rel. Atty. Gen. v. Salomon*, 54 Ill. 39, it was held that "a ministerial officer cannot be allowed to decide upon the validity of a law, and thus exempt himself from responsibility for disobedience to the command of a peremptory mandamus, his disobedience to the law being the cause of his inability to obey the command of the court. It is the duty of a ministerial officer to obey an act of the legislature directing his action, not to question or decide upon its validity." Again: "To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government; for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection to the laws." In *Wellington, Petitioner*, 16 Pick. 96, 26 Am. Dec. 631, it was said by the court: "Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the 47 L. R. A.

conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers." *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Williamson v. Carlton*, 51 Me. 449; *State v. Rich*, 20 Mo. 393.

Cooley again declares: "The constitutionality of a law, then, is to be presumed because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny; and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must therefore be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may, with some confidence, repose upon their conclusion, as one based upon their best judgment." Cooley, *Const. Lim.* p. 183. Again: The courts "must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." *Id.* p. 186, *Dormire v. Cogly*, 8 Blackf. 177; *Magruder v. Marshall*, 1 Blackf. 333. Cooley again says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." Cooley, *Const. Lim.* p. 187. The judiciary are "the rightful expositors of the laws." *Bank of Hamilton v. Dudley*, 2 Pet. 492, 7 L. ed. 496; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401. In the case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, mandamus was resorted to for the purpose of compelling the respondent to deliver a commission which had been signed by the president to relator as a justice of the peace, and the principal question was as to the constitutionality of the law which imposed the duty on the respondent. There was no discussion as to the right of the secretary to raise the question, for the question was raised by the court, and they said: "In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?" Page 179, L. ed. 74. In *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623, Justice

Bradley, as the organ of the court, said: "In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ" of mandamus. In *Huntington v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469, the authority of the board of railroad commissioners to raise the question of the unconstitutionality of the law was not mooted or discussed. The court said: "An unconstitutional act is not a law, it binds no one, and protects no one. Here the conflict between the Constitution and the statute was obvious, and the board had the advice of the highest legal officer of the state, and his construction was sustained by the judgment of the supreme court of the state." This was an exceptional situation. *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, was an ordinary common-law action of debt, and the question of the constitutionality of a law was directly involved as a part of the case. *Poindester v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, was an action for the recovery of personal property, and the constitutionality of the law was properly in issue. In *Seasums v. Botts*, 34 Tex. 335, it was held that, from the date of the enactment of a law until it was adjudged unconstitutional by that court, it had the force and effect of law, so far as to protect ministerial officers in obeying its mandates; and that it is advisable for all good citizens to obey whatever the lawmaking power shall promulgate as law until it shall be adjudicated by the judicial tribunals not to be law.

We have not only gone over all of the foregoing cases, and examined them with care, but we have likewise examined a great many others. Those not cited were found, in our opinion, inapplicable to the present controversy, because only private rights were litigated between individuals, and the constitutional questions were properly raised and decided. In mandamus proceedings against a public officer, involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute and the ministerial character of the duty he is charged to perform. After careful investigation of the authorities, we feel fully confirmed in the correctness of the conclusions we arrived at in *State ex rel. Nicholls v. Shakespeare*, and other cases, to the effect that executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established; for in a well-regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance. Were it not so, the most inextricable confusion

would inevitably result, and "produce such collision in the administration of public affairs as to materially impede the proper and necessary operations of government." "It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it." The result of this conclusion is that the respondents are without right to urge the unconstitutionality of the concurrent resolution which is involved.

2. With regard to the second question which is presented by the return, whether, in point of fact, the concurrent resolution of 1894 was not an act of appropriation in disguise, enacted without observance of the forms of law, and therefore absolutely void and without legal effect, we are of opinion that it rests upon a different footing. The auditor is in duty bound to exercise proper watchfulness and care in the performance of his arduous and responsible duties. In dealing with legislative appropriations he must necessarily examine the laws making the same, and should his judgment suggest that any act was wholly irregular, it would be his duty to pause in issuing his warrants thereunder until its validity has been judicially ascertained. This is a part of his official duty, and this court will assume that he has acted with due circumspection, and not arbitrarily or captiously. Looking into the facts which we have detailed *supra*, we find that his contention is not well grounded; for, *inter alios*, it was admitted by the attorney general that there is money enough in the interest fund of 1889 to cover the amounts claimed by the relators. Hence the funds under consideration had been already appropriated, long prior to the passage of the joint resolution of 1894, and the general assembly merely dealt with an existing surplus of the money which had been theretofore dedicated to the interest fund. In this light, the legislative purpose and object were to make this surplus applicable to the claims of relators, and the concurrent resolution was the means adopted for that purpose. In *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882, it was held that any balance remaining to the credit of one or more of the separate funds created by law, after the satisfaction of all the warrants drawn against the same, is the property of the state, with full power in the legislature to apply the same to any lawful purpose under the Constitution. In our opinion that decision is correct, and it is conclusively against respondents' contention.

3. In view of the authorities we have cited and the opinion we entertain of the right of the respondents to raise the question of the constitutionality of the law, it is needless for us to examine the question of the sufficiency of the evidence on which the legislature acted; for we believe it to be obligatory upon us to coerce the respondents to perform the ministerial function imposed by the concurrent resolution upon them, respectively, and leave the evidence upon which they acted without comment, and the constitutionality of the law to future determination. In so

far as concerns the question of the unexpended balance resulting from the general appropriation of 1888, having been dedicated to the board of liquidation for the purpose of purchasing outstanding consolidated bonds, and consequently beyond the control of the general assembly at the time of the passage of the concurrent resolution, it is sufficient to say that we must act on the evidence in this record, and it shows, by the respondents' admissions, that there is sufficient money in the interest fund of 1889, appropriated by said resolution, to cover the

relators' claims. Whether the board of liquidation has any prior or better claim thereto than the relators does not appear from the evidence. At all events, the board of liquidation has not been made a party, and its rights cannot be determined here, and they will not, of course, be interfered with by our decree.

The judgment of the court below was in favor of the relators, and it is affirmed.

Miller, J., recuses himself, having been of counsel for the relators.

MINNESOTA SUPREME COURT.

Lincoln DREW, Appt.,
v.

M. C. TIFFT, Probate Judge of McLeod County, Resp't.

(.....Minn.....)

- *1. The mandate of equality of taxation, as near as may be, of § 1, art. 9, of the state Constitution, applies to inheritance taxes exactly as it does to taxes on property, except as otherwise expressly provided in the last proviso to the section, relating to an inheritance tax law.
2. Chapter 293, Laws 1907, which attempts to lay an inheritance tax, is unconstitutional for the reasons: (a) It excludes from its operation real property, and lays the tax upon inheritances of personal property alone; (b) It exempts from its operation persons and corporations whose property is exempt by law from taxation; (c) It allows a larger exemption to lineal heirs than to collaterals, and does not lay the tax on the excess of the value of the property received above a uniform exempted sum.
3. The statute is not unconstitutional because it taxes collateral heirs and distributees at a higher rate than lineals, for the Constitution expressly authorizes such graduation of the tax.

(February 14, 1900.)

A PPEAL by petitioner from an order of the District Court for McLeod County refusing a writ of mandamus to compel respondent to proceed with the distribution of the estate of George Drew, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. Haynes & Chase, for appellant:

The burden sought to be imposed by this law is a tax within the meaning of § 1, art. 9, of our state Constitution.

That such a law is one imposing taxes is not open "to question."

*Headnotes by START, Ch. J.

NOTE.—As to the constitutionality of an inheritance tax, see also *State ex rel. Davidson v. Gorman* (Minn.) 2 L. R. A. 701; *Wallace v. Myers* (C. C. S. D. N. Y.) 4 L. R. A. 171, and *note*; *State v. Hamlin* (Me.) 25 L. R. A. 632; *Minot v. Winthrop* (Mass.) 26 L. R. A. 259; *State v. Alston* (Tenn.) 28 L. R. A. 178; *State*

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 301, 42 L. ed. 1045, 18 Sup. Ct. Rep. 594; *State ex rel. Garth v. Switzler*, 143 Mo. 315, 40 L. R. A. 280, 45 S. W. 245; *St. Louis v. Spiegel*, 75 Mo. 145; *Cooley*, Taxn. p. 573; *Stinson v. Smith*, 8 Minn. 360, Gil. 331; *Sanborn v. Rice County Comrs.* 9 Minn. 273, Gil. 260; *State ex rel. Davidson v. Gorman*, 40 Minn. 235, 2 L. R. A. 701, 41 N. W. 948.

Our Constitution necessarily and clearly embraces all kinds of taxes without distinction or exception.

The term "all taxes" must be interpreted to mean precisely what it expresses and what everybody understands it to mean.

Cases in other states, sustaining inheritance tax statutes, went off on the point that such a tax could not be deemed a property tax, but rather a tax on the right or privilege of succeeding to and receiving the property of a decedent.

Said tax must be equally imposed.

Eyre v. Jacob, 14 Gratt. 436, 73 Am. Dec. 367; *Minot v. Winthrop*, 162 Mass. 116, 26 L. R. A. 259, 38 N. E. 512; *Re Sherwell*, 125 N. Y. 379, 26 N. E. 464; *Noonan v. Stillwater*, 33 Minn. 201, 53 Am. Rep. 23, 22 N. W. 444; *State ex rel. Merrick v. Hennepin County Dist. Ct.* 33 Minn. 245, 22 N. W. 625, 632; *State ex rel. Burger v. Ramsey County Dist. Ct.* 33 Minn. 306, 23 N. W. 222; *Curry v. Spencer*, 61 N. H. 630, 60 Am. Rep. 337; *State ex rel. Garth v. Switzler*, 143 Mo. 331, 40 L. R. A. 280, 45 S. W. 245; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 336, 30 L. R. A. 218, 41 N. E. 579; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 292, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *St. Louis v. Spiegel*, 75 Mo. 146; *Nichols v. Walter*, 37 Minn. 272, 33 N. W. 800.

Messrs. F. R. Allen and W. B. Douglas, Attorney General, for respondent:

By an unbroken line of adjudications in the courts of last resort of many of the states, as well as in the Supreme Court of the United

ex rel. Schwartz v. Ferris (Ohio) 30 L. R. A. 218; *State ex rel. Gelsthorpe v. Furnell* (Mont.) 39 L. R. A. 170; *State ex rel. Garth v. Switzler* (Mo.) 40 L. R. A. 280; *Kochersperger v. Drake* (Ill.) 41 L. R. A. 440; *Re Cope* (Pa.) 45 L. R. A. 316.

States, the rule is settled that enactments of the class to which chapter 293 of the Laws of 1897 belongs: (1) Impose a tax upon the privilege of receiving property by inheritance or devise, and not upon property itself; (2) the right to take property by devise or descent is the creature of the law, and not a natural right; (3) the usual limitation requiring uniformity in imposing taxes upon property does not apply to such enactments.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1045, 18 Sup. Ct. Rep. 594; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *Dos Passos*, Inheritance Tax Law, § 8, p. 20; *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367; *Kochersperger v. Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Gelsthorpe v. Furnell*, 20 Mont. 299, sub nom. *State ex rel. Gelsthorpe v. Furnell*, 39 L. R. A. 170, 51 Pac. 267; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; *Strode v. Com.* 52 Pa. 183; *Clymer v. Com.* 52 Pa. 189; *Com. v. Herman*, 16 W. N. C. 210; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Tyson v. State*, 28 Md. 577.

Other and different statutes somewhat in the form of provisions for the imposition of a tax upon inheritances, but by their terms clearly imposing a tax upon the estates of deceased persons as distinguished from the net amount of property inherited or devised, have been before various courts for review, and held unconstitutional.

This class of statutes is clearly distinguishable from the class to which chapter 293 belongs.

State ex rel. Davidson v. Gorman, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948; *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; *State ex rel. Garth v. Switzler*, 143 Mo. 331, 40 L. R. A. 280, 45 S. W. 245.

A third class of cases has arisen in which certain special restrictions in the Constitutions of various states have been decided to operate as limitations upon the exercise of this power by the legislature.

Curry v. Spencer, 61 N. H. 624; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579.

The right of the state to control the subject of inheritances, and to designate the class of persons who inherit, has always been conceded.

McCormick v. Sullivant, 10 Wheat. 202, 6 L. ed. 303; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 291, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Dos Passos*, Inheritance Tax Law, § 23.

This tax is in the nature of an impost.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; 47 L. R. A.

State v. Hamlin, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073.

Chapter 293 of the laws of 1897, with one exception, is a duplicate of the amended act of New York, which received a final construction by the court of appeals in—

Re Hoffman, 143 N. Y. 327, 38 N. E. 311.

The general right to classify, based upon substantial considerations, has always been recognized by this court dealing with many subjects, including taxation for special purposes.

Sanborn v. Rice County Comrs. 9 Minn. 273, Gil. 261; *Nichols v. Walter*, 37 Minn. 272, 33 N. W. 800; *State ex rel. Douglas v. Kitt* (Minn.) 79 N. W. 535; *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *State ex rel. Garth v. Switzler*, 143 Mo. 333, 40 L. R. A. 280, 45 S. W. 245; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781.

Start, Ch. J., delivered the opinion of the court:

This is an appeal by the plaintiff from the order of the district court of the county of McLeod denying his petition for a peremptory writ of mandamus requiring the probate court of that county to proceed with the distribution of the estate of George Drew, deceased, without requiring the payment of an inheritance tax, as provided by Laws 1897, chap. 293. The sole question for our decision is the constitutionality of such inheritance tax law. We are relieved from any necessity of discussing the power of the legislature to enact a law taxing all inheritances, or the propriety of exercising such power, for it is unanimously conceded (as it must be) by counsel that such a law, if uniform and equal, without discrimination, would be constitutional, wise, and wholesome. Legacy and inheritance taxes are not of modern origin. They were imposed by the Roman civil law, and in England as early as 1780. They are now in force generally in the countries of Europe. Pennsylvania imposed such taxes by a statute enacted as early as 1826, and similar statutes are now in force in many of the other states of the Union. They have, as a rule, been held to be constitutional by state and Federal courts. *Dos Passos*, Colateral Inheritance Tax Law, chap. 1. But Minnesota is, so far as we are advised, the only state whose Constitution in express terms limits the power of the legislature in the laying of an inheritance tax. Therefore the precise question in this case is whether the act in question conforms to the limita-

tions of our state Constitution. Such being the case, it necessarily follows that the large number of judicial decisions in other jurisdictions, cited by counsel in this case, although interesting and helpful as illustrating the history of inheritance tax statutes and the general principles upon which they have been sustained, are not directly in point. The here material provisions of our Constitution are these: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state: provided, that the legislature may, by general law or special act authorize municipal corporations to levy assessments for local improvements . . . : and provided further, that there may be by law levied and collected a tax upon all inheritances, devises, bequests, legacies, and gifts of every kind and description above a fixed and specified sum, of any and all natural persons and corporations. Such tax above such exempted sum may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." Minn. Const. art. 9, § 1. This proviso as to an inheritance tax was added in 1894 as an amendment to § 1, art. 9, and is to be construed as a part thereof, precisely as if the original section and the proviso had been adopted at the same time, as a complete statement of the fundamental law upon the subject of taxes, including those upon inheritances. In order to determine intelligently whether the inheritance tax act of 1897 violates any of the provisions of this section, it is first necessary to ascertain its meaning. The power of taxation by the state, except as limited by constitutional provisions, is practically unlimited, hence this section must be construed, not as a grant of the power of taxation, but as a limitation upon the exercise of the power. *Coolcy*, Const. Lim. 105, 593. So construing it, its meaning is obvious, and it stands as a barrier against legislative invasion of the reserved rights of the individual as to the manner of imposing taxes upon him for the support of the state. Its keynote is that "all taxes to be raised in this state shall be as nearly equal as may be." Counsel for respondent however claims that this limitation, as originally adopted, applies only to taxes on property. If this be so, then the power of the legislature to lay unequal and arbitrary impost and excise taxes was left unrestricted. Such a construction is contrary to the spirit of the Constitution, its clear and direct language, and the trend of all of the decisions of this court on the question. *Stinson v. Smith*, 8 Minn. 366, Gil. 326; *Sanborn v. Rice County Comrs.* 9 Minn. 273, Gil. 258; *Faribault v. Misener*, 20 Minn. 396, Gil. 347; *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948. It is true that all of these cases involved only questions as to taxes or assessments on property, but the rationale of the opinion in each case leads

directly to the conclusion that all taxes, whether on property or in the form of excise and impost taxes, must, under this constitutional mandate, be laid as nearly equal as practicable. The case of *State ex rel. Davidson v. Gorman* has been understood and cited as an authority that the requirement of our Constitution that all taxes to be raised in this state shall be as nearly equal as may be applies to excise and impost taxes, and therefore a statute laying an inheritance tax would be unconstitutional. See *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. In the *Gorman Case* it was held that chapter 103, Gen. Laws 1885, requiring, as a condition precedent to probate proceedings for the settlement of estates in probate court, the payment to the county treasury of specified sums arbitrarily prescribed with reference to the value of the estate, was unconstitutional, because it violated the constitutional requirement of equality of taxation. It is not quite clear whether this decision was based upon the proposition that the tax was one laid upon property or upon the privilege of having estates settled and distributed in the probate court. If the former,—which was probably the case,—the decision is not an authority for or against the right of the legislature to levy an inheritance tax under § 1, art. 9, of the Constitution. If the word "taxes," as used in this section as it originally stood, includes excise and impost taxes, it by no means follows that a statute laying an inheritance tax, which aimed at practical equality, would not be valid.

Again, the decisions of this court with reference to statutes and ordinances imposing license fees upon auctioneers, draymen, hackmen, peddlers, persons dealing in intoxicating liquors, and others engaged in occupations of a character bringing them within the police power of the state, are based upon the proposition that the constitutional mandate that all taxes to be raised must be as nearly equal as may be includes excise and impost taxes. Such statutes have been sustained only upon the ground that the enactment was a proper exercise of the police power, and in every case where it was apparent that the license law was enacted with a view to revenue, and not as a police regulation, it has been held void, when the constitutional requirement of equality of taxation was disregarded. *Rochester v. Upman*, 19 Minn. 108, Gil. 78; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *Duluth v. Marsh*, 71 Minn. 243, 73 N. W. 962; *State v. Finch* (Minn.) 46 L. R. A. 437, 80 N. W. 856. If, however, there is any doubt as to the proposition that under the original provisions of § 1, art. 9, of the Constitution, any statute laying an inheritance tax which ignored the fundamental principle of equality of taxation would have been invalid, the doubt is set at rest by the proviso to the section adopted as an amendment thereto in 1894. The necessary effect of this proviso was to subject the power of the legislature to lay an inher-

itance tax to the original limitation that all taxes to be raised in this state must be as nearly equal as may be, for, as already suggested, the section in question, as it now reads, must be construed precisely as if the proviso had been a part of the original section; hence the mandate of equality qualifies the provisions of the amendment, and applies to the whole section. *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444. We therefore hold that by virtue of § 1, art. 9, of our state Constitution, as it now stands, the requirement of equality in taxation applies to inheritance taxes exactly as it does to taxes on property, except as expressly provided in the last proviso thereto. In reaching this conclusion we have not overlooked the fact that it is contrary to the great weight of authority in other states. But our Constitution in this particular is unique, and its mandate so clearly expressed as to leave no doubt as to its meaning; hence the decisions of the courts of other states are not in point. Now, it is apparent from the mere reading of the proviso as to an inheritance tax in connection with the requirement of equality of taxation that any statute providing for an inheritance tax must lay the tax upon "all inheritances, devises, bequests, legacies, and gifts of every kind and description," including those of real property as well as personal. There can be no discrimination in this respect. Therefore any statute laying a tax upon all bequests and gifts of personal property and exempting inheritances, devises, and gifts of real property would be void, for the reason that it would violate the constitutional mandate of equality of taxation, and the limitations of the proviso, which declares, in legal effect, that, if the legislature decides to lay an inheritance tax, it must be upon all bequests, devises, and gifts, without exempting any. It is equally clear, and for the same reason, that such a statute must lay the tax upon all bequests, devises, and gifts to "any and all natural persons and corporations." If any person or corporation is exempted from the burden, the statute is void. It might be otherwise if the tax were one on property, and not on the privilege of receiving the property. Again, the amendment provides that the tax may be laid upon all devises, bequests, and gifts "above a fixed and specified sum," and that "such tax above such exempted sum may be uniform or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." These particular provisions are exceptions to the rule of equality in taxation, and enforced by the general terms of the section. They authorize the exemption of devises, bequests, and gifts, to the extent of a fixed and uniform sum, from the operation of the tax, and the laying of the tax only upon the excess of such devises, bequests, and gifts. The exemption, however, must be uniform, and apply equally to all persons and corporations, for it is only the tax above a fixed and specified sum which may be uniform, graded, or progressive, in the discretion of the legislature. This last

proviso is a distinct departure from the rule of equality, as near as may be, in the laying of taxes, for it expressly provides that the tax may be graded or progressive. This authorizes the legislature, in its discretion, to graduate the tax by increasing the percentage of the tax, within the maximum limit of 5 per cent, as the value of the property to be received increases, or as the relationship to the deceased of those who are to receive the property is more remote.

We come now to the question whether the inheritance tax law of 1897 violates any of the provisions of § 1, art. 9, of the Constitution, as we have construed it. The title of the statute is "An Act for a Tax on Gifts, Inheritances, Devises, Bequests, and Legacies in Certain Cases," and its here material provisions are these:

"Sec. 1. A tax shall be, and is hereby imposed upon the transfer of any personal property of the value of five thousand (5,000) dollars or over, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations, not exempt by law from taxation, on real or personal property in the following cases: . . . Such tax shall be at the rate of five (5) per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

"Sec. 2. When the property or any beneficial interest therein passes by any such transfer to or for the use of father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, or any children adopted as such, in conformity with the laws of this state, of the decedent, grantor, donor, or vendor, or to any person to whom any such decedent, grantor, donor, or vendor for not less than ten (10) years prior to such transfer, stood in the mutually acknowledged relation of a parent, or to any lineal descendant of such decedent, grantor, donor, or vendor, born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand (10,000) dollars or more, in which case it shall be taxable under this act at the rate of one (1) per centum upon the clear market value of such property."

It may be conceded, as claimed by counsel for respondent, that the tax attempted to be levied by this statute is not upon the property received by the beneficiary, but upon the privilege of receiving it. The statute, however, was enacted, by virtue of the legislative power of taxation, solely with a view to revenue, and the burden it seeks to impose is a tax within the meaning of the Constitution. The first objection to the statute to be considered is the claim that, in so far as it attempts to tax lineal heirs (we use the term to designate the class referred to in the statute) and distributees at the rate of 1 per cent of the value of the property and collateral (that is, those not expressly named in the statute) at a higher rate (5 per cent) it is unequal taxation, and therefore unconstitutional. There is a natural reason for tax-

ing the privilege of the latter of receiving the property at a higher rate than that of the former, and, as we have already decided, the proviso in question authorizes such graduation of the tax. Hence the statute is not unconstitutional for this reason. It is further claimed that the statute is void because it allows a larger exemption to lineals (\$10,000) than to collaterals (\$5,000). It is unconstitutional for this reason, for, as already stated, the Constitution authorizes only one uniform exemption to all persons and corporations. Again, it is urged that the statute is invalid because it lays the tax upon the entire devise, bequest, or distributive share, if of the specified value, and not upon the excess above a fixed specified exempted sum, as the amendment requires. The gross inequality of the statute in this respect is manifest. Thus, by its terms, a tax on a legacy to a collateral of \$5,000 would net the beneficiary, after deducting the tax thereon (\$250), only \$4,750, while a legacy of \$4,999 would be exempt from the tax, and would give the beneficiary \$249 more than would the larger legacy. The Constitution authorizes the laying of the tax only upon the excess above the exempted sum, and the statute violates the Constitution in this respect. It is also contended on behalf of the appellant that the statute is unconstitutional because it exempts from the tax all persons and corporations whose property is exempt by law from taxation. It is invalid for this reason, for the Constitution expressly provides for a tax "upon all inheritances . . . of every kind and description, . . . of any and all natural persons and corporations." The statute is unconstitutional for the further reason that it exempts from its operation all devises, bequests, and transfers by intestate laws of real property, and lays the tax only upon those of personal property. This is forbidden by the Constitution. In holding this statute unconstitutional for the reasons stated, we have not overlooked the fact that it is substantially a copy of the inheritance tax law of the state of New York (except that the latter applies to both real and personal property), which has been sustained by the courts of last resort of that state and by the Supreme Court of the United States. But this is immaterial, for the Constitution of the state of New York contains no limitations and restrictions upon the exercise of the power of taxation by the legislature similar to those of our own Constitution which we have considered. This difference in the Constitutions of the two states seems to have been lost sight of in the adoption of the New York statute in this state, and explains why a statute which violates our Constitution in so many particulars was enacted.

It follows that the order appealed from must be reversed, and the cause remanded, with directions to the District Court to grant the writ of mandamus prayed for.

So ordered.

47 L. R. A.

Harriet G. F. MILTON, Exrx., etc., of George R. Milton, Deceased, *Reapt.*,
v.

Albert N. JOHNSON *et al.*, *Appts.*

(.....Minn.....)

- *1. A subagent intrusted with the collection of a debt due from a third party may not apply the proceeds of the same to the payment of a claim due himself from the principal agent from whom it came, knowing that it belongs to such party, or in any way divert the funds so collected from a quick and speedy transmission to the owner thereof.
2. Where the principal agent has forwarded collections to a subagent, and directs the latter to make any use of the funds other than the usual one of their application to the payment of the debt to the principal, and such subagent complies with such direction, he becomes responsible therefor to the principal.

(February 18, 1900.)

A PPEAL by defendants from an order of the District Court for Hennepin County denying a motion for new trial after judgment in favor of plaintiff in an action brought to recover money collected by defendants for correspondents to whom the claim had been delivered by plaintiff for collection. *Affirmed.*

The facts are stated in the opinion.

Mcassrs. S. H. Hudson and Daniel Fish,
for appellants:

Defendants are liable only to the Kellys.

It was their duty, and their only duty, to account to the party who employed them. There was no privity between them and the plaintiff. The Kellys were independent contractors, and the defendants were their agents, not plaintiffs.

Hoover v. Wise, 91 U. S. 308, 23 L. ed. 393; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141; *Streassguth v. National German American Bank*, 43 Minn. 50, 7 L. R. A. 363, 44 N. W. 797; *Power v. First Nat. Bank*, 6 Mont. 265, 12 Pac. 597; *Hyde v. First Nat. Bank*, 7 Biss. 156, Fed. Cas. No. 6,970.

An accounting and settlement, such as appears in this case, amount to a payment as between the defendants and the Kelly firm. There were mutual accounts between them, with debits and credits equivalent to payment in cash. The formality of transmitting the money, or of drawing and exchanging checks, was not required.

Hare v. Bailey, 73 Minn. 409, 76 N. W.

*Headnotes by LOVELY, J.

NOTE.—As to agent's authority to use property of principal for payment of his own debt, see *Gerard v. McCormick* (N. Y.) 14 L. R. A. 234, and *note*.

As to power to appoint subagents, see also *McKinnon v. Vollmar* (Wis.) 6 L. R. A. 121.

As to liability for acts of subagent, see *Dun v. City Nat. Bank* (C. C. App. 2d C.) 23 L. R. A. 687.

As to liability of collecting bank for default of correspondents and agents, see *National Butchers' & D. Bank v. Hubbell* (N. Y.) 7 L. R. A. 852, and *note*.

213; *General Convention of O. M. & O. of Vt. v. Torkelson*, 73 Minn. 401, 76 N. W. 215; *Ohristofferson v. Howe*, 57 Minn. 67, 58 N. W. 830.

The defendants here collected this money and other like sums as agents of the Kelly firm, and they were, at the time, creditors of that firm.

By the agreed course of business between them, they were to credit such collections to the Kellys, and charge them with disbursements therefrom. The money in dispute was so credited on the day of its receipt. The legal result was to transfer it at once to the general funds of the Kelly firm.

Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. Rep. 533. *Messrs. Kitchel, Cohen, & Shaw*, for respondent:

The bank, knowing the collection to be Mrs. Milton's property, may not lawfully retain it against her for the debt of her agents.

The bank is liable to Mrs. Milton because when it collected the Alsaker note it knew that the note and its proceeds belonged to her. The mere diversion of the money from the purposes impressed upon it by Mrs. Milton, and the conversion of it to the bank's use, create a privity which rests, not in contract, but in the circumstances,—in the participation by the bank in the Kellys' wrongful act.

Brand v. Williams, 29 Minn. 238, 13 N. W. 42; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337; *Libby v. Johnson*, 37 Minn. 220, 33 N. W. 783; *United States v. State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647; *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426.

The trustee's application of trust funds to the payment of his own debts, or in any way to his own use, is highly improper. A creditor receiving trust funds thus misapplied, or anyone coming into the possession of trust property, with a knowledge of its character, stands in the trustee's shoes, and must account as trustee for everything so received.

27 Am. & Eng. Enc. Law, p. 265; *Perry, Tr.* §§ 217, 828; *Davis v. Smith*, 27 Minn. 390, 7 N. W. 731; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849; *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75, 30 N. W. 440; *Hale v. Dressen*, 73 Minn. 277, 76 N. W. 31; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234, 29 N. E. 115; *Rusk v. Nevell*, 25 Ill. 226; *Harrison Mach. Works v. Coquillard*, 26 Ill. App. 513.

If the bank participates with the trustee in a misappropriation of the fund, or knowingly permits such misappropriation to take place, it must answer to the beneficiary for the loss thereby occasioned.

3 Am. & Eng. Enc. Law, 2d ed. p. 832; 47 L. R. A.

Mechem, Agency, § 519; *Morse, Banks & Banking*, § 593.

Lovely, J., delivered the opinion of the court:

The defendants were engaged in the banking business at Benson, in this state, under the partnership name of the Swift County Bank, and, as such firm, had had considerable to do with A. F. & L. E. Kelly, loan agents of Minneapolis. The Kellys became insolvent and made an assignment in September, 1896, previous to which time the bank at Benson had acted as their subagent, receiving applications for loans, which the Kellys took up with funds which belonged to themselves, or to the third parties for whom they acted. The bank also collected from time to time both principal and interest due upon loans for the Kellys, and remitted the proceeds to them. Several years before the assignment, George R. Milton made a loan of \$1,000 to one Alsaker, who lived near Benson. This loan was secured by mortgage. Milton, the mortgagee, died, and plaintiff was duly appointed executrix of his will. In April, 1896, afterwards, at the request of the defendant bank, the Kellys procured the note and mortgage, which had still a year to run, and forwarded the same, with a satisfaction, to the bank for collection. The Kellys had full authority from plaintiff to collect this debt, and to invest the proceeds in another loan. The defendant bank collected the note and one interest coupon, amounting to \$1,035, and also collected interest due on previous coupons amounting to \$192.14, which sum had previously, when due, been sent to the plaintiff by the Kellys, as if it had been actually collected. Of this last proceeding, defendant bank knew nothing. At the time the money was collected on the Milton note and mortgage, the Kellys were indebted to the defendant bank in the sum of \$5,000 on a demand note which they had given in the previous December, and upon which payment was demanded in the following January, when the Kellys directed the defendant to pay it out of "collections" coming to them as loan agents through the bank. In May, 1896, the defendant, as subagent of the Kellys, collected eleven other notes, running to third parties, which had been placed with the bank for collection, and had in its hands after receiving the money on the Alsaker note the round sum of \$2,532. Of this money so collected it remitted \$32 to the Kellys, and credited \$2,500 on the note of \$5,000 running from the Kellys to the bank. The Kellys accepted the remittance in full payment of the collections to that extent, including the Alsaker note and interest due on the last coupon. The bank kept an accurate account with the Kellys on its books, in which it credited all moneys sent it for investment, and against which it charged all disbursements made at their instance, including the deal last referred to. The Kellys never remitted the money so collected upon the Alsaker note, or an equivalent sum, to the plaintiff; and some time after their insolvency, when the facts above

stated became known, this suit was commenced to recover of defendant the amount due to the plaintiff in that transaction. The case was tried to the court, who found, as an essential fact, that "at the time of making the Alsaker note and mortgage, and at all the times thereafter, the firm of A. F. & L. E. Kelly had no interest whatsoever in the said note and mortgage [or coupon], . . . but that, at the time of making the said Alsaker note and mortgage, defendants knew that George R. Milton was the sole owner thereof, and at the time of the collection of said sum of \$1,035 said defendants knew that plaintiff herein was then the sole owner of the Alsaker note and mortgage, and the said July, 1890, interest." The court also found the other facts which we have stated above at length and in detail, and held that the plaintiff was entitled to recover the money of the bank, received on the Alsaker note, which it had applied in payment of the debt due the bank from the Kellys. Defendant moved for a new trial, which was denied, from which order this appeal is taken.

We have no doubt that the evidence is sufficient to support the findings of the trial court. It was, among other things, established that the bank, before the Alsaker note was due, requested that to be sent to itself (through the Kellys), to pay it and replace it by another loan upon the same land. The undorsed note, with a satisfaction from the plaintiff, wherein the fiduciary character of the Kellys' relation and duties appeared, was forwarded, and might well have furnished the knowledge of the ownership of the property which the trial court held to be in plaintiff. Upon well-understood principles, the facts thus found must necessarily be the basis of every legal conclusion we arrive at in this review; and the salient fact that defendant knew that the plaintiff owned the Alsaker note and mortgage, and the money collected thereon, when it appropriated it to pay the debt of the Kellys to itself, cannot be ignored by us, with its legal inferences. It was zealously contended by the able counsel for defendant that, in view of the business methods between the Kellys and the bank, this transaction was no different in character than if the bank had forwarded the money to the Kellys, and the Kellys had immediately returned it, to be applied on their note to the bank. As often occurs in argument by illustration, the supposed is not the real case. It lacks one element—a knowledge by the bank of the misappropriation—to complete the similitude. Again, it was asked with much plausibility whether the bank should have remitted the money of Mrs. Milton to her direct, to exonerate it. Of course, this was not the duty of the bank; but we doubt not that it was the duty of the bank to remit the money to the Kellys, which was as far as the bank could go under its trust relations. But, instead of this, it kept the money to pay itself a debt due from plaintiff's agent; and there is little that affects this view in the suggestion that defendant bank, in the absence of

proof that amounted to guilty knowledge or scienter, had a right to assume that the Kellys would not settle fairly with their principal when they closed their account with her, for the fact remains that neither the bank nor the Kellys had the legal right to the money; it belonged to neither of them; it was the property of plaintiff; and it was, in the legal sense that follows, misappropriated and withheld in fact by the Kellys, who were aided by the bank, with actual knowledge of her ownership. There was, of course, no privity between plaintiff and the bank, except such as arises from the trust relation; but this relation was sufficient to create an obligation on the part of the bank to deal with plaintiff's money as its principals, the Kellys, were required to deal with it and its owner. There was a privity between the bank and the Kellys, and the bank must, by legal intendment, be charged with knowledge of what the Kellys did, for it was the combined acts of both by which plaintiff was deprived of her property. It is the knowledge of the ownership of this money, as found by the court, which is the controlling element in determining the liability of the defendant, and subjects the bank to an action for money had and received, upon the rule that where one has the money of another, which he has no right to retain, the law implies a promise that he will repay it to the true owner. *Brand v. Williams*, 29 Minn. 239, 13 N. W. 42. The duties between the various parties in this transaction were confidential, and imposed trust obligations, which could be performed in only one way, *viz.*, by promptly transmitting to the owner her property by the Kellys; and in such cases "the trustee's application of trust funds to the payment of his own debts, or in any way to his own use, is highly improper, . . . and anyone coming into the possession of trust property, with a knowledge of its character, stands in the trustee's shoes, and must account as a trustee for anything so received." 27 Am. & Eng. Enc. Law, p. 265; *Perry*, Tr. 211-298. This rule is most rigidly enforced; for the law is solicitous to guard the relation of principal and agent in control of the trust funds in the remotest channels through which they flow, and it will not allow either the agent or subagent to assume for a moment that his principal's property is for his own use. Such improper assumptions in such dealings are often followed by loss to the principal, and work business and moral ruin to the agent. It therefore must be regarded as a correct principle of law that the least turning aside of the funds held in trust by the agent or subagent is legally a wrongful act, and subjects any party who aids in any such diversion to full responsibility. If there is anything in the authorities cited by counsel for appellant that is opposed to these views, we cannot coincide with such doctrine; for the rule we state in its application to this case is not new in this court. It was sententiously stated by Gilfillan, Ch. J., in *Leuthold v. Fairchild*, 35 Minn. 99-110, 27 N. W. 503,

and 28 N. W. 218, as follows (where the principle involved was the same as here): "In a case where the agent or servant not only knows that disposing of the property is a wrong, but to some extent directs as well as performs it, he is to be deemed a party to the wrong." It is elementary that a party cannot say that he does not know that an act is wrong, when its legal effect is obvious. In such case he must recognize the possible connection of his acts, and the probable legal effects that may follow. He must take no chances with the expectation that courts will look complacently upon his misdirection of the funds trusted to his care by the beneficiary, and, being so presumed to intend the consequences of his acts, must be held responsible pecuniarily for the results that follow, although, as in the case of this defendant, his intentions may be just and honorable.

The order appealed from is affirmed.

Elzeard GODBOUT, Appt.,

v.

ST. PAUL UNION DEPOT COMPANY,
Respt.

(.....Minn.....)

- *1. In an action for damages brought by a hackman against the Union Depot Company for being prohibited from soliciting business within the building, *Held*, that a common carrier has, by virtue of its right of ownership in its property, the control of its depots, subject only to the rights of the public having business relations with it.
2. Such common carrier may make such rules and regulations as it deems necessary for the control of its business within such building, and may grant special and exclusive privileges to hackmen to solicit business, provided such rules and regulations are reasonable, and conduce to the comfort, convenience, and interest of its patrons.
3. Subdivision b, § 380, Gen. Stat. 1894, applies only to those persons or parties having contractual relations with a common carrier.
4. A hackman or private carrier for hire is not a party having such relations with a common carrier as will permit him to enter a depot to solicit business from passengers.
5. Such hackmen and private carriers, in common with all others in that business, have the right and privilege of soliciting public patronage, without being discriminated against, at all points without the depot, when such points or places have been properly designated.
6. All hackmen and persons engaged in the business of conveying passen-

*Headnotes by LEWIS, J.

NOTE.—The conflicting decisions on the right of a carrier to discriminate between hackmen and similar solicitors of business are found in a note to *Cole v. Rowen* (Mich.) 13 L. R. A. 848.

Later cases in favor of the exclusive right are *Lucas v. Herbert* (Ind.) 37 L. R. A. 376; *New* 47 L. R. A.

gers and baggage for hire have the right of entry, without discrimination, to the depots of a common carrier, to deliver or receive passengers or baggage, in pursuance of a contract or order, subject to proper rules and regulations for the interest of the traveling public.

7. The contract and evidence in the case examined, and found to provide a reasonable and proper arrangement for the patrons of the defendant, in reference to the transfer of passengers and baggage.

(February 16, 1900.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County denying a new trial after judgment in favor of defendant in an action brought to recover damages for alleged wrongful ejection from defendant's depot grounds. *Affirmed.*

The facts are stated in the opinion.
Messrs. R. L. Penney, and Stevens, O'Brien, Cole, & Albrecht, for appellant:

The defendant is a quasi-public corporation, holding under its charter rights and privileges granted to it upon that theory; this involves duties and responsibilities upon its part towards the public, which it is obliged to discharge faithfully in obedience to the trust imposed upon it.

State v. St. Paul Union Depot Co. 42 Minn. 142, 6 L. R. A. 234, 43 N. W. 840; *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.* 47 Minn. 154, 13 L. R. A. 415, 49 N. W. 646; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; 1 Fetter, Carr. Pass. § 204.

The characteristic features which distinguish plaintiff's business from that of the general hack or livery business are that plaintiff's class of occupation is conducted indiscriminately in the service of the general public.

It is carried on in the most intimate connection with defendant's business, and constitutes a well-recognized and ancillary branch of the great transportation systems of the country. As such he is a common carrier, no less than the defendant, with all the rights and obligations inherent in that capacity.

Hutchinson, Carr. §§ 59-61; 1 Fetter, Carr. Pass. § 207, p. 548.

The defendant is organized for and engaged in furnishing terminal and station facilities to all railroads, with only two exceptions, entering the city of St. Paul, and controls their trains while upon its premises. It is a common carrier, subject to all the duties and obligations of a railroad company.

Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; 1 Fetter,

New York, N. H. & H. R. Co. v. Scovill (Conn.) 42 L. R. A. 157; and *Kates v. Atlanta Baggage & Cab Co.* (Ga.) 46 L. R. A. 431.

For later cases in denial of the exclusive privilege, see *Indianapolis Union R. Co. v. Dohs* (Ind.) 45 L. R. A. 427; and *Lindsey v. Anniston* (Ala.) 27 L. R. A. 436.

ter, Carr. Pass. § 204; *Worcester v. Western R. Corp.* 4 Met. 564.

The discrimination sought to be legally established by defendant in this case violates both the express statutes and the legislative and judicial policy of this state.

Minn. Gen. Stat. 1894, chap. 6, title 9, § 380, subdiv. b; *Myers v. Chicago, M. & St. P. R. Co.* 50 Minn. 371, 52 N. W. 962; *Farwell Farmers' Warehouse Assn. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 55 Minn. 8, 56 N. W. 248; *Cooley, Const. Lim.* 486 (*393).

By-laws against trade are said to be against the common law, which favors trade.

Dunham v. Rochester, 5 Cow. 462.

The American authorities conflict somewhat upon the question whether or not the carrier may lawfully grant exclusive privileges to a single hackman to solicit patronage upon its station grounds.

Authorities denying right to discriminate are:

Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209; *Kalamazoo Hack & Bus Co. v. Sootama*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *State v. Reed*, 76 Miss. 211, 43 L. R. A. 134, 24 So. 308; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387, 10 So. 480; *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411.

The weight of authority is against discrimination.

1 Fetter, Carr. Pass. § 245, p. 638; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 54 N. E. 825.

Messrs. **Hadley & Armstrong**, for respondent:

The depot company has the right to exclude all hackmen from soliciting business in the depot building.

If appellant has no right in the depot of respondent at all, we fail to see how he can have the right to assert that his privileges shall be uniform with other persons.

A common carrier may grant to one or more hackmen or baggage-delivery men the exclusive privilege of soliciting the patronage of passengers on its boats or trains of cars.

Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *The D. R. Martin*, 11 Blatchf. 234, Fed. Cas. No. 4,092.

A railroad company or other carrier of passengers may grant to one or more persons the privilege of selling books, papers, refreshments, and the like in its depot or on its grounds or in its vehicles, and exclude all others from similar privileges.

Fluker v. Georgia R. & Bkg. Co. 81 Ga. 461, 2 L. R. A. 843, 8 S. E. 529; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 47 L. R. A.

753, 24 Pac. 209; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69.

Except in so far as the railroad company has devoted its property to the use of persons having relations with it as a carrier, it is free to deal with its property the same as a private individual. If it grants equal facilities at its passenger stations to all passengers, one who does not have any relation with it as a common carrier cannot complain, and a hackman, when not employed by a passenger, has no business connection with the railroad company, and therefore has no right on the platform or grounds of the railroad company.

Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69; *Alexandria Bay S. B. Co. v. New York C. & H. R. R. Co.* 18 App. Div. 527, 45 N. Y. Supp. 1091; *New York, N. H. & H. R. Co. v. Scottill*, 71 Conn. 136, 42 L. R. A. 157, 41 Atl. 246; *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Barker v. Midland R. Co.* 18 C. B. 46; *Perth General Station Committee v. Ross* [1897] A. C. 479.

It is necessary that hackmen generally should not be allowed to enter the station and there solicit passengers, in order that the people, while alighting from trains and waiting in the station, may be protected from undue solicitation and annoyance.

St. Paul v. Smith, 27 Minn. 364, 7 N. W. 734; *Chillicothe v. Brown*, 38 Mo. App. 609.

Lewis, J., delivered the opinion of the court:

Defendant is a corporation under the laws of Minnesota, owning and operating transfer tracks in the city of St. Paul, and, in connection therewith, owning and maintaining a union passenger depot, and tracks for access thereto, which are used by defendant for the carriage of passengers into and out of the city, amounting to many thousands daily. On the 1st day of February, 1899, defendant entered into an agreement with J. B. Cook & Son, as follows:

This agreement, made and entered into this first day of February, A. D. 1899, by and between the St. Paul Union Depot Company, party of the first part, and J. B. Cook & Son, party of the second part, witnesseth: Whereas, said party of the first part deems it necessary for the convenience of the public using its depot, that an opportunity be had in its depot building to engage for transfer of baggage and for engaging passage to various parts of the city in omnibuses and carriages; and whereas, it would greatly interfere with the prompt despatch of business, as well as with the comfort and convenience of passengers using said depot, to be importuned by hackmen and transfer men generally while passing through or waiting in said station, and it is for the best interest of the people using said station that the privilege of soliciting such business should

be confined to some one person or firm, over which said party of the first part can exercise control in the way said business shall be conducted: Now, therefore, said party of the first part, in consideration of the covenants and agreements to be kept and performed by the party of the second part, does hereby grant to said party of the second part, during the continuance of this agreement, the exclusive privilege of soliciting and contracting with passengers for the transfer and delivery of baggage, for passage in omnibuses to various parts of the city, and for hiring of hacks, cabs, and carriages, within the Union Depot Building, and train sheds attached, at the city of St. Paul, and also permission to occupy and use the stand in the said depot building set apart for that purpose. In consideration thereof, said parties of the second part covenant and agree as follows: (1) During the continuance of this agreement to, at all times during the day, and on the arrival of trains during the evening, keep an agent at said stand to attend to and accommodate the public in connection with such business. Such agents shall, while attending to such business, wear a cap similar to those usually worn by railroad employees, lettered in such a manner as to indicate his business to the public. (2) To have an agent meet all important trains arriving at said depot before they reach the city of St. Paul, and give the passengers on such trains an opportunity to arrange for passage in said omnibuses, for the hire of carriages, and the transfer or delivery of baggage, before arriving at said depot. (3) All employees of the parties of the second part shall transact their business in and about said station in a quiet and polite manner, and they shall in this regard be subject to the direction of the superintendent of the party of the first part, and said parties of the second part agree to dismiss from their service in or about said depot any agent, driver, or other employee, after receiving written notice of his objection to the employment of such man by the superintendent of the party of the first part. (4) To have present at said station, upon the arrival of all important trains, one or more omnibuses to take passengers to the various hotels in the central part of the city, and also to have within call at said station, on the arrival of all trains, a sufficient number of hacks, carriages, or cabs to accommodate the passengers using said depot on all ordinary occasions, and that such hacks, carriages, cabs, and omnibuses shall be kept in a clean, neat, and serviceable condition, and provided with strong, gentle, and serviceable horses, and to employ drivers who are of temperate habits, polite, honest, and reliable, and capable of performing their duties in an efficient manner. (5) The scale of charges demanded for services shall in all cases be reasonable, and not greater than those provided for by the ordinances of the city of St. Paul, and proof of any extortionate charging or unfair dealing by any driver or employee to or with any of the patrons of said

47 L. R. A.

depot shall be deemed sufficient grounds for the party of the first part to demand the dismissal of such driver or employee from the service of the parties of the second part. (6) Said parties of the second part will hold and save the party of the first part harmless from any and all damages, costs, and expenses on account of any acts or omissions of any of the employees of said parties of the second part. (7) That the parties of the second part will protect and save and hold harmless the party of the first part from any and all expenses, costs, and damages on account of any action at law or suit of any kind that may be brought against it, by any person or persons, on account of granting the exclusive privilege hereinbefore mentioned to the parties of the second part. It is covenanted and agreed that this contract may be terminated by either party by giving to the other thirty days' written notice of its intention so to do. In witness whereof, said party of the first part has caused these presents to be signed by its president, and the parties of the second part have hereunto set their hands, the day and year first above written.

Saint Paul Union Depot Company,

By W. A. Scott, President.

Jno B. Cook & Son.

Cook & Son had, long prior to the time of operating under the agreement, owned and operated omnibuses and hacks, in the city of St. Paul, for the carriage of passengers for hire, and had agreements with the various railroad companies running trains into said city, authorizing them and their agents to enter such trains and take up transfer coupons issued by the companies to passengers. For the purpose of attending to this business, Cook & Son placed their agents upon such trains, and maintained a stand in the Union Depot, with men in attendance to take up the checks and coupons issued to passengers on the trains. After the agreement was entered into, Cook & Son continued to enter the arriving trains for the same purpose, and continued to maintain such stand in the Union Depot, and kept therein from two to four agents to attend to the business of transfers, and to solicit transfer business to other depots and hotels from the passengers generally arriving and passing through. While Cook & Son were conducting such business pursuant to the agreement, defendant prohibited the plaintiff and all other hackmen and persons engaged in carrying passengers and baggage in vehicles for hire, from soliciting patronage within the depot, and from exercising therein the privileges granted Cook & Son under their contract. During the time mentioned, there were a large number of persons operating vehicles for the carriage of persons and baggage for hire to and from the Union Depot. The entrance to, and exit from, the depot is about 24 feet from the street line of Sibley street, a public street of St. Paul, and along this street, opposite the depot entrance, in a space allotted by the city authorities, all vehicles

landed and received their passengers. On the 9th day of February, 1899, plaintiff was the owner of a hack, and used the same in said city to convey passengers for hire to and from different places in said city, and to and from said depot and other points in said city. On that day plaintiff placed his hack in the allotted space, and leaving the same in the charge of a driver, and with knowledge of the regulations and arrangements between defendant and Cook & Son, entered the Union Depot, and, without disturbance, did solicit persons arriving on trains in said depot to become passengers in his hack. Defendant thereupon requested plaintiff to cease such soliciting, and, upon refusal to cease, ejected him from the building. Plaintiff brought this action to recover damages. The cause was tried by the court without a jury. The court found substantially the facts as above stated, and ordered judgment for defendant. From an order denying a new trial, plaintiff appealed.

The view we take of the case makes it unnecessary to consider whether ordinance No. 376 was valid and binding upon plaintiff. We assume that he was a duly licensed hackman.

Appellant bases his right to recover upon the following propositions: (1) That the defendant is a quasi-public corporation, holding, under its charter, rights and privileges which involve duties and responsibilities upon its part towards the public; (2) that the plaintiff, as a hackman, is a common carrier, with all the rights and obligations as such; (3) that plaintiff has both a statutory and common-law right of entry to defendant's depot, in common with any or all others in the transfer business to whom such privilege is conceded, subject to reasonable and uniform regulations; (4) that, even if such right of entry does not exist as a matter of law, no discrimination can be exercised against plaintiff.

To put it differently, plaintiff, as a common carrier, has both the statutory and common-law right of entry to the Union Depot, in common with other common carriers accorded the privilege; but, if no common carrier has the legal right of entry, defendant cannot discriminate by admitting one to special privileges and excluding others. Of the several cases relied on by appellant, the following are the leading ones, and are the most favorable to his contention: *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209, held that a railroad company could not grant to one person the exclusive right to use a portion of its depot platform to deliver and receive passengers and to solicit patronage; such grant being against public policy, and contrary to a constitutional provision that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company, between persons or places within this state." The decision is based squarely upon the mutual relations of the common carrier and its passen-

gers; that all passengers, in common, are entitled to equal opportunities and conveniences of place to approach and depart from the trains; that the contract of carriage between the carrier and its passengers commences or terminates at the station, and passengers must have the right of competition among hackmen, and freedom of choice in selecting their method of transfer beyond the station. This case is followed in *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667, where a like contract was under consideration. While the opinion is expressed that such exclusive contracts, as to depot approaches, tend to establish monopolies, not granted by the charter of the carrier, nevertheless the same principle is invoked as was applied in *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209. *Oravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106, is a similar case, and the decision is placed upon the same grounds,—that free competition tends to establish a reasonable price, and affords the safest, best, and most comfortable means of conveyance, a rapid passage, and polite and agreeable service to the traveling public. In *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, although no statute was in effect, the court held, upon grounds of public policy, that an exclusive contract with one hackman for platform privileges was in contravention of the rights and privileges of passengers. To the same effect see *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 53 N. E. 937. There is another line of cases which adopt a different rule, and which are relied on by respondent. The leading case is *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89. The railroad company entered into an exclusive contract with one to furnish the means to carry passengers and their baggage from its station. All others were prohibited from entering the company grounds to solicit business, although they might enter to deliver or receive passengers upon order. The following statute was construed: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds, and at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." Mass. Pub. Stat. chap. 112, § 188. The majority of the court held that the use of its depots and grounds obviously meant a use of right; that the statute did not intend to prescribe who shall have the use of the grounds, but to provide that all who have the right to use them shall be furnished by the company with equal conveniences; that the statute applied only to relations between railroads as common carriers and their patrons; that the defendant, in his business as solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and

had no right to its station grounds and buildings. Three judges dissented, and placed their opinion upon the ground that the rule established by the majority would enable a railroad company largely to control the transportation of passengers and merchandise beyond its own lines, and to establish a monopoly not granted by its charter, which might be for its own benefit, and not for the benefit of the public; that such a regulation did not give to all persons or companies reasonable and equal terms and facilities, as required by the statute. This dissenting opinion is referred to and approved in *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209. The doctrine laid down in *Old Colony R. Co. v. Tripp* is followed in *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 73; also in *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143. The reasoning is adopted but distinguished, and it is held that the carrier could not deprive a passenger of the privilege of being carried from the terminus by other means than as provided by it. In *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859, the Massachusetts rule is followed, the facts being similar. In an English case (*Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509) the company had sold for £800 the exclusive right to ply for hire within their station. The court held that no inconvenience to the public had been shown, and that it was important to the interests of the public that the vehicles which ply for hire in the station yard should be kept upon their good behavior, by being under the control of the company. To the same effect see *Barker v. Midland R. Co.* 18 C. B. 46. These English cases were discussed and treated as authority in several of the American cases *supra*. It is well settled that a common carrier may grant the exclusive privilege of soliciting the patronage of passengers on its boats and trains; also to sell books and refreshments on its trains, grounds, and depots. *Fluker v. Georgia R. & Bkq. Co.* 81 Ga. 401, 2 L. R. A. 843, 8 S. E. 529; *Darney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barney v. The D. R. Martin*, 11 Blatchf. 234, Fed. Cas. No. 1,030. We have met with no case to the contrary. Conceding to appellant the most favorable interpretation of the cases bearing upon this subject, we find that the courts have gone no further than to prevent discrimination in granting privileges at the point where the contractual relations between the company and the passengers cease; that is, at the station yard or platform where passengers enter and leave the premises. No case has been brought to our attention where an attempt has been made to apply the rule within a depot, where the general business is transacted between a common carrier and its patrons.

No complaint is made in the case before us that any discrimination was practised against appellant outside the depot. He seeks, however, to extend the doctrine of no

discrimination in soliciting patronage to the very heart of the building, where thousands of people are passing through daily, pursuant to their business relations as passengers with defendant. Whether arising upon considerations of public policy, or having its foundation in a statute, the principle which applies to prevent discrimination is that the rights of the public must be subserved. The passenger is entitled to have the benefit of open competition among carriage men at the place of departure from the depot. Any interference beyond this point by the company would be unwarranted, and an exercise of power not granted by its charter. This is the principle recognized and adopted in most of the cases relied upon by appellant, and, so far as those cases are based upon that principle, we consider them authority. But within the Union Depot the condition is different. Here are located offices and rooms for the accommodation and convenience of the masses of persons departing, arriving, and waiting for trains. It is a public building only in a qualified sense. Its use is confined to the care and accommodation of those having business with the roads. The defendant was compelled to construct it to properly care for the business it had to do under its charter. The traveling public have rights and demands in their relations with the defendant which the building was designed to meet. The company cannot discriminate between different persons dealing with it as a common carrier. For the benefit of all such patrons, it may make necessary rules and regulations. The same rule that permits common carriers to control the sale of articles upon their trains by restricting the number; the same rule that permits it to grant special privileges to expressmen and transfer agents upon its trains,—applies to a depot where practically the same relations exist between the company and its patrons.

The statute cited by appellant (Gen. Stat. 1894, § 380, subd. b) is a part of the warehouse and commission laws, and has reference only to parties having contractual relations with common carriers. Appellant is not a common carrier. He has no established route, place of business, or time of employment. He is a carrier in a restricted sense, but had no contractual relations with defendant on the day he was evicted from the building. But, even if the statute were general and applicable, the conclusion would be the same.

Neither does it make any difference whether appellant is a common or a private carrier; the rule applies to the same extent. As a private carrier, he may, without being discriminated against, solicit business outside the building. As a private carrier, he has the right of entry to deliver or receive passengers; for then he would have contractual relations with the company through the passenger. The contract with Cook & Son recites that defendant deemed it necessary and for the convenience of the public to have an opportunity to secure transfer privileges within the depot. Cook & Son are under ob-

ligations to have an agent meet the trains, and arrange for transfers of passengers on the trains and in the depot, to preserve order, and to have on hand proper vehicles, and to make reasonable charges. If this arrangement is a reasonable and proper one for such passengers and patrons, and conserves their interests, and does not tend to deprive them of proper opportunity to control their action after leaving the depot, then there is no ground for complaint. There is no evidence in the case tending to show that the arrangement provided by the contract is unreasonable, or that it in any respect interferes with the rights of the traveling public. On the other hand, the court below found, as a fact, that the contract conduced to the convenience and comfort of the public, and to the orderly performance of its business by defendant. If appellant were admitted to the building to solicit business, then all hackmen would have to be admitted. The presence of soliciting agents, without restrictions, would interfere with the comfort, welfare, and convenience of the public. It would not change the principle involved if, as appellant contends, all the hackmen in the city could be admitted in rotation daily or weekly, and thereby order and public convenience be conserved.

We therefore conclude as follows: That neither a hackman nor a common carrier has either a statutory or common-law right to enter the Union Depot to solicit business; that both may enter the depot for the purpose of delivering or receiving passengers upon order or contract; that all carriers, private and public, have a common right, without discrimination, to solicit patronage at such points as may be properly designated beyond the depot; that within such building defendant is compelled to make such proper rules and regulations as will conserve the interest and convenience of the traveling public; that within such building defendant has control of its property and business, by virtue of its right of ownership, subject only to the rights of the public transacting business with it; and, as an incident to such obligations to the public and right of ownership, defendant may grant special privileges for the transfer of passengers and baggage.

Order affirmed.

Edward G. ROGERS *et al.*, *Respts.*,
v.

City of ST. PAUL, *Appt.*

(.....Minn.....)

*1. The city of St. Paul, in 1891, instituted proceedings to grade East Third

*Headnotes by LEWIS, J.

NOTE.—As to the right to recover back payment of an assessment for local improvement, see also *Phelps v. New York* (N. Y.) 2 L. R. A. 626, and *note*; *Budge v. Grand Forks* (N. D.) 10 L. R. A. 165; and *McConville v. St. Paul* (Minn.) 43 L. R. A. 584.

As to the necessity of a special benefit to sustain an assessment, see *notes* to *Re Bonds of Madera Irrigation Dist.* (Cal.) 14 L. R. A. 755; *Asberry v. Roanoke* (Va.) 42 L. R. A. 636; also *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289; and *Schroder v. Overman* (Ohio) 47 L. R. A. 156.

street from Earl street to the east city limits. Assessments were levied upon abutting property upon the rule of benefits. A contract was let for the improvement, and a great deal of work performed at different points, but the street was left for some distance to the west of plaintiffs' property in a less passable condition than before, and access to said property from the heart of the city was cut off by failure to complete the work. Plaintiffs' property was assessed in the sum of \$4,706.94, and in default of payment the premises were sold to a third party for the amount due. After the work mentioned was performed, the defendant, on the 7th day of September, 1893, rescinded the grading contract. No more work was done towards completing the improvement. The plaintiffs' property was not benefited by the work as done.

2. Held, in an action brought by the property owners to recover from the city the money so received, it not appearing from the complaint that all of the money accruing from the assessment had not been expended upon the improvement, that the complaint (setting up the above-mentioned facts) does not state a cause of action.

3. Held, conceding the complaint to be otherwise sufficient, the fact that the property had been sold by the city to satisfy the assessment did not deprive plaintiffs of their right of action.

(January 24, 1900.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a demurrer to a complaint filed to enjoin defendant from enforcing a street improvement assessment upon complainants' property. *Reversed.*

The facts are stated in the opinion.

Messrs. James E. Markham and Franklin H. Griggs, for appellant:

Even assuming that plaintiffs had paid the assessment in question, they cannot recover except upon a showing that the money has not been devoted to the purpose for which it was raised, but that it still remains in the city's treasury.

Valentine v. St. Paul, 34 Minn. 440, 26 N. W. 457; *Bradford v. Chicago*, 25 Ill. 411; *Falls v. Cairo*, 58 Ill. 403; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *Peyser v. New York*, 70 N. Y. 497, 26 Am. Rep. 624; *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131.

But plaintiffs cannot recover here, in any event, for the one all-sufficient reason that they have suffered no injury. Whoever else may be entitled to insist upon consideration, these plaintiffs are not.

Messrs. H. J. Horn and A. E. Horn for respondents.

Lewis, J., delivered the opinion of the court:

The complaint, in substance, alleges that on August 18, 1891, the defendant instituted

proceedings for condemning and taking an easement in the land abutting on East Third street from Earl street, a mile and a half west of White Bear avenue, to the east city limits, a total distance of $2\frac{1}{2}$ miles; that this easement was deemed necessary for the construction of cuts and fills in grading East Third street for this entire distance, the easterly mile of which had not been opened as a street until January 20, 1891; that this grading had been ordered as a single improvement; that the expense of the same was estimated and ordered to be assessed as a single improvement upon the property benefited, as provided by law; that, in pursuance of such proceedings, on March 29, 1892, a contract was duly entered into between said city and Keough & Donnelly to do the entire work by October 31, 1892, for the sum of \$47,000, and to meet such cost an assessment according to benefits was made upon the abutting property, including the property of plaintiffs; that plaintiffs' property was assessed in the sum of \$4,706.94; that thereupon judgment was rendered and entered in the district court for said sum, with interest and costs, and that said property of plaintiffs was duly sold on the 1st day of August, 1892, to F. V. Heyderstaedt, for the sum of \$4,750.50, which amount was paid by said Heyderstaedt into the treasury of said defendant, and that said defendant ever since has had the full benefit of said payment and money; that said contractors commenced said work approaching a point between Clarence and Flandrau streets, a considerable distance west of White Bear avenue, and in the vicinity of plaintiffs' property; that between Clarence street and Birmingham street, which streets intervene between Earl and Flandrau streets, there was a deep hole, with gradually sloping approaches, before said contractors began work at that point, and that at another point in that vicinity there was a high bank, which it was possible to traverse; that the contractors did some work upon this hole and embankment, but left it in a worse condition than they found it, thereby rendering plaintiffs property impassable by that street from the west; that no work whatever was done east of Flandrau street, and that the effect upon plaintiffs' property was a damage instead of a benefit. The complaint further alleges that said contract with Keough & Donnelly was rescinded by the defendant on September 7, 1893, and that said work and improvement was never resumed or completed, and has been permanently abandoned by defendant; "that, had said improvement been completed as projected, access to plaintiffs' property from the center of St. Paul to the east city limits would have been secured therefrom, and said property would have been benefited thereby to the amount of the assessment imposed thereon as aforesaid." To this complaint the defendant interposed a demurrer upon the ground that it did not set forth a cause of action. Demurrer overruled. Defendant appeals.

The plaintiffs place their right to recover
47 L. R. A.

distinctly upon the ground of a failure of consideration, and rely for their authority upon three decisions of this court, viz., *Valentine v. St. Paul*, 34 Minn. 446, 26 N. W. 457; *Strickland v. Stillwater*, 63 Minn. 43, 65 N. W. 131; *McConville v. St. Paul*, 75 Minn. 383, 43 L. R. A. 584, 77 N. W. 993. In the *Valentine Case* the assessment had been levied upon the plaintiff's property to defray the expense of grading a street, and he had paid the amount into the city treasury. Thereafter the proceedings were enjoined by the court, and the whole scheme abandoned. No work whatever was done towards carrying out the improvement, and the city retained the money. The court held that the effect of abandonment by the city of the project for and on account of which only the assessment had been made was that the consideration of the assessment wholly failed, and that an action would lie as at common law for money had and received. In the case of *Strickland v. Stillwater* the city began proceedings for an entire improvement to grade parts of three streets, including that part of a certain street in front of plaintiff's property. An assessment of \$159.61 was levied upon plaintiff's property in accordance with the rule of benefits, to meet the cost of the general expense. For some reason the city abandoned the grading of the street in front of plaintiff's premises, but completed the improvement otherwise. The plaintiff sued to recover the entire amount of the assessment which she had paid into the treasury. The trial court rendered judgment in her favor for the full amount, but the judgment was reversed in this court upon the ground that the plan of improvement was a general scheme, and it did not follow that, because the grading was not done in front of plaintiff's premises, she was not benefited by the improvement at other points; and hence, if she could recover at all under such circumstances, the measure of damages would be the difference between what she paid and her actual benefits accruing from the work as done. While the opinion discusses at some length the possible rights of parties under such conditions, we need only to ascertain the true grounds upon which the decision rests. The rule of damages adopted by the court below was manifestly wrong, but whether, under the facts presented in the record, plaintiff could recover upon some other rule of damages, we are not called upon to decide. There are a few facts, however, appearing in that case which must be emphasized, and which clearly distinguish the case from the one before us. First, in the *Strickland Case* the improvement was completed except in front of plaintiff's property, a distance of about 300 feet; second, that the cost of so completing the improvement was decreased presumably in the amount of the sum assessed against plaintiff's property; third, an amount equal to the sum paid by plaintiff was retained by the city in its treasury. Upon this state of facts possibly the plaintiff might recover as for a partial failure of consideration. The controversy in the case of *McConville v. St.*

Paul grew out of the same improvement as is involved in the case now under consideration. In that case the plaintiff, who was the owner of lots abutting on Third street east of Clarence street, paid into the city treasury the amount of the assessment, and, after the work was abandoned, brought suit to recover it, relying upon the authority of the *Valentine* and *Strickland Cases*. While this court sustained a judgment in his favor, we think that the facts presented in the record, and the facts assumed and conceded to be before the court, make the case quite different from the one presented by the complaint in this action. It appears from the record in the *McConville Case* that the grading had been completed from Earl street east to within a short distance of Clarence street; that the plaintiff's property was situated about $\frac{1}{2}$ mile east of Clarence street; and that the city left the street between said points in such condition as not to permit of travel. The court rests its decision upon the authority of the *Strickland Case*, and it appears from the opinion that the facts were assumed to be similar. The court assumed that the city had abandoned that part of the work east of Clarence street, and could not have referred to the part west of that point, because the record showed as stated that the work was completed to Clarence street. Again, it was assumed or conceded, if it does not appear from the record, that the money paid in by the plaintiff was still unexpended, and was retained by the city. In this respect the following language is used in the opinion: "And with commendable forbearance he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named." Whatever may have been the actual fact, it is apparent that the decision of the court in the *McConville Case* was based upon the assumption, justified by the express or implied concession of counsel on the argument of the case, that the city, having received and retained the plaintiff's money, abandoned the further prosecution of the proposed improvement. This brought the case within the principle of the *Valentine* and *Strickland Cases*.

We now come to the complaint in this action, and we find that it does not appear that the work was completed to Clarence street, and the exact position of plaintiff's property is not stated. It appears that work was done in a general way along East Third street approaching Clarence street, and that the street was rendered impassable to plaintiff's property by the acts of the city in partially executing the work and then abandoning its further prosecution. It does not appear whether any work was done in front of plaintiff's property. On this state of facts we would not be justified in holding that the city had abandoned that part of the work east of Clarence street, as distinguished from the other part. Again, there is no allegation that the money realized on the sale of plaintiff's property was not ex-

pendent on the improvement. There are some general statements in the complaint to the effect that the defendant retained and refused to pay plaintiffs the money received on the sale, but, when taken in connection with the fact that a large part of the work was done, and no cause for the abandonment being assigned, these statements are too indefinite, and do not amount to an allegation that the money had not been so expended. It would be immaterial, if the city were otherwise liable, whether it retained the money in its treasury, or diverted it to some other use. Defendant could not render itself liable to an action for money had and received by abandoning the improvement and not expending the money, and then shield itself by using it for some other purpose. The plaintiffs have their right to recover upon the authority of the cases mentioned, if the facts alleged are the same. They have followed the complaint in the *McConville Case*, and have argued and submitted the case upon the supposition that the facts are identical, yet it appears that the facts are not the same. We are then met with this question: Can plaintiffs recover, assuming that the city did not complete any special part of the work,—did not abandon any special part as distinguished from the whole,—but expended the money, so far as collected, upon the general improvement, leaving the whole incomplete? We think not. Under such circumstances the mere stopping of work because the money had been expended would not confer upon lotowners the right to recover the money paid. So far as appears from the complaint, this money may have been used in the undertaking, and, whatever remedy plaintiffs might have, there is no relief upon the ground of a failure of consideration.

While the questions already discussed dispose of this case, another claim of defendant is presented for decision with a view to a possible amendment of the complaint. It is this: That the plaintiffs cannot recover in any event, because they are not the parties in interest, and have suffered no injury. This assertion is based upon the fact of the sale of the premises in question by the city to Heyderstaedt. Appellant contends that, because plaintiffs suffered the premises to go to a sale, and did not redeem, they have not paid any money on the assessment, and that, whoever else may recover, plaintiffs cannot. We do not so hold. The law provides that the amount of the judgment shall be a first lien upon the premises. The plaintiffs may pay the money, or permit their property to stand subject to the lien, or be absorbed in payment of it. In either case they pay the amount. And the purchaser at the sale does not succeed to their rights. We need not here decide what the rights of a purchaser would be. The question is not directly involved. But we assume that in no event could a purchaser recover his money except upon the same state of facts as would give lotowners the right, and the city is not called upon to pay the money twice. Under such conditions it is possible that a purchaser

might recover as for a failure in part of the consideration, growing out of the implied contract on part of the city to complete the work and expend the money, presumably for the benefit of the premises. Whatever be the legal remedy of the purchaser, if any, he has not succeeded to plaintiffs' claim, and the positions of the two are not inconsistent.

It is suggested that plaintiffs must redeem before they can maintain this action. In

case of redemption the money would go to Heyderstaedt, and the city would act only as the agent to pay it over, and the only effect such action would have upon plaintiffs would be to change the nature of the payment by substituting the money in place of the lot. In either case the city would receive the money, and the plaintiffs pay it.

The order is reversed.

NEVADA SUPREME COURT.

Frank PAUL, *Respt.*,

v.

Rocco CRAGNAS, *Appt.*

(.....Nev.....)

1. Papers which constitute no part of the record on appeal may be struck out on motion.
2. A notice of appeal is not insufficient because of a clerical mistake in giving the date of the order appealed from as the 11th, instead of the 10th, day of a certain month.
3. An undertaking on appeal is not vitiated by a mere clerical mistake in stating the date of the order appealed from.
4. The execution of an undertaking on appeal before the notice of appeal is filed will not make the undertaking insufficient, if it is filed after the filing of the notice of appeal, as the statute requires.
5. Objections to instructions, which were not made in the court below, cannot be considered on appeal.
6. A lease of an undivided one-third interest in a mining claim, and not a mere license, is made by an instrument by which the party of the first part "hereby leases" such interest from date for a period of one year, while the party of the second part "agrees to work said mine in a workmanlike manner and leave the same in as good condition as it is at this time," and to pay royalty for all ores taken therefrom.
7. The estate or right of possession of the owner of an undivided interest in a mine is not limited or restricted with respect to his own property by his cotenant's lease of the other portion of the mine.
8. A person excluded by a cotenant from a mine in which he has an undivided interest can maintain an action for damages, and his remedy is not limited to an action for partition, or an accounting of rents and profits.
9. The damages recoverable for wrongful exclusion by a cotenant from a mine in which plaintiff has an undivided interest consist in the loss of profits that he would have made but for such exclusion.

(Belknap, J., dissents.)

(January 29, 1900.)

NOTE.—For distinction between lease and license, as to minerals, see note to *Heywood v. Fulmer* (Ind.) 18 L. R. A. 491; also *Woodland Oil Co. v. Crawford* (Ohio) 34 L. R. A. 62; and *Detlor v. Holland* (Ohio) 40 L. R. A. 266.

For accounting between cotenants in general, see note to *Gage v. Gage* (N. H.) 28 L. R. A. 829; also *Ward v. Ward* (W. Va.) 29 L. R. A. 449; and *Williamson v. Jones* (W. Va.) 38 L. R. A. 694.

47 L. R. A.

APPEAL by defendant from an order of the District Court for White Pine County denying a motion for new trial after judgment in favor of plaintiff in an action to recover damages for refusal to permit plaintiff to take possession of certain mining property under a lease. *Affirmed.*

The facts are stated in the opinion.

Messrs. Robert M. Clarke, Peter Breen, A. E. Cheney, and O. J. Smith for appellant.

Messrs. Wren & Julien and Frank X. Murphy for respondent.

Bonnifield, Ch. J., delivered the opinion of the court:

This action was brought to recover damages of the defendant for refusing to permit the plaintiff to enter into the possession of a certain mining claim and work the same, and for excluding him therefrom. The plaintiff based his right to enter into possession and work said claim upon a written lease, executed to him, for an undivided one-third interest in said claim by the owners of said interest, the defendant owning an undivided two-thirds interest therein. The trial resulted in a verdict of the jury in favor of the plaintiff for \$2,287.50, and a judgment accordingly. This appeal is from an order denying defendant's motion for a new trial.

The respondent moves the court to strike out each of twenty-three papers, designated by name, which are found in a package of papers certified to be the whole record on appeal. This motion is granted. These papers constitute no part of the record on appeal. The practice of gathering up all the papers and documents filed in a case in the trial court, and sending them up on appeal, mixed with or attached to the record, when they constitute no part of it, should be discontinued. The statute clearly specifies what papers shall constitute the record on appeal in every appealable case. There is no authority for withdrawing any other papers from the files of the trial court for the purposes of an appeal. A party may be subjected to unnecessary costs by filing useless papers on appeal, as the fee of the clerk of the supreme court is 30 cents for filing each paper, and for entering each order of the court \$1.50.

In the notice of appeal it is recited that the defendant hereby appeals to the supreme court "from the order overruling and denying defendant's motion for a new trial in

said action, which said order was made and entered on the 11th day of May, 1899." The record shows that the order denying defendant's motion for a new trial was made and entered on the 10th day of May, 1899, instead of the 11th day of said month. Respondent moves for a dismissal of the appeal upon certain grounds named. One ground is to the effect that no appeal has been taken from the order made and entered on the 10th day of May denying the defendant's said motion. In *Weyl v. Sonoma Valley R. Co.* 69 Cal. 202, 10 Pac. 510, the respondent made objection to the notice of appeal for the reason that the notice did not give the correct date of the entry of the judgment and order denying a new trial from which the appeal was sought to be prosecuted. The court held, in substance, that, as the record showed that there had been but one judgment and order of the kind appealed from entered in the case, the notice was sufficient, and that the mistake of dates merely should be regarded as a clerical misprision. In *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, the judgment appealed from was rendered on the 29th day of March, 1884, and entered on the 30th day of April following. The notice of appeal referred to the judgment as having been entered on the 29th of March, 1884. Held, that the notice was sufficient. In *McAlle v. The Latona* (Wash. Terr.) 19 Pac. 131, the notice of appeal described the decree appealed from, which was rendered October 7, as of October 1. It not appearing that there was any other decree in the cause, the error as to the date was held not to be material. It will be observed that the appeal is taken "from the order overruling and denying defendant's motion for a new trial in said action." The date in the clause following, "which said order was made and entered on the 11th day of May, 1899," clearly appears to be a clerical mistake, as the record shows that the order in said case overruling the motion was made and entered on the 10th day of May, 1899. It does not appear, nor is it claimed, that there was more than one order made on the motion. We are of opinion that said notice of appeal is sufficient.

Another ground alleged for the motion to dismiss is that no undertaking was filed on an appeal from said order of May 10. We do not think this contention is tenable. The undertaking refers to the order appealed from as "the order of said district court denying and overruling defendant's motion for a new trial, which said order was made and entered on the 11th day of May, 1899." There being but one order made and entered overruling and denying defendant's said motion by the district court, it is evident that the reference to the date thereof as the 11th day of May, 1899, instead of the 10th day of said month, was and is simply a clerical mistake, and does not vitiate the undertaking. We do not think that the mistake could avail the sureties as a defense in an action against them on said undertaking. *Sweeney v. Kar-sky*, 25 Nev. —, 58 Pac. 813.

The third ground given for the motion to
47 L. R. A.

dismiss is that the undertaking was executed before the notice of appeal was filed. The statute requires that, to render an appeal effectual for any purpose, a written undertaking shall be executed on the part of the appellant by at least two sureties; that such undertaking shall be filed with the clerk within five days after the notice of appeal is filed. It is true that the undertaking was executed, in one sense, before the notice of appeal was filed,—that is, it was prepared and completed ready for filing before said notice was filed,—and, had it been filed before said notice, it would have been nugatory. But it is not required that the undertaking shall be thus executed within five days after the notice of appeal is filed, but simply that the filing thereof shall be made within that time. The execution of the undertaking was not completed until delivered. Its delivery was effected by filing it with the clerk. The motion to dismiss is denied.

Counsel for appellant, in his brief, points out certain portions of several instructions given to the jury, makes certain specific points of objections to the same, and contends that the court erred in giving the said instructions. But the statement of the case does not show that any of said points of objections or exceptions were stated at the trial. The alleged errors cannot be considered on appeal. *McInnis v. McGurn*, 24 Nev. —, 55 Pac. 304, and cases cited.

The defendant interposed a demurrer to plaintiff's complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the ruling is assigned as error. We do not think said ruling was error, but that the facts alleged are sufficient. The facts, as shown by the complaint, stated in brief, are that on the 13th day of June, 1896, the defendant and Irene Robinson, Eugene Howell, and R. M. Clarke were the owners of a certain mining claim described therein, the defendant owning an undivided two-thirds interest, and the said Robinson, Howell, and Clarke owning among them an undivided one-third interest in said mining claim; that on said day the said owners of said one-third interest leased to the plaintiff their said interest for one year from said date upon the terms and conditions expressed in said lease; that the plaintiff on the 18th day of June exhibited said lease to the defendant, and offered to pay him any sum due from plaintiff's lessors as their proportion of the expenses incurred in the development of said mine; that defendant at said time, and at divers other times about said date, refused to give any statement of such expenses, refused to permit the plaintiff to enter into possession and work said mining claim, and excluded him therefrom; that the value of the rents, issues, and profits of said one-third interest in said mine for the said term of said lease is \$3,000. It is alleged that by reason of the refusal of defendant to let plaintiff into possession of said one-third interest in said mining claim under said lease, plaintiff was damaged in the sum of \$2,500. A copy of said lease is

attached to the complaint, and made a part thereof.

Counsel's first contention with respect to the facts alleged is that the writing called a "lease" is not a lease, but simply a license to plaintiff to extract and work ore at his option for the period of one year at a specified royalty on ores that he might perchance extract. The instrument in question, after giving the names of the parties thereto, respectively, as the party of the first part and the party of the second part, recites that they "do by these presents covenant and agree, and the said party of the first part hereby leases unto the said party of the second part one-third interest in and to that certain mine known as and called the 'Homestake Mine,' situated," etc.; "this lease to take effect and go in force from this day, and to continue for a period of one year up to and including June 13, 1897. The provisions of this lease to be as follows: The party of the second part hereby agrees to work said mine in a workmanlike manner, and leave the same in as good condition as it is at this time. The said party of the second part agrees to pay to the said party of the first part, or to . . . as shall be directed by the party of the first part, royalty from all ores taken out, extracted, and shipped from said Homestake mine by the party of the second part during the continuance of this lease." After specifying the amount of the royalty on each ton taken out, etc., it is recited, "Said royalty to be paid upon the first day of each month to the party or parties as hereinbefore named." The instrument is dated the 13th day of June, 1896, and signed by the parties thereto. "No particular form of words is requisite to make a lease. Any words that show an intention on the part of the lessor to divest himself of the possession of the premises, and confer it upon the lessee for a term, whether long or short, is sufficient; but the lessee also should sign the lease, or in some manner become bound by such covenants as it is agreed that he shall perform." 1 Wood, Land & T. § 210. "A lease is a species of contract for the possession and profits of lands and tenements, either for life, or a certain term of years, or during the pleasure of the parties." 12 Am. & Eng. Enc. Law, p. 976. "No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be that one shall divest himself of the possession of his property and the other shall take it for a certain space of time are sufficient, and will amount to a lease for years as effectually as if the most proper and permanent form of words had been made use of for the purpose." Id. p. 977. In reference to leases of mines Lindley says: "As to whether an instrument is or is not a lease depends upon the intent of the parties, and not upon the mere form in which it is prepared." 2 Lindley, Mines, § 861. "Whether an instrument is a license or a lease will depend upon the manifest intent of the parties gleaned from a consideration of its entire contents." Id. 47 L. R. A.

§ 860. We are of opinion that the writing in question, from a consideration of its entire contents, clearly and legally expresses the parties' meaning, and shows an intention on the part of the lessors to divest themselves of the possession of the premises, and to confer it upon the lessee, the plaintiff, for the term therein named, and to obligate the lessee thereby to work said mine in a workmanlike manner during said term, and to pay the royalty monthly as therein specified. We are of opinion that said writing was a grant to the lessee of the lessor's undivided one-third interest in said mining claim for said term of one year, being their share of the whole of said mining claim or mine.

Counsel's further contention is that, whatever may be the nature of the instrument, it cannot limit or restrict the estate, rights, or possession of the defendant in his own property, and he cites several authorities to support this contention. The answer to this is that said lease does not limit or restrict the defendant in any of his rights with respect to said mine or mining claim, his estate therein, or right of possession thereof. The authorities cited are to the effect that it is not in the power of a tenant in common to convey the whole of the estate or the whole of a distinct portion by metes and bounds; that such conveyance is void as against the cotenants, but that the respective cotenants may convey their shares of the whole estate to one or many grantees as they please, so the share be of the entire estate. As an illustration in one of the said cases cited, it is said: "I have a moiety. My cotenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other cotenants with me. But, all being seised of aliquot parts in the same estate, and of like kind and quality, my right to partition is not disturbed by the number of cotenants." *Adam v. Briggs Iron Co.* 7 Cush. 368. The lease in question is not a lease of the whole estate, nor the whole of a distinct portion by metes and bounds, but it is a lease from the three cotenants of their undivided one-third interest, being their share of the whole mining claim.

Counsel contends, as we understand, that if the defendant had excluded Howell and others from the mine, as he did the plaintiff, they could not have sued for damages, but would have been confined to an action for partition of the common property, or an accounting of the rents and profits received by the defendant from third parties; and that plaintiff having no greater rights than his lessors, he is confined to said remedies. In *Carpentier v. Webster*, 27 Cal. 550, the court says: "Partition would afford no redress for the dispossession, whether total or partial. In the first place, the tenant expelled might not desire a partition; and it is possible that a partition would be equally unwelcome to the cotenant who expelled him. In the second place, partition does not lie between tenants in common at common law

(2 Bl. Com. 182, 191), and we are now treating the subject on common-law conditions only. And, in the third place, partition in equity is not for the purposes of redress for ousters, nor for any description of legal wrong previously committed; but for the sole purpose of terminating the common tenancy. By the common law the ejected tenant was not only entitled to be restored to his moiety, but to damages also. 1 Coke, Litt. p. 906. In chancery, in partition cases there is no account taken of damages, but of mesne profits only. 1 Story, Eq. Jur. § 466. "In case of lodes and veins, it would seem impossible to effect a fair, actual division. It is a matter of common knowledge that the metallic substances occurring in veins are not distributed uniformly, either as to quantity or quality. They are found in 'shoots' or vuggs, kidneys, and other irregular bodies, making it impracticable to segregate the interests without great injury to the owners." 2 Lindley, Mines, § 792. "It has been said that the only partition that can be made of this class of property is to order a sale, and divide the proceeds." *Ibid.* A sale in most instances would doubtless be equally as injurious to the owners as partition of the property, if not more so, on account of the scarcity of bidders and the smallness of the amount bid. Partition being impracticable in most cases, and affording no redress for damages sustained by a cotenant by reason of being ejected or excluded from the common property, if an accounting for the rents and profits received from third parties by a cotenant who did the ousting is the only remedy left the ousted cotenant for such redress, then a tenant in common, if he so elect, whether his moiety be great or small, may exclude all of his cotenants, to their great damage, from a mine, let the mine lie idle, or only work it himself, and incur no liability to his cotenants: for whether he let the mine remain idle, or only worked it himself, there would be no rents or profits to be received from third parties, and thus he may appropriate the whole profits, however great, to his own use. There is no rule of law which grants a tenant in common such rights or privileges against a cotenant whom he ousts. The authorities are to the contrary. *Gage v. Gage* (N. H.) 28 L. R. A. 829, note a. "If A disseises his cotenant, B, it is no defense in an action against him by B to recover rents and profits that in fact he has received or realized nothing from the land during the dispossession, and B may recover what the rents and profits are worth, without regard to the inquiry as to whether A in fact collected rents or received profits." *Sears v. Sellew*, 28 Iowa, 501. The said lessors, as tenants in common with the defendant, might have lawfully entered and worked said mine themselves if the lease had not been made. There can be no doubt that one as a tenant in common may authorize another to do what he himself could do with the common property. *Alford v. Bradeen*, 1 Nev. 228. It is denied by the answer that the defendant refused to permit the plain-

tiff to enter into the possession of said mining claim and to work the same; denied that he excluded the plaintiff therefrom; denied that he refused to give to plaintiff a statement of the expenses of the development of said claim; denied that plaintiff offered to pay defendant any amount due from his said lessors, or either of them, for their proportion of said expenses; denied that the value of the rents and profits of said one-third interest was any sum of money whatever; and denied that plaintiff was damaged in any sum by reason of defendant's refusal to let plaintiff into the possession of said one-third interest under said lease, or for excluding him therefrom. But, in our opinion, there was sufficient evidence to support a finding of the jury in favor of the plaintiff on each of the above controverted points. There was evidence to the effect that the plaintiff repeatedly requested of the defendant to be let into the possession of the mine, to work the same, and that defendant refused every request; that defendant threatened the plaintiff with personal violence if he entered and mined the ore; that he refused to permit the plaintiff to work on ore then accessible in the drifts, and on which no work was being done by anyone; that the plaintiff requested that he be permitted to sink a shaft from the surface to the bodies of ore on their dip, below, outside, and away from the level on which defendant was working, and that he might extract the ore therefrom, and that defendant refused to permit him to do so; that there was no way of reaching the ore bodies then developed except through a tunnel from the surface and connecting incline; that the defendant locked the door that was at and in the mouth of the tunnel every night after the plaintiff got his lease, and that he threatened to scatter the plaintiff's brains if he entered there; that the defendant applied to the plaintiff insulting language and opprobrious epithets, and that the plaintiff did not enter and work the mine for fear that one or the other of them might get killed if he did so. The evidence was certainly sufficient to support a finding of the jury of an ouster of the plaintiff by defendant.

There was evidence sufficient to support a finding that the plaintiff offered to pay the defendant the lessors' proportion of all expense incurred by the defendant in any developments of the mine that he may have made. There was evidence, also, tending to show that the defendant had been fully reimbursed for all such expenses by the proceeds of ores extracted by the defendant from said mine. It appears that all of the work in developing the mine in that part where the defendant was working and from which the plaintiff was excluded as aforesaid was done by lessees of the mine, and that all the bodies of ore found there were found by such lessees. It appears that the first lease was given by Eugene Howell for a term commencing on the 14th day of January, 1894, and ending on the 14th day of January, 1895; that the lessees worked eleven months under ground; that they had ten or eleven

men at work from January to November, 1894, and then three men; that then a lease was given from January to August, 1895; that on this lease three men worked up to July and five men during that month; that during the term of this latter lease the lessees discovered and developed the ore body that defendant was working on when plaintiff was refused possession; and that all the work the defendant did afterwards was on that body of ore. If there be any rule of law relating to the rights of tenants in common with respect to the common property that would justify the defendant in excluding the plaintiff from entering into possession and working said mine, it has not been cited, and we know of no such rule.

The contention of appellant that the damages awarded by the jury are excessive and vindictive, and wholly without evidence to support them, is the only remaining contention that we regard requires special consideration in this opinion. Counsel asserts "that there was no proof of the amount of ore that Paul would have mined, the number of tons that he could have removed, the number of men that he would have employed or could have employed profitably, the cost of removal at that time, the value of the ore then known to exist, or the profit per ton or in gross." There was evidence to the effect that the plaintiff was a practical miner of many years' experience in practical mining; that mining was his business; that at the time he took his lease the mine was in such condition, and such bodies of ore had been and were then exposed in the underground workings by other lessees, as to make it reasonably certain that a large amount of ore could be extracted therefrom; that it appeared to be reasonably certain from the extent of these ore bodies in said workings and their dip that they continued downward out and beyond where the defendant was working, and could be tapped by a perpendicular shaft if sunk 40 or 50 feet deep from the surface; that the plaintiff intended and proposed to sink such a shaft, and work the said ore bodies below the level on which the defendant was working, and raise the ore through the shaft; that other practical miners secured a lease on the — day of June, 1897, on said mine for the term of one year, sunk a shaft 52 feet deep at the place where the plaintiff intended to sink one, struck the said ore bodies, and mined therefrom 1,150 tons of ore during the term of their lease, with five men working four or five months and six men working the balance of said term. Besides, they took out 65 tons from the level above, or 1215 tons in the aggregate. From the above facts the jury might reasonably have found that there was reasonable probability that the plaintiff could and would have mined from 1,000 to 1,200 tons of ore during the term of his lease if he had been permitted to work as he proposed and intended to do. It appears that the ores of the mine were valuable only for the lead and silver they contained; that 66 per cent was lead, and that there were 12 or 13 ounces of silver per ton of ore; that

on the market price of lead depended mainly the value of the ore; that the plaintiff could have sold all the ore he could have mined in 1896 at the rate of \$3.30 per 100 pounds of lead contained therein. It was agreed between the parties at the trial that when the market price of lead was \$3.30 the ore was worth \$18.34 per ton over and above cost of shipping to market, less the expense of mining and sacking the ore; that it required 14 sacks to sack a ton of ore, and that the sacks cost 7 cents apiece, and miner's wages were \$3 per day. If the lessees in 1897 prosecuted the work every day, the wages of their men would be \$6,030. If it required sufficient sacks to sack all the ore before any shipments were made, their cost would be \$1,190. It appears from the evidence that two men could sack 10 tons per day. Their wages for sacking 1,215 tons would be \$732. These three items of costs of mining and sacking of 1,215 tons are figured at the highest possible costs that could have been incurred according to the evidence. It is not probable that the men worked every day in the year, or that it was necessary to have on hand so great a number of sacks to sack the ore. But, taking these items as the necessary costs of extracting and sacking the 1,215 tons of ore from \$22,283, the gross yield at \$18.34 per ton, and a profit of \$14.331 is shown. We think the evidence would have justified the jury in finding that the plaintiff, as a practical miner of long experience in mining, whose business was that of mining, could, and would probably, have extracted such quantities of ore from said ore bodies during his said term, if the defendant had not excluded him therefrom, and sold the same at such market price then existing, as would have yielded him a net profit even greater than the sum allowed him for damages. The only value a mine has to a lessee thereof is the profits arising from his working the same, and, when he is wrongfully excluded and prevented from such working, his loss consists in the loss of profits that he would have made but for such exclusion. "The adjudged cases very clearly show that in actions to recover for damages resulting from a tort a more liberal rule in favor of the plaintiff prevails than in actions to recover for a loss resulting from a breach of contract. Yet in the latter class of cases the overwhelming weight of authority supports the doctrine that profits, when not entirely speculative, may be taken into account" (*Terre Haute v. Hudnut*, 112 Ind. 555, 13 N. E. 686); and it is only required that they be ascertained with a reasonable degree of certainty (*Chapman v. Kirby*, 49 Ill. 211). "It is not to be forgotten that the law does not require absolute certainty in any case. . . . In civil cases all that is deemed requisite is a fair and reasonable degree of probability. Lord Mansfield says 'that the only degree of certainty attainable in judicial proceedings is a probable one,' and this is the doctrine of logical as well as of law writers. It is, indeed, impossible to secure any higher degree of certainty in human affairs, although there may be degrees

of probability. All that can be required in any case or upon any subject is that the evidence shall tend, with a fair degree of probability, to establish a basis for a relevant inference." *Terre Haute v. Hudnut*, 112 Ind. 557, 13 N. E. 686. "A tenant in common, when ousted by his cotenant, may recover the damages resulting from the ouster, as well as when ousted by an entire stranger to the land." *Carpentier v. Mitchell*, 29 Cal. 330, and cases cited.

The order appealed from is affirmed.

Massey, J., concurs.

Belknap, J., dissenting:

The written instrument which is the basis of this action is as follows:

Know all men by these presents, that Eugene Howell, of the county of White Pine, state of Nevada, the party of the first part, and Frank Paul, of the county and state, the party of the second part, do covenant and agree, and by these presents do covenant and agree, that the said party of the first part hereby leases unto the said party of the second part a one-third interest in and to that certain mine known as and called the "Homestake Mine," situated in Swansea cañon, near Shermantown, White Pine mining district, White Pine county, state of Nevada. This lease to take effect and go into force from this day, and to continue for a period of one year up to and including June 13, 1897. The provisions of this lease to be as follows: The party of the second part hereby agrees to work the said mine in a workmanlike manner, and leave the mine in as good a condition as it is at this time. The said party of the second part agrees to pay over to the said party of the first part, or to the sheriff of White Pine county, or to C. A. Mathewson, of Hamilton, White Pine county, Nevada, as shall be directed by the said party of the first part, royalty from all ores and ores taken out, extracted, and shipped from the said Homestake mine by the said party of the second part or by anyone during the continuance of this lease, as follows: The party of the second part agrees to pay one dollar (\$1.00) per ton net money for all ores shipped and worked from said mine which is at the rate of three dollars (\$3.00) per ton for all ores taken out and shipped under this lease. This royalty to be net over everything, and no expenses of any nature to be deducted from same. Said royalty to be paid upon the first day of every month to the party or parties as hereinbefore named, together with duplicate statements of ores worked by smelters. The said party of the first part empowers the party of the second part to ship all ores that may be out on the dumps and extracted from said Homestake mine at this time, the ores representing the one-third interest as named in this lease, paying the royalty therefor as herein named. All ores to be marked in the name of the Homestake mine. The party of the second part agrees to post a notice upon said mine at once that said mine and

interest will not be responsible for any debts, obligations, expenses, wages, or dues of any nature or character whatsoever during the term of this lease, to read as follows:

Know all men by these presents, that a one-third interest in the Homestake mine has been leased unto Frank Paul, and said mine will not be responsible or said Eugene Howell will not be responsible or holden, or said mine holden, for any debts, obligations, wages of men, expense of mining supplies, or any dues of any nature or character whatsoever during the term of this lease. In witness whereof we have this 13th day of June 1896, set our hands and seals at Carson City, Nevada.

Frank Howell.

[Seal.]

Frank Paul.

[Seal.]

We unite in the above lease, and agree upon and accept its terms and conditions upon the understanding that the royalty or rental mentioned therein shall be paid to C. A. Mathewson, to be by him held in trust and on special deposit, to be paid over when it is determined to whom the same belongs.

Irene M. Robinson.

[Seal.]

Robt. M. Clarke.

[Seal.]

The parties have called it a lease, but the name they have attached to it can make no difference as to its legal effect. Bainbridge, in his work on the Law of Mines and Minerals (page 236), says: "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a *profit à prendre*, and may be held apart from the possession of land. . . . In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring an action of ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license, and, though the grantee of the license will certainly be entitled to search and dig for mines according to the terms of his grant, and appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover." Another distinction is that a lease is a contract for exclusive possession, whereas a license merely gives the licensee the right to use the premises for a specified purpose, the possession remaining in the licensor. "The authorities are agreed that a license to dig and take ore is never exclusive of the licensor, unless expressed in such words as to show that that was the intention of the parties. Where the license simply gives the licensee the right to dig and take ore, the licensor may take ore from the same mine at the same time, and also grant permission to others to exercise the same right." *Sibley*

v. Trotter, 29 N. J. Eq. 233; *Malcomson v. Wappoo Mills*, 85 Fed. Rep. 907.

It will be noticed that under the provisions of the instrument above set forth respondent acquired no estate in the mine, and that his possession was not exclusive. I

conclude, therefore, that the instrument is a license, and that plaintiff acquired no interest thereby except as to ore extracted by him. As to ore not extracted, there was no change of ownership. For these reasons I dissent from the judgment.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Betsey E. FELT, *Appt.*,
v.

Joseph P. FELT, *Respt.*

(.....N. J.....)

*Interstate comity requires that a decree of divorce pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect, within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognises as a sufficient cause for divorce.

(December 22, 1899.)

APP^{EAL} by complainant from a decree of the Court of Chancery denying a divorce. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank L. Holt for appellant.

Mr. W. B. Williams, for respondent:

A judgment of divorce, rendered in another state, where the plaintiff is domiciled, by a court having jurisdiction of the plaintiff and the subject-matter, will be treated as conclusive by the courts of this state, although the defendant, being a resident of this state, was not served and did not appear to the suit in the state where the judgment was rendered, but was personally served with notice of the suit in such manner as to afford such defendant knowledge of its purpose, and reasonable time to defend.

Doughty v. Doughty, 28 N. J. Eq. 581; *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 732; *Ditson v. Ditson*, 4 R. I. 87.

*Headnote by GUMMERE, J.

NOTE.—As to effect of divorce in other state, see also *Cumington v. Belchertown* (Mass.) 4 L. R. A. 181, and *note*; *Thompson v. Thompson* (Ala.) 11 L. R. A. 444, and *note*; *Adams v. Adams* (Mass.) 18 L. R. A. 275; *Kelley v. Kelley* (Mass.) 25 L. R. A. 806; *Bullock v. Bullock* (N. J.) 27 L. R. A. 218; *Hillbush v. Hattel* (Ind.) 47 L. R. A.

The state of the plaintiff's residence has power to change his or her status or legal position in the community as to marriage as well as other relations, by a proceeding in its courts, with such notice to the non-resident party and to the world as is reasonably possible under the circumstances, which notice may be either constructive or actual, that the sister states can and ought to recognize and give effect to such change of status by the exercise of interstate comity, as being in accord with the best interest of the community.

See 2 Bishop. Marr. Sep. & Div. Bk. VIII.; 1 Nelson, Div. & Sep. § 28; 2 Black, Judgm. § 932; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 649; *Ditson v. Ditson*, 4 R. I. 87; *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35, 24 N. W. 579; *Thoms v. King*, 95 Tenn. 60, 31 S. W. 983; *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248; *Loker v. Gerald*, 157 Mass. 42, 16 L. R. A. 497, 31 N. E. 709.

Gummere, J., delivered the opinion of the court:

The appellant, by her bill in this case, seeks a decree of divorce from her husband for adultery, and also for desertion. The respondent has pleaded, in bar of the relief sought, a decree of absolute divorce obtained by him against the appellant in a district court of the territory of Utah. A full recital of the averments of the plea is not necessary. It is sufficient for present purposes to say that the truth of those averments is conceded by the appellant; that from them it appears that the court which rendered the decree pleaded had jurisdiction of the subject-matter of the suit, and of the respondent here, who was the complainant therein, and who at the time of the institution of the suit was a bona fide resident of the territory of Utah; that the domicile of his wife was in this state, and that she was neither served with process within the territory of Utah, nor did she personally submit herself to the jurisdiction of the court, but that jurisdiction was obtained by publication of the process and complaint made in accordance with the statutes of Utah; that.

33 L. R. A. 783; *Dunham v. Dunham* (Ill.) 35 L. R. A. 70; *Atherton v. Atherton* (N. Y.) 40 L. R. A. 291.

As to validity of divorce granted by court of foreign country, see *St. Sure v. Lindsfelt* (Wis.) 19 L. R. A. 518.

in addition, personal service thereof was made upon her, at her residence in New Jersey, a sufficiently long time before the period within which to make answer had expired to afford her an opportunity to defend the suit, if she had desired to do so; and that the decree was granted upon two grounds, *viz.*, cruelty and desertion. What force and effect will be attributed to a decree of divorce rendered in a court of a sister state, where the jurisdiction of the court rests solely upon the domicile of the complainant, and where the defendant, being a nonresident, is brought into court by publication and the service of notice outside the jurisdiction, is a question of first impression in this court. It will not be denied that the preservation of good morals, and a proper regard for social relations, make it desirable that such a decree should be considered valid, not only in the state where it is pronounced, but in every other jurisdiction, provided the grounds upon which it is based are recognized in such jurisdiction as justifying the decree. By it the matrimonial relation of the husband and wife is terminated in the state in which it is rendered. Within the boundaries of that state a marriage afterwards contracted by either of the parties with a third person is entirely valid. So, too, sexual relations between the former husband and wife, within that jurisdiction, subsequent to the entry of the decree, are illicit, unless sanctioned by a new marriage. But, if the decree is without extraterritorial force, the entire status of both parties is reversed as soon as they pass beyond the limits of that state. A subsequent marriage to a third person within that state then becomes void, and the relations of the parties to it become adulterous; while sexual relations between the parties to the decree, which are meretricious if indulged in within that state, become matrimonial again when indulged in without its borders. A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous, as they happen to be within the limits of one state or another, is not to be tolerated any further than is plainly required by public policy.

That the public policy of New Jersey does not require that recognition should be refused to a decree of divorce, rendered by a court of a sister state, because the defendant had her domicile in another state, and was not within the jurisdiction of that court, seems to me plain. State policy, when determined by the legislature, controls the judicial branch of the government; and the legislature of New Jersey, by vesting in our court of chancery sole jurisdiction over the subject of divorce, and then authorizing it to render decrees divorcing, *a vinculo*, resident complainants from nonresident defendants, after obtaining jurisdiction over the latter by publication, and notice served out of the state upon, or mailed to the postoffice address of, the latter, has, as it seems to me, declared what our policy in this regard shall be. That it was intended by the legislature that decrees of divorce so rendered should be valid in every jurisdiction, so far as it had

the power to make them so, goes without saying; and it cannot be conceived that it was intended that we should refuse to accord to the decrees rendered in the courts of our sister states against nonresident defendants, who have not submitted themselves to the jurisdiction of such courts, the efficacy we claim for our own, when liable to the same objection.

As has been heretofore stated, the question before us has never been determined in this court. It, however, received consideration in *Doughty v. Doughty*, 28 N. J. Eq. 581, although the case was decided upon another ground. In that case Beasley, Ch. J., delivering the opinion of the court, says: "A judgment of divorce, resting even on such a contracted foundation as the domicile of one of the parties alone, bears with it, into other jurisdictions, a title to respect, and in some cases a claim to voluntary adoption. In such instances, I regard the question whether the judgment shall be extraterritorially enforced to be one resting entirely on the consideration that, in a matter of unusual interest of this nature, an obligation rests upon every government to carry into effect, as far as is reasonably practicable, and as may be consistent with its own policy, all foreign judgments. But an appeal of this kind to interstate comity should, I think, never prevail, when the judgment sought to be accredited has been rendered in violation of that fundamental axiom of justice before referred to, that the parties, before their rights are adjudged, shall have an opportunity of being heard. A judgment of divorce proceeding from a jurisdiction founded on domicile would not contravene essential rules of natural justice, if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction." There is much contrariety of opinion upon the question in the courts of the various states, but the weight of authority seems to support the view expressed in *Doughty v. Doughty* to this extent, at least: that interstate comity requires that a decree of divorce pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided, that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which

it is sought to be enforced recognizes as a sufficient cause for divorce. That view commends itself to us, and we think that, subject to the limitations mentioned, the courts of New Jersey should, as a matter of interstate comity, recognize as valid a decree of divorce rendered by the court of a sister state against a resident of this state who has not been served with process.

In the case before us, the court pronouncing the decree which has been pleaded in bar of the relief sought by the complainant was a court of the domicile of the present defendant. It had jurisdiction of the subject-matter of the suit. There was a substituted

service of process upon the defendant therein (the present complainant) by publication, in accordance with the provisions of the Utah statute. Actual notice of the pendency of the suit was given to her in time to have enabled her to make defense thereto, if she had desired to do so. There is not even a suggestion that the decree is tainted by fraud, and one of the grounds upon which it rests, namely, desertion, is recognized by the laws of this state as justifying the dissolution of the marriage relation.

The decree appealed from should be affirmed.

OREGON SUPREME COURT.

Amos T. YOUNG *et al.*, *Respts.*,
v.

STATE of Oregon, *Appt.*

(.....Or.....)

1. **Declarations made by a man as to his own history and family relations** are admissible after his death, for the purpose of identifying him, in an action by his relatives against the state to recover the proceeds of his estate, which has been escheated.
2. **The expense, including reasonable counsel fees, of the successful defense by the state of actions for the proceeds of property which has been escheated in proceedings that were regular and in accordance with the statute, may be deducted from the recovery of such proceeds by subsequent claimants under Hill's Anno. Laws, § 8141.**
3. **Failure to set up previous payment or the value of services of special counsel in successfully defending prior actions against the state for the recovery of the proceeds of escheated property will not prevent the deduction thereof from the recovery against the state in a subsequent action therefor, under Hill's Anno. Laws, § 8141, which provides that such recovery shall be "without interest or costs to the state."**

(January 29, 1900.)

APP^{EAL} by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiffs in an action to recover the proceeds of property escheated to the state which formerly belonged to John Fenstermacher, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Russell E. Sewall, Chester V. Dolph, and N. H. Bloomfield, for appellant:

A witness can be heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge, that is, which are derived from his own perception, except in those few express cases in

which his opinion or inferences or the declarations of others are admissible.

1 Hill, Anno. Laws (Or.) § 882.

Evidence may be given on the trial of the following facts:

"§ 4. The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person."

Hill, Anno. Laws (Or.) § 706 (696).

These provisions are substantially a reiteration of the rule at common law.

Greenl. Ev. § 103.

To the admissibility of declarations when offered as authoritative in pedigree, it is essential that they should be made by lawful relatives.

Wharton, Ev. 2d ed. § 202, chap. 55, § 218; Wood, Practice, Ev. ed. 1886, § 98, p. 275; 7 Am. & Eng. Enc. Law, p. 74; *Tyler v. Flanders*, 57 N. H. 618; *Flora v. Anderson*, 75 Fed. Rep. 233; *Fulkerson v. Holmes*, 117 U. S. 397, 29 L. ed. 918, 6 Sup. Ct. Rep. 784; *Blackburn v. Crawford*, 3 Wall. 187, 18 L. ed. 191; *Thompson v. Woolf*, 8 Or. 463; *Wilmington v. Burlington*, 4 Pick. 174; 1 Rice, Ev. ed. 1892, § 220b, p. 416; 1 Taylor, Ev. §§ 576-579, 581; 2 Jones, Ev. §§ 316-322; Abbott, Trial, Ev. pp. 90-92; *Greenfield v. Camden*, 74 Me. 61.

Relationship must be established by other evidence than the declarations themselves, and this is a preliminary question for the judge.

Abbott, Trial, Ev. p. 92.

As evidence of pedigree, the declarations of a deceased person as to place of birth were not admissible by the law of England.

Braintree v. Hingham, 1 Pick. 247.

Hearsay evidence is not admissible to prove the place of a person's birth.

Wilmington v. Burlington, 4 Pick. 176.

Messrs. Killin & Moreland, for respondents:

The declarations offered in evidence are admissible as to decedent's identity and his life, in a proceeding to establish the right of his heirs to his estate.

Every man establishes his identity by his

NOTE.—As to admissibility of hearsay evidence to prove pedigree, see *Eisenlord v. Clum* (N. Y.) 12 L. R. A. 838, and other cases in note thereto; also *Re Pickens* (Pa.) 25 L. R. A. 477.

life and his conversations, his actions and his appearance. From the very necessity of the case such testimony is the very best evidence that can be produced, and is absolutely convincing. The rules of evidence are built up on common sense.

Wharton, Ev. § 278.

Deceased spoke without motive, and his declarations concerning himself are admissible testimony, both as to his pedigree and his identity.

Thompson v. Woolf, 8 Or. 454; 1 Wharton, Ev. § 209; *Shields v. Boucher*, 1 De G. & S. 51; *Hood v. Beauchamp*, 8 Sim. 26, 9 Am. & Eng. Enc. Law, p. 866; *Mullery v. Hamilton*, 71 Ga. 720, 51 Am. Rep. 268; *North Brookfield v. Warren*, 16 Gray, 175; *Nehring v. McMurray* (Tex. Civ. App.) 45 S. W. 1032; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Cuddy v. Brown*, 78 Ill. 418.

The testimony that we have offered is admissible both as to pedigree and identity.

Jackson ex dem. Ross v. Colley, 8 Johns. 129; *State use of Charlotte Hall School v. Greenwell*, 4 Gill & J. 407; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; *Long v. McDow*, 87 Mo. 202; *Kenyon v. Ashbridge*, 35 Pa. 160; *Gould v. Smith*, 35 Me. 513; *Eaton v. Tallmadge*, 24 Wis. 222; *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71; *Winder v. Little*, 1 Yeates, 152; 18 Am. & Eng. Enc. Law, p. 261; *Eisenlord v. Olum*, 126 N. Y. 552, 12 L. R. A. 836, 27 N. E. 1024.

Such testimony has been received always; many estates have been saved to their rightful heirs by such testimony without even an objection. Wherever the question has been raised the courts have held it admissible.

Jackson ex dem. People v. Ets, 5 Cow. 314; *Howard v. Russell*, 75 Tex. 171, 12 S. W. 526; *Doe ex dem. Moffit v. Witherspoon*, 32 N. C. (10 Ired. L.) 185; *Adie v. Com.* 25 Gratt. 712; *Hintze v. Krabbeneschmidt* (Tex. Civ. App.) 44 S. W. 38.

Bean, J., delivered the opinion of the court:

This is an action brought to recover the proceeds of property heretofore escheated to the state. The facts are that about thirty or forty years ago a man calling himself John Fenstermacher settled in Multnomah county, where he continued to reside until his death, in 1887, and in the meantime accumulated considerable property. He seems to have been a retiring, eccentric, and somewhat peculiar man, and, except in a very few instances, was reticent on the subject of his parentage, antecedents, and history. Dying intestate, unmarried, and without known heirs, his property was regularly escheated to the state, in the manner provided by statute (Hill, Anno. Laws, §§ 3136 et seq.) and the proceeds thereof, amounting to \$15,165.62, were paid into the state treasury, to the credit of the escheat fund. Within the time allowed by law (Id. § 3141), this action was brought by the plaintiffs, who claim to be his nephews and half-sisters, to recover the escheated assets. To prove

their heirship, they gave evidence to the effect that in 1826 or 1827 one George Fenstermacher and Elizabeth Newhard were married in Pennsylvania, and as a result of such marriage four children were born to them, to wit, Lavina, Jonas, Amanda, and John; the two latter of whom died at an early age, unmarried. About 1837 or 1838 the father deserted the family, and was never afterwards heard of. Lavina, the eldest daughter, then a girl ten or eleven years of age, went out to work, and was subsequently married to John Young, a stage driver, by whom she had three children, one of whom died in infancy, and the other two are plaintiffs in this action. The mother, Elizabeth, with her two sons, after living among her relatives a short time, went to the Northampton poor house in 1839. From there Jonas was bound out to one David Keller, of Stroudsburg, Pennsylvania, where he remained five or six years. He then went to learn the brick mason's trade with a man by the name of Deal, with whom he remained a short time, and then went away to shift for himself. After remaining at the poor house for a time, his mother married one Osterman, by whom she had three children, who are also plaintiffs in this case. She died July 22, 1889. These facts were proved by persons related to the family, many of whom testified from their own knowledge. The plaintiffs further gave evidence to the effect that in June, 1855, a young man calling himself John Fenstermacher enlisted at Wilkesbarre, Pennsylvania, in Company G., 9th regiment, United States infantry, and afterwards came with his company to this coast. After he enlisted he was arrested, or his arrest attempted, on a warrant under the name of Jonas Fenstermacher; but by some arrangement or management of the captain the officer was not allowed to take him, and he went on with his company. At Ft. Simcoe, about 1858 or 1859, he was accused of desertion, caught, flogged, and dishonorably discharged. The plaintiffs were also permitted, over the defendant's objection and exception, to prove declarations made by the young man, John Fenstermacher, at Wilkesbarre, Pennsylvania, about the time of his enlistment, to his comrades in the army, from 1855 to 1858; and by the deceased, whose property is in controversy, to the citizens of Portland, concerning his past life and history, to the effect, among other things, that he came from Pennsylvania, and his given name was not John, but Jonas; that he changed it to conceal his identity; that his father deserted the family when he was a small boy, and he and his mother went to the poor house; that one Dave Keller took him out and kept him a few years, when he ran away, enlisted in the army, and came with his company to Washington territory; that he deserted, was flogged, and subsequently discharged, and came to Portland; that he had a younger brother, and a sister named Lavina, who married a stage driver named Young. And the only question to be decided is whether such evidence is competent.

It is contended for the defendant that such declarations were not admissible, because there was no evidence given or offered on the trial showing or tending to show that the Fenstermacher who resided near Portland, and whose estate is in controversy, was related to the present plaintiffs, except his own declarations. It is undoubtedly the rule that declarations of a deceased person cannot be admitted to prove the pedigree of other parties unless the relationship of the declarant to such parties is shown by evidence other than his own declarations. *Thompson v. Woolf*, 8 Or. 454. But the declarations of Fenstermacher were not offered or admitted in evidence as proof of pedigree, but for the purpose of identifying him as the Jonas Fenstermacher who was born and formerly lived in Pennsylvania, and who is shown by the testimony to have been a relative of the present plaintiffs in this action. Upon this question it is said in the American & English Encyclopedia of Law (vol. 9, p. 866) that the "identity of person may be proved by the concurrence of several characteristics. In a question of identity, it is admissible to show the name a person bore, his personal appearance and conversations, and the account he gave of himself, his family connections, and associations." This statement of the law is fully supported by the case cited (*Mullery v. Hamilton*, 71 Ga. 720, 51 Am. Rep. 288), and also by *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381. The facts in the latter case are quite similar to those now under consideration. A man calling himself Charles Wise lived in Holmes county, Mississippi, continuously for many years; and dying intestate, unmarried, and without known heirs, his property was by regular proceedings escheated to the state. Within the time limited by the statute, an action was brought for the recovery of the property by parties claiming to be heirs at law of the decedent. In support of their contention they proved that they were the children of Thomas Wise, formerly a resident of a place known as "Hell's Corner," in Virginia; that nearly fifty years before their father had a younger brother, named Charles, who, having seduced a young lady of respectable family, fled the country to escape the consequences of his act, and announced at the time, to an intimate friend, that he expected to go to Mississippi, and should take care that no one in Virginia should ever discover the place of his future home. From that time forth, until within a short time before the bringing of the action, nothing was ever heard in Virginia of the subsequent career of Charles Wise. Having made this character of proof the plaintiffs proposed to prove by two witnesses that the man known in Holmes county as Charles Wise, and whose estate was in litigation, told them that he came from a place in Virginia known as "Hell's Corner," that he had there a brother named Thomas, and that he had left there because of some trouble about a woman. This testimony was excluded by the trial court, but upon an appeal the supreme

47 L. R. A.

court, after an examination of the question, held the evidence competent, and, speaking through Mr. Justice Chalmers, said: "Independently of these or of any authorities, we think, *ex necessitate rei*, and as a matter of common sense, that declarations such as were offered here, and under the circumstances here existing, should always be received in evidence. They stand to some extent upon the footing of declarations against interest, or of what Mr. Wharton calls 'self-disserving declarations.' If they be not admitted, there must be in many cases a failure of justice. No man who knew Charles Wise in Virginia ever saw him here, and no man who knew him here ever saw him in Virginia; and, if we reject his own statements as to who he was and whence he came, these inquiries must remain forever unanswered. If such be the rule of law, it must be impossible legally to establish the identity of very many travelers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they were." In *Mullery v. Hamilton*, 71 Ga. 720, 51 Am. Rep. 288, a legacy had been left to a certain child; and the question was whether he survived the testatrix, and whether a certain person who did survive her and claimed to be the legatee was such in fact. On the question of identity it was held admissible to show the name such person bore, his personal appearance and conversation, and the account he gave of himself, his family connections, and associations. The doctrine of this case is approved by the civil court of appeals of Texas in *Nehring v. McMurray*, 45 S. W. 1032; and, although the opinion in the *Nehring Case* was subsequently modified (Tex. Civ. App.; 46 S. W. 389) because it appeared that the person who made the declarations was living at the time of the trial, the general doctrine does not seem to have been disturbed. In *Cuddy v. Brown*, 78 Ill. 415, and *Adie v. Com.* 25 Gratt. 712, evidence of this character seems to have been admitted without objection. And in *Thompson v. Woolf*, 8 Or. 454, it was said by this court that such evidence would have been competent if it had been offered on the trial. From these authorities,—and they are the only ones directly in point to which our attention has been called, or which we have been able to find,—we conclude that there was no error in admitting the testimony referred to. As having more or less bearing upon the general question, reference, however, is made to Hubback, Evidence of Succession, 457; Wharton, Ev. § 208; Gillett, Indirect & Collateral Ev. § 143; *Jackson ex dem. People v. Ets*, 5 Cow. 314; *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, and 29 S. W. 760; *North Brookfield v. Warren*, 16 Gray, 171; *Hintze v. Krabbeneschmidt* (Tex. Civ. App.) 44 S. W. 38; *Brown v. Brown* (Tex. Civ. App.) 36 S. W. 918.

It is held in *Fenstermacher v. State*, 19 Or. 608, 25 Pac. 142, that a proceeding of this kind is an action at law, and therefore the

findings of the trial court upon controverted facts are not open to review here. The court below found that the plaintiffs were the heirs at law of the deceased, and entitled to recover, and such finding is conclusive upon this appeal.

The only remaining question is the amount to which the plaintiffs are entitled. The evidence shows the original amount of the escheated assets to have been \$15,165.62, but that the state has paid out \$1,995.05 for costs and expenses necessarily incurred in successfully defending two certain actions brought to recover the fund by parties claiming to be entitled thereto; and the court below found that \$1,000 is a reasonable compensation for special counsel employed by the governor to defend this action, and held that the state was entitled to retain from the escheated assets the amount of money so paid out, and such counsel fees, and entered judgment in favor of plaintiffs for the remainder. From this judgment the plaintiffs prosecute an appeal, but, in our opinion, it must be affirmed. The proceedings for the escheat of Fenstermacher's property having been in all things regular and in accordance with the statute, the judgment therein is conclusive, and vested the title to the property in the state, save and except as the rights of subsequent claimants are preserved by § 3141. 11 Am. & Eng. Enc. Law, 2d ed. p. 328; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585. That section provides, in substance, that, within ten years after a judgment in an escheat proceeding, a person not a party or privy thereto may file a petition in the circuit court of the county, where the information was filed, showing his claim or right to the property or proceeds thereof, a copy of which must be served upon the district attorney, who must answer the same; and the court is thereupon required to try the issue as in a civil action, and, if it is determined that such person is entitled to the property or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or, if sold, and the proceeds paid into the state

treasury, then it must order the secretary of state to draw his warrant on the state treasurer for the payment of the same, "but without interest or costs to the state." It is by virtue of this statute only that the plaintiffs have any standing in court, and they are entitled to just what the statute allows them, and no more; and that is a right to the fund, "but without interest or costs to the state," which plainly contemplates that it shall be paid to them, less such costs and expenses as the state may have incurred on account thereof. It seems to be the primary idea of the statute that the state shall incur no costs or expenses on account of escheated assets or funds. Section 3140 provides that the court before whom escheat proceedings are conducted shall allow to the district attorney a reasonable fee for conducting the same, not exceeding 10 per cent, which shall be paid out of the fund itself; and § 3144, that the fees of special counsel employed by the governor shall be paid out of the proceeds arising from the proceedings. In our opinion, therefore, the plaintiffs in this case are entitled to the fund paid into the state treasury, less the costs and expenses incurred by the state in preserving and defending it. The reasonableness of such costs, expenses, and attorney's fees is not challenged; nor is there any question as to the necessity for incurring them. It is claimed, however, that because the answer to this proceeding does not set up or allege the previous payment, nor the value, of the services of special counsel, it ought not to be allowed; but proceedings of this character are statutory, and the strict rules of pleading in ordinary actions do not apply. The direction of the statute that the money shall be paid over to the claimant, "without interest or costs to the state," is the measure of the court's authority in the premises, and must be observed, although the answer to the petition may be in some respects informal or defective.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

MISSOURI SUPREME COURT.

STATE of Missouri upon Information of E. C. CROW, Attorney General,
v.

Siegmund L. KRAMER.

(150 Mo. 89.)

The power to decide between candidates for justice of the peace who

have an equal number of votes, which Rev. Stat. 1889, § 6099, attempts to give to county courts, is denied by the Missouri Constitution, which provides for the election of justices of the peace, without making any provision, or authorizing the general assembly to make any provision, for deciding in case of a tie, while it does make such provision in respect to other officers.

(May 30, 1892.)

NOTE.—Decision of the vote at election.

I. In the absence of statutory provisions.

II. Statutory provisions applicable to the vote.

a. General statement as to.

b. Decision by lot.

1. Constitutionality and construction.

2. Effect of, on contest and right to contest.

II.—continued.

c. Casting vote by presiding officer.

d. Appointment or election on failure to elect or to fill vacancy.

III. Summary.

I. In the absence of statutory provisions.

In the absence of statutory provision on the subject, in case of a tie vote there is no elec-

QUO WARRANTO proceeding certified to the Supreme Court by the St. Louis Court of Appeals, which was brought for the purpose of determining the right of respondent to the office of justice of the peace for the Fourth District of the City of St. Louis. *Judgment of ouster.*

Statement by **Marshall, J.:**

This is a proceeding by quo warranto instituted in the St. Louis court of appeals by the attorney general, in his official capacity, to oust respondent from the office of justice of the peace for the fourth district of the city of St. Louis. The return of the respondent shows that at the general election in November, 1898, respondent and James Griffen were the only candidates for said office, and that the election resulted in a tie vote, each receiving 3,766 votes; that the board of election commissioners certified this result to the circuit court, which in turn certified it to the mayor of that city, who commissioned respondent to said office. The power of the mayor is alleged to be complete, under §§ 6099, 6092, Rev. Stat. 1889. The relator demurred to the return. The St. Louis court of appeals held that there is a constitutional question involved in the case, and hence certified the case to this court.

Messrs. E. C. Crow, Attorney General, R. T. Brownrigg, and Jesse A. McDonald for relator.

Messrs. Fisse & Kortjohn, for respondent:

The plain effect of the statute is to transfer to the mayor of the city of St. Louis a

jurisdiction elsewhere in this state and formerly within this territory exercised by the county court.

The power of the legislature to thus put upon the mayor of the city the duty to perform all that is, in § 6099, Rev. Stat. 1899, required of the county court will not be disputed.

The power given to a political officer or body of political officers to decide the election is not inimical to any provision of the Constitution.

Lewis v. State ex rel. Mayo, 12 Mo. 128.

The duty to be performed in the exercise of the authority conferred by law upon the county court "to decide" an election is not a judicial duty, but an executive or ministerial function,—merely a power to determine, i. e., end, a tie by giving a casting vote. There is therefore no impropriety in the statute that transfers this duty to an executive officer because of the abolition of the body to whom this power was formerly given.

Marshall, J., delivered the opinion of the court:

Respondent bases his right and title to the office in question upon the commission issued to him by the mayor of St. Louis, and claims that the mayor had full power to do so, under §§ 6099, 6092, Rev. Stat. 1889, and that § 6099 is a constitutional enactment, as interpreted by this court in the case of *Lewis v. State ex rel. Mayo*, 12 Mo. 128.

The Constitution (§ 37, art. 6) provides: "In each county there shall be appointed or elected as many justices of the peace as the

tion, and without such authority neither election officers nor candidates have the power to determine the result by lot. *Beck v. Wayne County Election Comrs.* 103 Mich. 192, 61 N. W. 346; *State v. Adams*, 2 Stew. (Ala.) 231; *State ex rel. Heath v. Kraft*, 18 Or. 550, 23 Pac. 663; *Reed v. Cosden* (Md.) 1 Clarke & H. Cong. Elect. Cas. 353; *Tulee v. Mallory*, 2 Cong. Elect. Cas. 608, *Senate Elec. Cas.* 146.

And no certificate of election should be given in such a case to anyone. *Reed v. Cosden* (Md.) 1 Clarke & H. Cong. Elect. Cas. 353, 384.

And the power to give a deciding vote, if not expressly given, cannot be allowed by implication. *State v. Adams*, 2 Stew. (Ala.) 231.

Thus, where in a caucus each of two candidates for delegate to a political convention received six votes, which was the highest number cast for any one candidate, and a bystander drew from his pocket a handful of coins and the two candidates made their choice of odd or even, the one in whose favor the victory resulted on a count of the coins was not entitled to a seat as delegate. *Beck v. Wayne County Election Comrs.* 103 Mich. 192, 61 N. W. 346.

And a decision of an election for the office of town marshal of a town in which two candidates had received a tie vote, made by the board of examiners by casting lots, would be illegal and void where the special act under which the election was held neither required nor authorized them to do more than to examine the polls and report the legal votes cast for each of the candidates; and where such a tie exists the board cannot be compelled by mandamus to decide it by casting lots. *Hammock v. Barnes*, 4 Bush, 390.

So, where an election for justice of the peace held in 1898 resulted in a tie it was a nullity, 47 L. R. A.

the statute providing for a decision in case of a tie being unconstitutional, and under Mo. act 1891, p. 175, providing that in certain cities the election for justice of the peace shall be held in 1894 and every four years thereafter, no other election can be held for that office until 1892, and the term of the justice previous in office continues until that time. *State ex rel. Crow v. Smith* (Mo.) 54 S. W. 222.

And in an election contest in which it was found that there was a tie vote and the judgment neither confirmed nor annulled the election, neither of the parties can recover costs. *Soto v. Vannoy*, 65 Cal. 285, 3 Pac. 895.

So, in a deliberative body of a limited number of members four ballots are not sufficient to elect a candidate where eight members were present, though one of the other four votes was a blank, but this was put upon the ground, not that it was a tie vote, but that the four votes did not represent a majority of the members present and voting. *Lawrence v. Ingersoll*, 83 Tenn. 52, 6 L. R. A. 308, 12 S. W. 422.

But if illegal votes were cast on either or both sides the election is not vitiated by a tie vote. *State ex rel. Heath v. Kraft*, 18 Or. 550, 23 Pac. 663.

And where at a convention an attempt was made to elect a temporary chairman, which resulted in a tie, and pending the balloting the question was raised as to whether two of those present and voting were entitled to vote, it was proper to refer the solution of the question to a committee appointed for that purpose, where such reference was made in good faith. *Beck v. Wayne County Election Comrs.* 103 Mich. 192, 61 N. W. 346.

And the People may prove in a proceeding in the nature of a quo warranto against a person

public good may require, whose powers, duties, and duration in office shall be regulated by law." The Constitution makes no provision for determining the election in case of a tie vote for justice of the peace, but the general assembly has enacted § 6099, Rev. Stat. 1889, which is as follows: "Whenever two or more persons shall have an equal number of votes for justices of the peace for any township, or there is a contested election, the county court shall decide the same." The general assembly, by § 6092, Rev. Stat. 1889, divided the city of St. Louis into fourteen districts for the election of justices of the peace, and provided: "And all powers and duties now conferred by law on the county court and county clerk, respectively, relating to justices of the peace, shall, in the city of St. Louis, be vested in the mayor and city register," etc.; and it is claimed that as the power to "decide" in case of a tie between two candidates for justice of the peace is vested in the county court, by § 6099, and as the powers and duties of the county courts relating to justices of the peace are, in St. Louis, vested in the mayor, by § 6092, the mayor had full authority to decide the tie by appointing respondent, and that § 6099 has been held to be a constitutional enactment, in the *Lewis Case*, cited.

Similar questions have arisen in other jurisdictions, to which reference is here made, to throw light upon the constitutional and statutory provisions in our state hereinafter discussed.

In Indiana the Constitution provides that all elections shall be by ballot. Const. art.

2, § 13. The statutes (Rev. Stat. 1881, § 4736), provide that in case of a tie the judges of election shall "determine by lot the person entitled to the office." This statutory provision has been held constitutional, and not violative of the provision of the Constitution requiring all elections to be by ballot. *Johnson v. State ex rel. Sefton*, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422; *Wills v. State ex rel. Hughes*, 128 Ind. 359, 27 N. E. 423; *Kimmerer v. State ex rel. Black*, 129 Ind. 589, 29 N. E. 178. Consult also *State ex rel. Clifford v. McMullen*, 46 Ind. 307.

In Oregon the statute provides that, in case of a tie, it shall be settled by lot. In *Dunham v. Hyde*, 30 Or. 385, 48 Pac. 422, it was held that a town recorder had no power under this statute to have a tie between two candidates for town marshal settled by lot, but the constitutionality of the statute was not discussed or decided.

In New Jersey the statute (Revision, p. 1201, § 45) provides that in case of a tie for a municipal office the town committee shall "elect between those having an equal number of votes unless they deem a special town meeting for those purposes advisable, and in that case they shall have power to call such special town meeting," etc. In *State ex rel. Brown v. Boden*, 51 N. J. L. 114, 16 Atl. 58, it was held that, after the town committee had ordered a special election, it could not reconsider its action and settle the tie by electing one of those having an equal number of votes. The constitutionality of the statute was not passed upon.

In *State ex rel. Mahoney v. McKinnon*, 8

appointed supervisor by a justice of the peace of a town on the supposition that there had been a failure to elect at the preceding town meeting, at which it appeared a tie vote had resulted between the two candidates, that a vote had been given intended for the relator in which only the initial letters of his name were inserted, which was rejected, but which if allowed would have elected him. *People ex rel. Eastman v. Seaman*, 5 Denio. 409.

So, in *Trueheart v. Addicks*, 2 Tex. 217, it was conceded that if an election results in a tie between the opposing candidates, there is no election; but the question in the case was as to the powers and duties of certain officers in counting votes.

And in *State ex rel. Rosenheim v. Hoyt*, 2 Or. 248, it was held that an election for city marshal, held by the city council under a charter provision requiring five votes to elect, at which a member of the council received five votes one of which he cast himself, would be a nullity, and would not prevent the previous incumbent from holding over where there was a valid and binding rule that a councilman should not vote in a matter in which he was immediately interested, as without his own vote the councilman would not have a majority; but it is to be noted that nothing was said about a tie vote in the above case further than appears inferentially from the facts above stated.

It will be seen from the above cases that, in the absence of statutory provision on the subject, a tie vote does not amount to an election; but creates a vacancy, as there is no election, therefore there would be nothing to decide or to consider on the question of decision of the votes since it is the universal rule that vacancies are to be filled by independent ap-

pointment or by a new election. But as one of the tie candidates might be again selected, which would in effect amount to a decision between them, the few cases on the question of filling vacancies arising from tie votes are here included. The general question of appointments and elections to fill vacancies, however, is not here touched, though the general rules might apply in cases of tie votes.

Thus, where there is a tie vote at a proper and regular meeting of electors, and the meeting breaks up without a further vote, there is a failure to choose which will authorize an appointment under a statute giving a designated officer power to fill the office by appointment in case of a failure of the electors to make a choice. *People ex rel. Eastman v. Seaman*, 5 Denio. 409.

And an election for sheriff resulting in a tie vote creates a vacancy in the office which may be filled by executive appointment until the next general election, under a constitutional provision that should any vacancy occur subsequent to an election it shall be filled by the governor as in other cases. *State v. Adams*, 2 Stew. (Ala.) 231.

But where the presiding officers at an election declare that there was a tie vote between two candidates for supervisor, and the place is filled by appointment by justices under a statute authorizing such appointment in case of failure to elect if in point of fact the declaration was false, the appointment would be without jurisdiction and invalid. *People ex rel. Eastman v. Seaman*, 5 Denio. 109.

And the determination of the officers of a town meeting that a vote for supervisor was a tie, and an appointment pursuant thereto made by justices, may be drawn in question on the

Or. 493, it was held that in case of a tie neither candidate is elected, and neither can enter into office until the tie is settled by lot as the statute provides; but, although the Constitution of that state (§ 16, art. 2) provides that in all elections the person receiving the highest number of votes shall be declared elected, the constitutionality of the statute was not called in question or decided.

In *Webster v. Gilmore*, 91 Ill. 324, it appeared that the parties litigant had received an equal number of votes for the office of supervisor of the town and that "lots were thereupon drawn, and Gilmore drew the successful lot." Webster contested the election, but no question as to the constitutionality of the statute was raised or decided.

The statute of Michigan (Comp. Laws 1871, § 136) provides that in case of a tie "such persons shall draw lots for election to such office," etc. In *People ex rel. Keeler v. Robertson*, 27 Mich. 116, it was held that such settling of a tie did not preclude an inquiry by the attorney general, on the relation of the losing party in the drawing, into the legality of votes cast at the election. The constitutionality of the statute was not passed upon, although § 3 of article 10 of the Constitution, which requires a register of deeds (the office in question in that case) to be chosen by the electors, is quoted, and the words "chosen" and "electors" are emphasized and italicized. In *People ex rel. Evans v. Sutherland*, 41 Mich. 177, 1 N. W. 927, it appeared that there had been a tie, which had been settled by the parties drawing lots,

trial of an information in the nature of a quo warranto against the incumbent, by showing that a choice had actually been made at the town meeting. *Ibid.*

And the court on such an information against a person appointed to office after an alleged failure to elect, because of a tie vote, can look behind the certificate to see whether the canvass of the presiding officer at the election was correct, and whether or not they determined correctly that two of the candidates had an equal number of votes so as to give the justice jurisdiction to appoint. *Ibid.*

And a subsequent election for an office held in consequence of a declaration by the canvassers that there had been a tie vote is not a bar to a recovery of the office by a proceeding in the nature of a quo warranto by a person in fact elected thereto at the former election. *State, ex rel. Lillenthal v. Herndon*, 23 Fla. 287, 2 So. 4.

So, in *Shaw v. Buckminster, L. & R.* 221, it was held that if an election for member of the house of representatives be reported as resulting in a tie vote, and a second election is held as provided by the state Constitution, the house of representatives will, upon petition, inquire into the first election, and upon proof that at such election the petitioner received a plurality of the votes, the second election will be declared invalid and the seat given to the petitioner.

But in *Citizens v. Sergeant*, 1 Clarke & H. Cong. Elect. Cas. 516, where two candidates for the house of representatives of the United States received the same number of votes, and they waived their respective claims to the seat, and the governor ordered a special election, the House subsequently declined to entertain a contest for the seat under the first election on behalf of L. R. A.

but the constitutionality of the statute was not discussed or decided.

In Kentucky the statute requires the examining boards, in state, district, and county elections, to cast lots in case of a tie vote. In *Hammock v. Barnes*, 4 Bush, 390, this statute was held not to be applicable to ties in municipal elections. The constitutionality of the statute was not decided.

In *State v. Adams*, 2 Stew. (Ala.) 231, it appeared that the election for sheriff had resulted in a tie, and that the sheriff, as the supervisor of election, had cast the deciding vote. The court discussed the effect of a constitutional provision which would deprive the sheriff of his right to vote except in case of a tie, although there was in fact no such provision of the Constitution pointed out in the case, but held that there was no authority under the statute for the sheriff to break the tie by casting the deciding vote, and that in case of a tie no one was elected, and that a vacancy existed, which the governor had properly filled by appointment.

In *Erdman v. Barrett*, 89 Pa. 320, it appeared that Erdman and Folwell received an equal number of votes for the office of prothonotary. Barrett, the hold-over incumbent, claimed that, as the election resulted in a tie, he was entitled to hold over until the next election. Erdman instituted a proceeding against Barrett to test his right to hold the office. The court dismissed the proceeding, holding that in case of a tie either party might contest with the other the election, but that the incumbent (not being a party

half of the candidate who was unsuccessful at the second election.

No ratification of an election of an officer by a select body consisting of a definite number of voters on a vote which was a tie and did not in fact constitute an election can be made except by another ballot, where the board had no power to elect except by ballot. *Lawrence v. Ingersoll*, 88 Tenn. 52, 6 L. R. A. 308, 12 S. W. 422.

II. Statutory provisions applicable to tie vote.

a. General statement as to.

Different provisions have been adopted in different states for the purpose of obviating the inconvenience of a tie vote. The theory of many of these provisions seems to be that where the public preference is divided the public interest would be subserved by a determination by chance, and a number of the statutes provide for a decision between the tie candidates by drawing lots. The general rules of deliberative bodies consisting of a limited number of members giving the presiding officers a casting vote are usually applied to tie votes at elections in such bodies. A few provisions exist for the determination of a tie by appointment, and, in the absence of special provisions for the decision of a tie, general provisions authorizing the filling of vacancies by appointment are applied.

b. Decision by lot.

1. Constitutionality and construction.

The statutes of quite a number of the states have provided substantially that in case of a tie vote for designated officers it shall be determined by lot which candidate shall hold the

to the tie) was not a necessary or proper party to such a proceeding, and his right to the office could not be questioned by either party to the tie. This was all that was decided in that case.

In *Patterson v. People ex rel. Allen*, 65 Ill. App., loc. cit. 655, it was decided that, "in case of a tie in the election of any city officer, it should be determined by lot which candidate shall hold the office. Section 58, chap. 24, p. 254, Hurd's Rev. Stat. 284." The constitutionality of the statute was not decided.

In the contested election case of *Reed v. Cosden*, 1 Clarke & H. Cong. Elect. Cas. 384, it appeared that the parties had received an equal number of votes as representative in Congress from the state of Maryland, and that the governor and council, acting under a law of the state of Maryland, "proceeded to decide between them which should be the representative," and accordingly issued a certificate of election to Cosden. The constitutionality of the state statute was challenged. The Constitution of Maryland directed that all elections should be by ballot. The committee of elections of the House of Representatives of the seventeenth Congress, which was composed of Messrs. Sloane, of Ohio, Edwards, of North Carolina, Tucker, of South Carolina, Moore, of Virginia, Walworth, of New York, Rodgers, of Pennsylvania, and Smith, of Kentucky, after referring to article 1, § 2, of the Constitution of the United States, which provides that the House of Representatives shall be composed

of members chosen every second year by the people of the several states, and to § 5 of article 1, which makes each house the judge of the election of its own members, said: "On the first Monday of October, 1820, in conformity with the law of Maryland, an election was held by the qualified electors of the sixth congressional district. On that day they either did or did not elect a member of Congress. None could be elected unless he received a greater number of votes than were given for any other candidate. The term 'election' must mean the act of choosing, performed by the qualified electors, in conformity with the requirements of the Constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors on the day appointed shall fail to make a choice, it is confidently believed that no other authority of the state can at any other time make good this defect. Let it be supposed that the electors should fail to attend an election; that, consequently, no election is held; would it then be contended that the executive authority could, by lot or otherwise, appoint a representative for such district in the Congress of the United States? This is a power which, it is presumed, none will contend does exist. Yet it is believed to be nothing more than that which has been exercised by the governor and council of Maryland in the case under consideration. In this case the electors assemble, they proceed to elect, they make no choice, they come to no constitutional result. It is asked, What is the difference between the

office, the different statutes differing only with reference to the officers to which they apply and to the formal methods used in drawing the lot. These statutes have, as a general rule, subject to some exceptions, been upheld either under direct objection as to constitutionality or by their enforcement; but as they have been construed with a different degree of liberality in different states the cases on the subject have been arranged according to states so as to show the construction adopted by each state.

Thus, Ind. Rev. Stat. 1881, § 4736, providing that if two or more have the highest and an equal number of votes for the same office, the judges of election shall, when the result is certified, determine by lot the persons entitled to the office, and that the next day the inspector shall make out and deliver to the person elected when demanded a certificate for each person elected to any office in the township except justices of the peace, is not in conflict with a constitutional provision that all elections shall be by ballot. *Johnston v. State ex rel. Sefton*, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422.

And while a statute could not be upheld which assumed to destroy the right of the inhabitants of a township to elect their trustee, where a full opportunity is given them to make a choice and they equally divide their votes, it is within the power of the general assembly to make provision for determining the result of the tie, under a constitutional provision that the county and township officers shall be elected or appointed in such manner as may be prescribed by law. *Ibid.*

Where, as in Indiana, the practice of determining a tie vote by lot prevailed before the adoption of the Constitution, the framers of the Constitution, if there is nothing expressed to the contrary, may well be deemed to have had 47 L. R. A.

such usage in view, and to have intended that it should be resorted to in cases under it where an election should result in a tie. *Ibid.*

And a tie vote for two candidates for township trustee, and the neglect and refusal of one of the candidates, who was the present incumbent, to discharge the duty required of him by law to decide by lot in case of a tie, do not create a vacancy in the office which the county auditor is authorized to fill by appointment. *State ex rel. Clifford v. McMullen*, 46 Ind. 307.

But a finding in an election contest in which it was alleged that 8 of the 122 votes cast for the leading candidate were illegal, and that the other candidate received 119 votes, and that 11 legal votes cast for him were rejected, that there was a tie vote, and that the leading candidate was not elected, and an adjudication to that effect canceling the election and certificate and ordering a transcript of the proceeding to be certified to the mayor and common council of the city, is proper, where no attempt was made to procure the decision of the question by lot, as the other candidate not having received the highest number of votes cast was not entitled to the office. *Gimbel v. Green*, 134 Ind. 628, 33 N. E. 904.

The election officers may be compelled by mandamus to perform the statutory duty of determining by lot the person entitled to an office in case of a tie vote, and they cannot by an adjournment evade the performance of such duty. *Johnston v. State ex rel. Sefton*, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422.

And where each of two candidates for township trustee receives an equal number of votes, the election board may be compelled by mandate to reassemble and determine by lot which of the rival candidates shall be entitled to the office. *Kimerer v. State ex rel. Black*, 129 Ind.

two cases? The one would be an appointment, because no election had been held; the other, because no choice had been made. The committee, being of opinion that the power thus virtually exercised by the governor and council of Maryland, in appointing a representative to the Congress of the United States, being contrary to the express provision of the Constitution, and one which this house cannot sanction, have no hesitation in rejecting the official statement of the proceedings in the case as evidence of the right of the sitting member to a seat in this house."

It will thus be observed that, outside of Missouri, in every state where there is a statutory provision as to a tie, except Maryland, the statute prescribes that the tie shall be decided by drawing lots, which is done either by the candidates themselves or by the election officers; that in Indiana alone has such a statute been expressly held to be constitutional and not to conflict with the provision of the organic law which requires all elections to be by ballots cast by the electors, and that the Maryland statute which authorized the governor and council to "decide" where there is a tie, without saying how that decision is to be made,—whether by lot or otherwise,—is unconstitutional, whether it be made by lot or otherwise, because the people must elect, and no one is elected who does not receive "a greater number of votes than were given for any other

candidate;" and that an election which results in a tie is a no better constitutional result than a failure to hold any election at all.

In the case at bar it appears that the mayor of St. Louis based his action upon the decision of this court in the case of *Leavis v. State ex rel. Mayo*, 12 Mo. 128, and in so doing he acted properly and in obedience to the laws of this state, as declared by the highest court in the state, and his act is therefore to be commended, whatever the result in this case may be, for this court alone has power over that decision,—it is binding upon every other court, officer, and citizen, so long as it stands. We come, therefore, to the question whether, in the light of the Constitution, and of precedent and of reason, the decision in that case was a proper conclusion at the time it was rendered, and whether it ought to be adhered to under the Constitution as it now is. The office in controversy in that case was clerk of the county court of Platte county. The election resulted in a tie. Section 8, chap. 25, p. 201, Rev. Stat. 1845, provided: "Elections for clerks shall be conducted as other elections are, but the returns of all elections shall be made to the presiding judge of the county court; and if there be a tie or contested election, it shall be determined by the court to which the office belongs." Section 3 of article 2 of the constitutional amendments of 1834 provided "that the offi-

359. 29 N. E. 178: *Wills v. State ex rel. Hughes*, 128 Ind. 359, 27 N. E. 423.

And as public policy requires that the title and right to public office shall be settled speedily, a mandate to compel the election board to meet and determine by lot which of two persons receiving a tie vote is entitled to the office, fixing a particular time when the board shall reassemble and proceed to cast lots, is not subject to objection that it fixed the time for casting the lot, when no objection was made to the time fixed on the ground that it was unreasonable. *Kimerer v. State ex rel. Black*, 129 Ind. 589, 29 N. E. 178.

And where, after an election board has declared a vote a tie, and failed to determine by lot the person entitled to the office pursuant to Ind. Rev. Stat. 1881, § 4736, one of the judges of election moves from the state, the court should direct the inspector of election, whose duty it is to fill vacancies in the election board, to make the selection of a judge of the same political faith as the one who has removed, to act in his place, and they should then proceed to cast lots to determine who is entitled to the office. *Ibid.*

And one who contests the election of a councilman, and procures the rejection of a number of votes cast for the leading candidate so as to produce a tie, and an adjudication cancelling the election and certificate and a return of the transcript of the proceedings to the mayor and common council, is entitled to all costs of the case; and where the leading candidate is taxed with the costs made by him only, judgment will be reversed for error of the circuit court in overruling the contestant's motion to modify the judgment by giving him all the costs. *Gimbel v. Green*, 134 Ind. 628, 33 N. E. 964.

But the fact that the court only taxed the leading candidate with costs made by him, instead of all the costs in the case, is a matter of which he cannot complain. *Ibid.*

So, in Michigan the fact that a statute re-
47 L. R. A.

quiring the sheriff to conduct a drawing in case of a tie vote does not provide in terms that the duty may be performed through a general deputy does not authorize an inference that it cannot be performed in that way, but as the public interests are at stake, and a speedy determination of the question is of importance, it will be deemed to have been contemplated by the legislature that the sheriff might act by deputy in such case when unable to be present personally. *People ex rel. Evans v. Sutherland*, 41 Mich. 177, 1 N. W. 927.

And Mich. Comp. Laws 1871, § 136, providing for drawing lots by competitors for office in case of a tie vote, and declaring that whenever in elections of members of the state legislature or county officers it shall appear on the legal canvass of the votes that two or more persons have received an equal number of votes, and that a failure to elect to any office is caused thereby, such persons shall draw lots for the election to such office, is not a regulation and declaration that in case of a tie the office shall be deemed vacant under the power granted to the legislature by Mich. Const. art. 3, § 37, to declare and fill vacancies, as it applies to cases where no vacancies in fact exist, and the power to decide by lot is given subject to an express qualification excluding its exercise in cases where the Constitution makes provision for filling vacancies, and therefore does not apply to the case of registrars of deeds, provision for filling vacancies in such office being made by Mich. Const. art. 10, § 3. *People ex rel. Keeler v. Robertson*, 27 Mich. 110.

So, the act of the general assembly of Alabama, declaring that no sheriff shall vote at an election except in case of a tie, is not an unconstitutional deprivation of his right to vote under U. S. Const. art. 3, § 5, declaring that every white male person of the age of twenty-one years or upward, who shall be a citizen of the United States and shall have resided in the state one year next preceding an election, and

ces of the clerks of the several courts within this state shall be vacated on the first day of January, one thousand eight hundred and thirty-six; and the clerks of the circuit and county courts of the respective counties shall be elected by the qualified electors of their respective counties," etc. The Constitution made no provision for determining a tie as to such clerks, and did not authorize the general assembly to make any provision in this respect. Previous to the adoption of the constitutional provision the clerks of the county courts were appointed by the court. In the *Lewis Case*, 12 Mo. 128, it was reasoned that as the Constitution provided that sheriffs and coroners should be elected by the qualified voters of their counties, and as § 25, art. 4, of the Constitution, provided that "in all elections of sheriff and coroner, when two or more persons have an equal number of votes, and a higher number than any other person, the circuit courts of the counties respectively, shall give the casting vote," etc., therefore the statutes quoted, which gave the county courts the power, in case of a tie, to "determine" "to which the office belongs," was a constitutional enactment. No attention was paid to the fact that, as to sheriffs and coroners, the Constitution itself expressly gave the circuit court the power to "give the casting vote," while, as to a tie for clerk, no such power was given to anybody by the Constitution, but that in-

strument simply provided that the clerks must be elected by the qualified electors; but notwithstanding that the power was expressly conferred in the one case, and not conferred at all, but, on the contrary, excluded by implication, in the other, the conclusion is drawn in that case that the statute is constitutional. No attention is further paid in that case to the fact that, as to sheriffs and coroners, the Constitution expressly gives the circuit court the power to give the "casting vote," while as to county clerks the county court is authorized to "determine" "to which the office belongs." In the former the circuit court is given the power to break the tie by giving the casting vote, while in the latter the county court is required to "determine" "to which the office belongs." The circuit court could break the tie by casting the vote for the one it preferred, but it is not conceivable upon what legal principles the county court could proceed to determine to which of the tied candidates the office "belongs." As pointed out in the case of *Reed v. Cosden*, *supra*, if neither was elected (that is, if neither "received a greater number of votes than were given for any other candidate"), the office would not belong to either, and as the county court was limited, by the very terms of the statute, to the right to determine to which the office belongs, it would be unable to draw a legal conclusion or enter a valid judgment, for it would appear that the office

the last three months within the county, city, or town in which he offers to vote, shall be deemed a qualified elector, as no man is bound to become a sheriff, and if he does so he only relinquishes his right of suffrage for the time to be exercised in the excepted case. *State v. Adams*, 2 Stew. (Ala.) 231.

But Ala. act 1819, § 3, providing that certain elections shall be conducted by the sheriff and managers appointed in the same manner as heretofore by law directed, and the territorial act of 1812, § 5, providing that when two persons shall have an equal number of votes, the returning officer shall have the casting vote, but shall not vote in any other case, having been enacted at a time when the members of the house of representatives were the only officers elected by the people, give the sheriff power to give a casting vote only in the instance expressly provided for, that is in the event of a tie between candidates for the house of representatives,—and does not authorize him to give a casting vote in an election for sheriff resulting in a tie. *Ibid.* And in that case the court expressed the opinion by Taylor, J., that a statute requiring the sheriff, in case of a tie vote at an election, to give the casting vote, would not be unconstitutional, and said that this was provided for by Constitution in several of the states.

So, Pa. act April 6, 1841, pl. 155, § 2, providing that at elections for borough officers, in case any two or more candidates should have an equal number of votes, the preference shall be determined by lot, is not repealed by Pa. act May 22, 1895, pl. 109, § 4, providing that the members of town councils shall have power to fill any vacancies which may occur therein by death, resignation, removal from the borough or otherwise, until the next annual election, as an election resulting in a tie vote does not create a vacancy, such a contingency being expressly provided for, and a candidate having an equal number of votes with another in whose favor a lot results is legally elected. *Re Clarion* 47 L. R. A.

Borough, 189 Pa. 79, 41 Atl. 995, Reversing *Black's Contested Election*, 20 Pa. Co. Ct. 609.

And the original charter method of deciding the title to office on a tie vote, provided for by Pa. act April 6, 1841, pl. 155, § 2, by drawing lots, is not affected by a borough being brought under the general borough act of April 3, 1851, pl. 320, which directs that borough elections shall be held in accordance with the laws regulating township elections, and that elections for borough officers shall be held at the time and place for the choice of inspectors of the general election unless otherwise provided for in the charter. *Re Clarion Borough*, 189 Pa. 79, 41 Atl. 995.

But it has been held that Pa. act April 1, 1834, § 5, providing that in case any two or more candidates in borough elections shall have an equal number of votes, the preference shall be determined by lot to be drawn by the inspector in the presence of the judges and clerks, has been entirely changed by subsequent legislation, and that a mandamus will not issue to compel the members of the election board to reassemble and draw a lot in case of a tie election in a borough incorporated under a law making no provision for a tie vote. *Watson's Contested Election*, 3 Pa. Co. Ct. 486.

So, in Illinois, where the vote for town clerk is determined by the court in an election contest to be a tie, it is proper for the court to order the parties to settle the contest by lot under the direction of the town clerk, as provided for by Illinois statute. *O'Hair v. Wilson*, 124 Ill. 351, 16 N. E. 256; *Patterson v. People ex rel. Allen*, 65 Ill. App. 652.

And where the count of the court in proceedings by quo warranto to test the right of an incumbent to the office of alderman results in a tie, judgment of ouster is properly entered against him. *Patterson v. People, ex rel. Allen*, 65 Ill. App. 652.

And in North Dakota, where, by reason of a

did not belong to either, because neither had been elected by the people, and the county court was not given the power to give the casting vote for the one it preferred, and hence, even under the terms of the statute, there was nothing which the legal mind of the county court could operate upon, and hence the tie could not be broken, and the contestants would be left where the electors left them,—neither having a right to have any court say the office belonged to him. In the *Lewis Case*, however, the court invoked the spirit of the Constitution to supply an omission in its letter. The spirit of a law may be invoked, where a law has been passed which is ambiguous, in order to ascertain the meaning of the lawmaker; but there must first be a law on the subject, before the spirit and meaning can be invoked, for, if the law does not exist in letter in the books (that is, if the lawmakers have never spoken on that subject), their spirit and meaning cannot be inquired into, for they have neither said nor attempted to say anything which needs interpretation. So, as the framers of the constitutional amendment of 1834 never attempted to make any provision for deciding in a case of a tie for the office of clerk of the county court, but left it to the people to elect, there is no spirit or meaning to be invoked, nothing to which it could attach or throw light upon. The fact that provision was made as to ties for sheriff and coroner,

and no such or other provision made for ties for county clerks, is a very conclusive demonstration that the framers of the constitutional amendment did not intend that ties for county clerks should be determined in any manner by the county court or anyone else; for, if they had so intended, they would have said so in express terms, as they did respecting sheriffs. As they did not do so, it is plain that, instead of its being an oversight, it was their intention to require the people to elect, and, if there was a tie, there was no election, and the legal consequences ensued. The case of *Lewis v. State ex rel. Mayo*, 12 Mo. 128, was therefore erroneously decided, and is hereby overruled.

Passing now to § 6099, Rev. Stat. 1889, which authorizes the county court to "decide" in case of a tie for justice of the peace: Section 37 of article 6 of the Constitution of 1875 authorizes the election or appointment of justices of the peace, and the act of 1891 (Acts 1891, p. 175) requires justices of the peace in cities of 300,000 to be elected at the general elections, and § 6090 requires justices of the peace elsewhere in the state to be elected. The Constitution does not provide how ties for justice of the peace shall be settled, and does not authorize the general assembly to make any such provision. It leaves it with the people to elect, or some officer to appoint as may be regulated by law. Section 30 of article 6 of the Constitution of

tie vote neither candidate for an office is elected, neither is entitled to the certificate of election until the tie is removed, upon the notice and in the manner provided for by N. Dak. Rev. Code, § 528, relating to the duty of the county auditor in case of tie votes, and a certificate of election issued to one of the candidates prior to such determination is void. *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018.

And in Oregon, where three candidates received twenty-seven votes each and there were but two offices to fill, it was a case of a tie vote, and there was no election which would authorize any of the candidates to exercise the duties of the office until the matter had been decided by lot, and one of them had been declared duly elected in the manner provided by law. *State ex rel. Mahoney v. McKinnon*, 8 Or. 493.

But the charter of a town, providing that all the laws of the state regulating and governing general elections and proceedings and matters incident thereto shall apply to and govern elections under the charter, except as therein otherwise provided, does not extend the scope and operation of Hill's (Or.) Code, § 2939, providing the procedure in case of a tie in an election of county or precinct officers so as to make it the duty of the recorder of the town in case of a tie in a town election to take the same procedure required to be taken by the county clerk in the case of a tie in the election of county or precinct officers, where no such duty is directly imposed by special provision. *Dunham v. Hyde*, 30 Or. 385, 48 Pac. 422.

And in Kentucky the general law regulating examining boards in state, district, and county elections, and requiring them to cast lots in cases of tie votes, does not embrace town elections under special statutes for town officers. *Hammock v. Barnes*, 4 Bush. 390.

And under Neb. election law, chap. 26, § 49, providing that when there is a tie between two persons for an office to be filled by the county alone or by any precinct therein, the clerk shall

notify them to appear at his office at a given time to determine the same by lot before the canvassing board, and the certificate of election is to be given accordingly, and if either party fails to appear or to take part in the lot, the county clerk shall draw for him, the requirement of notice to the defendant, and on his failure to appear and take part in the lot that the clerk draw for him, are not presumed to have been carried out unless certified to; and it ought therefore to appear on the certificate that the statute was strictly complied with, and that each party to the controversy had an equal chance in the lot, and that the result from the method adopted could not have been influenced by the action of any member of the board, but that it was independent of forethought or design; and in the case of the absence of a party it must appear that the county clerk drew for him, and that the drawing was such that there was no possibility of anticipating the result. *State ex rel. Davey v. Wilkinson*, 23 Neb. 710, 37 N. W. 617.

In Missouri it has been held that Rev. Code, 201, giving to the courts power of deciding an election of a clerk of the court in case of a tie by giving the casting vote, is not in contravention of the constitutional provision of that state adopted in 1834, that the clerk shall be elected by the qualified voters of their respective counties; and that the power of giving a casting vote in case of a tie is not a power of appointment, and has none of the ingredients of such a power, and is not therefore inconsistent with the elective principle, but is a means provided by the legislature to carry it out, as the appointing power is unlimited and unrestricted in its range of selection, while in giving a casting vote the tribunals elected for the purpose merely decide between the individuals already designated by the popular voice as the choice. *Lewis v. State ex rel. Mayo*, 12 Mo. 128.

But this case was overruled by *State, Crow v. KRAMER*.

1875 provides that ties for judges of courts of record "shall be determined as prescribed by law," and § 40, *Id.*, has a similar provision in case of a tie between candidates for clerk of any court of record. Section 2 of article 4, *Id.*, requires senators and representatives to be "chosen by the qualified voters," but does not prescribe, or authorize anyone to prescribe, how a tie shall be settled. Section 3 of article 5, *Id.*, provides that in case of a tie for the offices of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public schools, "the general assembly shall, by joint vote, choose one of such persons for said office." Section 10 of article 9, *Id.*, requires sheriffs and coroners to be elected by the qualified voters, and the provision (§ 25, art. 4) of the Constitution of 1820, which authorized the circuit court to give the casting vote for sheriffs or coroner in case of a tie, has been left out of the Constitution of 1875, and these officers are left where county clerks were left by the Constitution of 1820,—to be elected by the people. Under the Constitution of 1875, the general assembly was expressly given power to prescribe by law how a tie between candidates for judge or clerk of a court of record should be determined; but, as to all other ties, the Constitution expressly declares how they shall be decided, and does not authorize the general assembly

to otherwise provide, or else it makes no provision for them, and does not authorize the general assembly to do so, but requires such officers to be elected by the people. This must have been intentional, and not an oversight; for in § 30 of article 6 the minds of the framers of the Constitution were directed to ties for judges of courts of record, and in § 40 of the same article they were directed to ties for clerks of courts of record. Section 37, *Id.*, relating to justices of the peace, comes in between these two sections of article 6; and therefore the question of ties cannot fairly be said to have been in mind when § 30 was adopted, out of mind when § 37 was adopted, and in mind when § 40 was adopted. It was plainly intentional. Being left in this shape by the organic law, neither the general assembly nor the courts have a right to supply an omission, if it could be so considered, in that organic law, either by express legislation or by judicial interpretation, but their duty is to enforce the law, and require all such persons to show that they had been elected by the people, and, failing so to show, to execute the law applicable to cases where there is an intrusion into a public office.

It follows that so much of § 6099 as attempts to authorize county courts to decide in cases where "two or more persons shall have an equal number of votes for justice of the peace for any township" is unconstitutional.

And in *State ex rel. Crow v. Smith* (Mo.) 54 S. W. 222, it was held that an appointment of a justice of the peace after an election resulting in a tie under Mo. act 1891, p. 175, providing that when a vacancy occurs in an office it shall be supplied by the judges by appointment, is invalid, as by Mo. Const. art. 14, § 5, providing that all officers elected or appointed shall hold during their terms and until their successors shall be duly elected or appointed or qualified, there was no vacancy to fill.

The above case grows out of the same transaction as the principal case, the principal case being a proceeding by quo warranto against a candidate for justice of the peace appointed by the mayor after a tie vote, and the case at bar being a proceeding by quo warranto against a person appointed by the judges of the circuit court to fill the position of justice of the peace alleged to have been made vacant by the failure to fill the position by election.

So, in *Reed v. Cosden* (Md.) 1 Clarke & H. Cong. Elect. Cas. 353, it was held that when two candidates for the office of representative in Congress had the same number of votes, and the governor and council, assuming to act under a state law, proceeded to decide between them, which should be the representative, and gave a certificate of election to the sitting member, the proceeding was not warranted by a constitutional provision requiring representatives to be chosen by the people, and conferring upon the house exclusive power to judge of the elections, returns, and qualifications of its members, and that the certificate was not admissible as evidence of the right of the sitting member to the seat.

2. Effect of, on contest and right to contest.

A candidate for office returned as having received an equal number of votes with another candidate voted for at the same time may contest the election in the same manner and to the 47 L. R. A.

same extent as when the opposing candidate is returned as having received a plurality of votes, and the contestant is apparently in the minority. *Erdman v. Barrett*, 89 Pa. 320.

And a trial by lot by candidates for office for whom a tie vote was given, had under Mich. Comp. Laws 1871, § 136, providing that whenever in elections of members of the state legislature or county officers it shall appear on the legal canvass of the votes that two or more persons have received an equal number of votes, and that a failure to elect to any office is caused thereby, such persons shall draw a lot for the election to such office, does not preclude the losing candidate from making inquiry through the attorney general into the legality of the votes counted by the board of canvassers for the opposing candidate. *People ex rel. Keeler v. Robertson*, 27 Mich. 116.

The determination of an election by drawing lots under that act in case of a tie vote is not conclusive upon the candidates and the public, the effect to be given to a certificate granted under the statute being the same as that which would be given to a certificate of election in ordinary cases. *Ibid.*

And a judgment of a county court in a proceeding to contest the election of a school director, two of the candidates for which had received a tie vote, and it was determined by lot in favor of the incumbent, will be reversed, and the cause remanded with directions to enter a judgment in accordance with the opinion of the court on appeal, where it appears by a clear preponderance of the evidence that three persons voting for the incumbent had not been residents of the district the requisite length of time. *Shepard v. Allen* (Ill.) 15 West. Rep. 182, 17 N. E. 756.

And an answer in a proceeding to contest the election of a party to the office of school director in which there was a tie which was determined by lot in favor of the incumbent to a petition, alleging that three persons voted for the

tional, and that, as county courts have no such power, the mayor of St. Louis has no such power, if he has the powers of county courts in this respect, which it is not necessary now to decide, and hence that the respondent herein has shown no legal title to the office of justice of the peace for the fourth justice's district of the city of St. Louis, but is, in law, an intruder therein.

The writ of ouster is hereby issued against respondent, ousting him from the office of justice of the peace for the fourth justice's district of the city of St. Louis, and he is also adjudged to pay the costs of this proceeding.

All concur; **Valliant, J.**, in the result only.

STATE of Missouri *ex rel.* Edward C. CROW, Attorney General,
v.

George E. SMITH.

(.....Mo.....)

A vacancy in the office of a justice of the peace to be filled by appointment by judges of the circuit court, under Acts 1891, p. 176, is not created by the failure to elect an incumbent at an election which results in a tie vote, under Const. art. 14, § 5, providing that all officers "shall hold office during

successful candidate who were not legal voters, which denied the allegations of the petition and alleged that seven illegal votes were improperly counted for the relator, is sufficient until excepted to. *Ibid.*

And the term "canvass," as used in S. D. Comp. Laws, § 1480, providing that any candidate or person claiming the right to hold an office contested, or any elector of the proper county desiring to contest the validity of an election or the right of any person declared duly elected to an office within the county, shall give notice thereof within twenty days after the canvass of the vote for such election, includes the decision of a tie vote by the clerk or auditor, as provided by S. Dak. Laws 1890, chap. 84, § 26, and all the various acts necessary to decide and determine who of the persons voted for should be deemed or declared elected, so that the time within which a notice of contest must be served would begin to run from the time of the decision of the tie vote, and not from the time of the decision that the vote was a tie. *Bowler v. Eisenhood*, 1 S. D. 577, 12 L. R. A. 700, 48 N. W. 136.

So, a candidate for office who was deprived of four votes on the ground of alleged illegality by the contesting board, after which upon count the vote was found to be a tie, whereupon the right to the office was determined by lot according to law in favor of the other candidate, is not estopped from appealing from the decision of the contesting board under a statute authorizing it, by having agreed to the settlement of the question by lot. *Imboden v. Culley*, 94 Ky. 45, 21 S. W. 339.

Nor is a candidate estopped from obtaining a writ of mandamus to compel election officers to decide a tie vote by lot according to law, by the fact that he requested them not to do so, since all parties had equal knowledge of the law, and the duty was to the public, and not simply to the candidate. *Johnston v. State ex*

their official terms and until their successors shall be duly elected or appointed and qualified."

(*Robinson, J., dissents.*)

(December 5, 1899.)

APPPLICATION for a writ of quo warranto to determine by what authority defendant was exercising the office of justice of the peace of the fourth district in the city of St. Louis. *Writ of ouster.*

Statement by **Marshall, J.:**

This is a proceeding by quo warranto, instituted in this court by the attorney general *ex officio* to oust defendant from the office of justice of the peace of the fourth district in the city of St. Louis. The facts are these: At the regular election in 1894 Patrick Sheehan was elected, and thereafter duly qualified as the justice of the peace for said district. Before the expiration of his regular term of four years he died, and in May, 1896, Richard B. Haughton was regularly appointed to fill the vacancy thus occasioned, and thereafter duly qualified, and was commissioned to fill the unexpired term. At the next regular time for electing justices of the peace, to wit, at the regular election in 1898, James Griffin and Siegmund L. Kramer were the regular nominees for said office. The election resulted in a tie vote.

rel. Sefton, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422.

But one who, on an information to try the right to an office for which he and another had received an equal number of votes, attacks the lot taken by the deputy sheriff upon the ground that it was not an act which could be done by deputy, will not, on a determination against him, be permitted to set up the invalidity of some of the votes cast for the respondent, as in such case the judgment should be final. *People ex rel. Evans v. Sutherland*, 41 Mich. 177, 1 N. W. 927.

And election officers who have counted the votes given for each of the candidates, and certified that the vote was a tie, cannot be allowed, in a proceeding brought to compel them to meet and determine by lot the person entitled to the office pursuant to Ind. Rev. Stat. 1881, § 4736, to contradict such return; the question whether the illegal votes were in fact received and counted must be determined by a contest of election or other appropriate proceeding after one of the rival candidates shall have received his certificate of election. *Kimerer v. State ex rel. Black*, 129 Ind. 580, 29 N. E. 178.

And Ind. Rev. Stat. 1894, § 6313, providing that no irregularity or misconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person, unless such irregularity or misconduct was such as to cause the contestee to be declared elected, when he had not received the highest number of legal votes, and no election shall be set aside for illegal votes, unless the number thereof given to the contestee, if taken from him, would reduce the number of his legal votes below the number of legal votes given to some other person for the same office, is designed to prohibit a contest or the setting aside of an election where such contest results only in producing a tie, or in showing that some other person had an equal number of legal votes with the con-

Afterwards the mayor of St. Louis appointed Kramer to said office upon the theory that in St. Louis he was vested with the powers of the county courts, and that in case of a tie vote he was entitled to "decide" the tie. Upon quo warranto this court denied the validity of the appointment, and ousted Kramer from the office. *State, Crow, v. Kramer*, 150 Mo. 89, ante, 551, 51 S. W. 716. Thereafter, on the 9th of June, 1899, the judges of the circuit court, the St. Louis court of criminal correction, and the probate court in St. Louis appointed the defendant to said office, reciting in the order of appointment: "Having been duly notified that there was a vacancy in the office of justice of the peace of the fourth justice of the peace district, caused by a failure to elect at the last general election, Tuesday, November 8, 1898," and further reciting that in making such appointment they acted pursuant to the act of April 23, 1891 (Acts 1891, p. 175). The mayor of the city of St. Louis, upon the faith of such appointment, thereupon commissioned the defendant as such justice of the peace "for the unexpired term ending on the first Tuesday after the first Monday in November, 1902, unless sooner removed from office, and until his successor shall be duly elected and qualified." The defendant thereupon attempted to enter upon the duties of the office, and has ever since been attempting to exercise its func-

tions. At all times, however, since his appointment in 1896 said Haughton has continued to act as justice of the peace for said district, refusing to recognize the termination of his term by the election and qualification of his successor, and refusing also to turn over the records of said office to anyone.

Messrs. Edward C. Crow, Attorney General, and Jesse A. McDonald for relator. Mr. George E. Smith, in propria persona.

The duration of the term of a public officer cannot be extended by his commission beyond the limit fixed by the law under which he was appointed.

State ex rel. Cosgrove v. Perkins, 139 Mo. 106, 40 S. W. 650.

The Constitution does not provide how tie votes for justices of the peace shall be settled, and does not authorize the general assembly to make any such provision.

It leaves it with the people to elect, or some officer to appoint, as may be regulated by law.

State, Crow, v. Kramer, 150 Mo. 89, ante, 551, 51 S. W. 719.

Respondent was lawfully appointed on June 9, 1899, to succeed Haughton. His official term under his appointment had expired on November 8, 1898, seven months before. No one had been chosen to succeed him at the general election then held.

testee, and would apply where such a result was produced by restoring to the person a vote or votes which the election board had rejected and refused to count for him, because they erroneously supposed they were illegal, as well as where it is produced by the rejection of illegal votes. *Montgomery v. Oldham*, 143 Ind. 34, 42 N. E. 474.

In the above case *Gimbel v. Green*, 134 Ind. 628, 33 N. E. 964, *supra*, II. b, 1, was overruled so far as it is in conflict with the later case.

An appeal by the unsuccessful candidate in a lot drawn to decide a tie vote lies under the Illinois statutes from the county court directly to the supreme court, and not from the county court to the appellate court. *Webster v. Gilmore*, 91 Ill. 324.

And the fact that a person was permitted to vote at an election creates a prima facie presumption of his right to vote, which must be overcome by proof on a contest of the election brought by the unsuccessful candidate on a lot drawn to decide a tie vote. *Ibid.*

And the original election returns are admissible in evidence in the trial of an information in the nature of a quo warranto to oust the incumbent of the office of sheriff in which the vote was alleged to have resulted in a tie to prove the true number of votes given, though they had been some days in an exposed situation and had been altered in some respects, their fairness and alteration being matters for the investigation of the jury. *State v. Adams*, 2 Stew. (Ala.) 231.

c. Casting vote by presiding officer.

The rule so universally applicable to boards and deliberative bodies consisting of a limited number of members, that in case of a tie vote the presiding officer is authorized to give a casting vote, is applicable to elections had in and appointments made by such bodies.

Thus, a vote in a city council in one way by four of the members, and a refusal to vote by the other four, constitute a tie vote which authorizes the mayor to give a casting vote. *Launts v. People ex rel. Sullivan*, 113 Ill. 137, 55 Am. Rep. 405.

So, in *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315, 23 N. E. 72, it was held that a resolution was properly adopted where it was voted for by three members of a common council and declared carried by the mayor, though three other members declined to vote, but the decision was placed on the ground that its adoption required a majority of the affirmative votes of a quorum only, and not a majority of the whole number of votes, and that therefore the presence of the silent members was of no effect.

But a majority of those present at a meeting of a select body consisting of a definite number of voters must concur in order to do any valid act in the absence of special provisions with reference thereto, and four ballots are not sufficient to elect an officer by an official board where eight members were present, though one blank vote was cast; and in such case there is no tie which will authorize the presiding officer to give the casting vote. *Lawrence v. Ingersoll*, 83 Tenn. 52, 6 L. R. A. 308, 12 S. W. 422.

And a vote by ballot for a city attorney under a charter authorizing the appointment of a city attorney by a major vote of the entire common council, and empowering the mayor to give a casting vote in case of a tie, at which twenty-two ballots were for one candidate and twenty-two for another, and a blank ballot was cast, is not a tie which will authorize the mayor to give a casting vote, as there could not be an equal division of the members. *State ex rel. Cole v. Chapman*, 44 Conn. 600.

So, where an equal number of ballots were cast for two candidates on an election by a city council of a constable, and the mayor, without

No further election could be held under the act until the general election in November, 1902.

Of course the office was not vacant in the sense that no one was occupying it, but it was vacant in the legal sense, in that the incumbent was holding over after his term had fully expired, by sufferance,—a mere tenant at will of the appointing power.

The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and public law, cannot enlarge the boundaries of his official term, or arrest the operation of the power of appointment or election.

State ex rel. Atty. Gen. v. Thomas, 102 Mo. 85, 14 S. W. 108; *State ex rel. Withers v. Stonestreet*, 99 Mo. 361, 12 S. W. 895; *State ex rel. Harvey v. Manning*, 84 Mo. 661; *State ex rel. Brown v. Spitz*, 127 Mo. 248, 29 S. W. 1011; *State ex rel. Walker*

v. Powles, 136 Mo. 376, 37 S. W. 1124; *State ex rel. Cosgrove v. Perkins*, 139 Mo. 106, 40 S. W. 650.

The incumbent's right to the office, whether he was elected to serve the whole term or to fill a vacancy therein, terminates with the fixed time prescribed for the ending of said term.

State ex rel. Brown v. Spitz, 127 Mo. 252, 29 S. W. 1011; *State use of St. Charles County v. Fulkerson*, 10 Mo. 681; *State ex rel. Richardson v. Ewing*, 17 Mo. 515; *State ex rel. Jackson v. Emerson*, 39 Mo. 80; *State ex rel. Atty. Gen. v. Conrades*, 45 Mo. 45; *State ex rel. Berry v. McGrath*, 64 Mo. 139.

In an early case in Alabama it was held that a failure to elect by reason of a tie vote for sheriff created a vacancy in the office, which might be filled by executive appointment.

State v. Adams, 2 Stew. (Ala.) 231. See

going through the formality of casting a ballot, determined and declared that one of them was elected, his act was sufficiently formal under a charter allowing him the casting vote, and under a statutory provision that in the election of any city officers by ballot by the board of aldermen or in convention of the aldermen and common council, in which the mayor has the right to give a casting vote if two or more candidates have each half of the ballots cast, he shall determine and declare which of them is elected, to bring the case within such statutory provision. *Small v. Orne*, 79 Me. 78, 8 Atl. 152.

And where at a meeting of the vestry of a church both wardens and eight vestrymen are present, and the senior warden is called to the chair, and five vote in favor of engaging a certain person as rector, and five, including the presiding officer, vote against engaging him, and the chairman declares the resolution to be lost, he must be deemed, under 1 N. Y. Rev. Stat. 4th ed. 1179, § 1, to have given the casting vote, his declaration that the vote was lost being equivalent to such vote. *People ex rel. Remington v. Church of the Atonement*, 48 Barb. 603.

But a declaration of a presiding officer of a select body consisting of a definite number of voters, that an officer is elected as the result of a ballot which without his vote is a tie and not sufficient to elect, is not equivalent to casting his own vote in favor of such person, where the board had no power to elect except by ballot. *Lawrence v. Ingersoll*, 88 Tenn. 52, 6 L. R. A. 308, 12 S. W. 422.

And the announcement by the chairman of a board of trustees holding an election for county superintendent, at which five voted for one candidate and four for the other, that the one receiving five votes was elected, is of no effect, and does not operate as a casting vote because such candidate illegally voted for himself, and such vote was void, thus leaving a tie of the valid votes, where it was made upon the mistaken assumption that he had a right to vote for himself if he chose to. *Hornung v. State ex rel. Gamble*, 118 Ind. 458, 2 L. R. A. 510, 19 N. E. 151.

And the failure of those who had not voted for him to interpose further objection is not such an acquiescence in and tacit consent to the announcement of his election as will amount to an appointment to the office. *Ibid.*

So, the rule that the mayor has a casting vote in case of a tie in a city council on an election or appointment of an officer applies to a vote on the question of the approval of the bond of an officer, as the appointment and approval

of the bond are both necessary to the investiture of the office. *Launts v. People ex rel. Sullivan*, 113 Ill. 187, 55 Am. Rep. 405.

And under a statute providing that the church wardens and vestrymen elected at the first election, and their successors in office, of themselves, and, if there be a rector, then together with the rector, shall form a vestry and be the trustees of the church, and giving them power to induct a rector whenever there is a vacancy, providing that the board shall not be competent to transact business unless the rector, if there be one, or if not, the church warden present, or if both are present then the one who shall be called to the chair by a majority of voices, shall preside at the meeting, and have the casting vote,—power is given to the presiding officer to vote first with the rest, and then upon an equality to create a majority by giving a second vote. *People ex rel. Remington v. Church of the Atonement*, 48 Barb. 603.

So, the mere fact that an act providing for the appointment of an officer provides that the council shall confirm the appointment, does not of itself manifest an intention on the part of the legislature to exclude the mayor from giving a casting vote in case of a tie. *Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1.

And under the Kansas law relating to cities of the second class, § 21, providing that the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other, where the mayor in accordance with the statute nominates a person as city attorney and submits his name for confirmation to the council, and a vote is taken, and the council is equally divided, he may give a casting vote in favor of confirmation, where there is no express statutory denial of that power, in the act providing for such appointment. *Ibid.*

But § 19 of the Kansas law relating to cities of the second class, providing that the council, by a vote of the majority of all the members may, for cause, remove certain officers, and § 42 thereof, providing that no ordinance providing for the borrowing of moneys, levying taxes, or appropriating money shall be of any validity unless a majority of all the councilmen shall vote for such ordinance, take the questions referred to out of the provisions of § 21 of that act, which gives the mayor a casting vote in case of a tie. *Ibid.*

Neither the vice president of the United States, nor the Lieutenant governor of the state of New York, as presiding officer of the senate, has any vote unless the vote be equally divided, but the speaker of the House of Representatives

also *People ex rel. Simpson v. Van Horne*, 18 Wend. 515; *People ex rel. Cloud v. Wilson*, 72 N. C. 155; *State ex rel. Bickford v. Cooke*, 54 Tex. 482; *People ex rel. Worley v. Smith*, 81 N. C. 304; *State ex rel. Sneed v. Bullock*, 80 N. C. 132; *Johnson v. Mann*, 77 Va. 265; *People ex rel. Mason v. MoClave*, 99 N. Y. 83, 1 N. E. 235; *State v. Hunt*, 54 N. H. 431; *State ex rel. Adams v. Hopkins*, 10 Ohio St. 509.

Haughton held over, by sufferance, seven months beyond the expiration of his term before the respondent was appointed, and still holds over.

Even if the act authorized a special election, it would seem that the judges might well appoint to fill the vacancy until the election was called and held, and a person chosen and qualified.

Marshall, J., delivered the opinion of the court:

This case lies within narrow limits. If

of the United States and of the assembly of the state of New York each have a vote. *People ex rel. Remington v. Church of the Atonement*, 48 Barb. 603, *dictum*.

And in the English House of Commons the speaker never votes except when there is an equality without his casting vote, which in that case creates a majority; but the speaker of the House of Lords has no casting vote; his vote is counted with the rest of the house, and in case of an equality the negative votes have the same effect and operation as if they were in the majority. *Ibid*.

The casting vote in an election for mayor is given by 3 & 4 Vict. chap. 108, in case of an equality of votes, not to the mayor, but to the alderman present who shall have been elected by the greatest number of votes recorded in his favor, so that an alderman elected after a contest is to be considered as elected by a greater number of votes than an alderman who had been returned by a constituency, however large, without a contest, and such an alderman would be the one who would be entitled to the casting vote. *Hall v. Walker*, Ir. Rep. 9 C. L. 66.

d. Appointment or election on failure to elect or to fill vacancy.

A few of the states have peculiar statutes providing for an election between candidates, or an appointment as distinguished from a selection by lot or a casting vote.

Thus, by N. J. act March 22, 1860, Rev. p. 1201, § 45, it is provided that the town committee shall, where two or more candidates have an equal number of votes for the same office at an annual election in town meeting for township officers, at their next meeting thereafter, elect between those having an equal number of votes, unless they shall deem a special town meeting for this purpose advisable, and in that case shall have power to call such special town meeting as provided by law.

This act furnishes a method of determining the result of the former election by referring it to the township committee representing the people, or to the people themselves, and is not an unconstitutional limitation of the right of voting by a free ballot. *State ex rel. Brown v. Boden*, 51 N. J. L. 114, 16 Atl. 58.

And it is mandatory, requiring the committee to do one of two things,—elect between those having an equal number of votes, or call a special town meeting to elect. They may do either as they may deem advisable, but they must do 47 L. R. A.

the office of justice of the peace for the fourth district in the city of St. Louis was vacant, as recited by the judges who appointed defendant, on the 9th of June, 1899, then those judges, under the power conferred upon them by § 7 of the act of 1891 (Acts 1891, p. 176), had the power to appoint the defendant, and his title to the office is good; otherwise not. In the *Kramer Case*, 150 Mo. 89, ante, 551, 51 S. W. 716, it was held that in case of a tie vote there was no legal election, and it follows that, if there was no legal election in 1898 for the office in question, no successor has yet been legally elected to succeed Haughton, for he was appointed in 1896, under § 7 of the act of 1891, to fill Sheehan's unexpired term, which ended at the regular election in 1898, and until his successor should be legally elected, as that section provides such appointees shall hold. There is no merit in defendant's contention that under the act of 1891 justices of the peace in St. Louis hold for a fixed

one, and must act at the next meeting after the annual town election; and where there has been a failure to elect, and a special election is ordered, and notices are posted, the committee cannot at a subsequent meeting rescind its action. *Ibid*.

And the election of one of two candidates for chairman of the board of commissioners of highways by the township committee is valid under N. J. Laws 1872, chap. 180, providing for a board of commissioners of highways to be elected by the legal voters in the township, and that if vacancies occur by death, or by becoming a nonresident, the township committee is authorized to fill them, and N. J. act 1860, in regard to the conduct of elections, providing that in case of a tie the committee shall elect between those having an equal number of votes, where at the first election the two candidates received the same number of votes. *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 894.

And the right of a township through its committee to decide whether in case of a tie vote a new election by the voters shall be ordered, or whether such election shall be confined to the committee itself, and be limited to a choice between the candidates having the tie vote, given by a previous statute, is not affected by N. J. act 1890, chap. 231, § 52, authorizing and directing a justice when he shall be of the opinion that fraud, bribery, or other illegal practices were resorted to at an election to such an extent as to affect the result, or that by reason of the death or resignation of a candidate voted for, or an insufficient supply of ballots, the voters were deprived of a fair opportunity to express their choice, to make an order nullifying the election, and direct a new election to be held within the district to fill the office in respect to which the former election was nullified and set aside. *Re Elk Twp. Election*, 14 N. J. L. J. 263.

So, in Ohio, boards of county commissioners are authorized by statute to appoint a superintendent of schools when the board of education has neglected to elect or appoint one, and while, under the Ohio act, a third person other than the tie candidates might be appointed, the cases are included in this note on the theory that if one of the tie candidates should be appointed it would be in effect a decision of the tie rather than an original appointment, and though another was appointed this, too, might be considered as a decision of the tie rendered against both.

Under this statute the action of a board of

term of four years, and not until their successors are elected and qualified. True, the first section of that act requires an election at the general election in 1894 and every four years thereafter, and does not prescribe that the person so elected shall hold until his successor is elected; but such a provision was not necessary in the statutes to accomplish this result, for § 5 of article 14 of the Constitution of Missouri provides: "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms and until their successors shall be duly elected or appointed and qualified." There is no contrary provision in the act of 1891; hence Haughton's term continued until the regular election in 1898, and also until his successor should be duly elected and qualified; and such continuance after the election in 1898 was as much a part of his term as that which preceded that election. *State ex rel. Atty. Gen. v. Ransom*, 73 Mo., loc. cit. 92. The appointment of defendant by the judges named was expressly predicated upon the theory that a failure to elect a successor to Haughton at the regular election in 1898 *ipso facto* created a vacancy in that office. This is a misapprehension of the law in this state. Whatever may be the rule in other states under their Constitutions and statutes, it has been the settled law in this state ever since the decision in *State ex rel. Tredway v. Lusk*, 18 Mo. 333, that the failure to elect a successor to an office at the regular time for holding an election for that office does not create a vacancy in such office, and does not, therefore, authorize anyone to appoint a successor, and that if a person is so appointed as such successor he acquires no title. *State ex rel. Atty. Gen. v. Ransom*, 73 Mo., loc. cit. 91, 94, 95; *State ex rel. Circuit Atty. v. McCann*, 81 Mo. 479; *State ex rel. Harvey v. Manning*, 84 Mo., loc. cit. 663; *State ex rel. Stevenson v. Smith*, 87 Mo., loc.

cit. 160; *State ex rel. Harris v. McCann*, 88 Mo., loc. cit. 390; *State ex rel. Atty. Gen. v. McGowney*, 92 Mo., loc. cit. 430, 3 S. W. 867; *State ex rel. Walker v. Poyles*, 136 Mo., loc. cit. 381, 37 S. W. 1125. In *McCann's Case*, 81 Mo. 479, Mullery was appointed in 1879 to fill a vacancy for an unexpired term ending in 1882, and until his successor was elected and qualified. Upon the theory that an appointee to the office of justice of the peace could only hold until the next regular election, McCann was elected to the office at the regular election in 1880. Mullery refused to surrender the office. McCann attempted to exercise the functions of the office. On quo warranto McCann was ousted, and it was held that a person appointed to fill a vacancy in the office of justice of the peace held title until the next regular time for electing justices of the peace, so as to secure uniformity of tenure, and that an election at any other time was invalid, and therefore conferred no title upon the person elected. In *Ransom's Case*, 73 Mo. 78, he was elected in 1876, for a term of four years, to the office of justice of the peace. Thereafter it was provided by § 2807, Rev. Stat. 1879, that justices of the peace should be elected at the general election in 1882 and every four years thereafter, and should hold their offices for four years. At the general election in 1880 one Childs was elected as Ransom's successor, and commissioned for a term of two years. Ransom refused to surrender the office, claiming that the election in 1880 was illegal, and that under § 2807 he was entitled to hold until the regular election in 1882. On quo warranto against him his contention was sustained, and it was held that "the object and intent of the legislature in framing § 2807, Rev. Stat., was to provide and fix a certain and uniform time at which the election of justices of the peace should take place. . . . That the time intervening between the end of the four years and the election or appointment and

county commissioners in appointing a superintendent of schools is valid, and the person so appointed is entitled to the compensation attached to the office, where three efforts to select were made by the board, and in each case there were three members for and three against the proposition, and there was nothing to indicate a determination on the part of the board to abolish the office, or to manage the schools without a superintendent. *State ex rel. Schnee v. Cuyahoga Falls Bd. of Edu.* 3 Ohio N. P. 236.

And the board of education is estopped to deny the validity of the appointment by the county commissioners of a superintendent of schools, where there was a dead-lock in the board, and after such appointment he attended all the meetings of the board, and at one of them they elected an assistant teacher and directed him to place her in any such position as in his judgment she was qualified to fill, and they received and accepted his monthly report by a clear majority of the members. *Ibid.*

And mandamus is the proper remedy of a superintendent of schools to compel the board of education to issue an order for the payment of his salary where payment is refused upon the ground that his appointment by the county commissioners when there was a dead-lock in the board was invalid. *Ibid.*

47 L. R. A.

III. Summary.

It would seem from the cases above that in the absence of special statutory provision a tie vote creates a vacancy which can only be filled by appointment or a new election under some general provision with reference thereto, though in case of elections held in boards and bodies of limited membership the general rule giving the presiding officer a casting vote in case of a tie would apply. The method which has been most extensively adopted to meet the difficulty of a tie vote is by drawing lots as between the tie candidates, though in New Jersey there is a provision for a selection as between the tie candidates or a new election in the discretion of the selecting body, and in Ohio there is a provision for an independent appointment in case of a neglect to elect or appoint to certain offices, which applies to a case of a tie vote. By the weight of authority these statutes are not unconstitutional, and have been enforced and given full effect, and held to prevent a vacancy in case of a tie vote. A few of the cases, however, have questioned their constitutionality, prominent among which is the principal case.

F. H. B.

qualification of his successor is as much a part of his term of office as the four years that preceded it. . . . If the respondent was rightfully in office, there could be no vacancy, and consequently no warrant for construing Childs' commission for two years into a valid appointment, as claimed by relator. In all such cases it is immaterial whether the want of a successor results from a failure to hold an election [or, as here, the failure to elect by reason of there being a tie vote], the failure of the person elected to qualify, or from a lawful change in the time of holding an election." In *State ex rel. Atty. Gen. v. Seay*, 64 Mo. 89, 27 Am. Rep. 206, it appeared that at the regular election in 1868 Gale was elected circuit judge for a term of four years. At the regular election in 1874 McCord was elected his successor, and he duly qualified, but two days before his term was to begin he died. A special election was held in March, 1875, to fill the vacancy, and the defendant, Seay, was duly elected, and properly qualified. Gale refused to surrender the office, claiming that, as McCord died before entering upon the duties of the office, there was no vacancy, and hence the special election was void. But on quo warranto against Seay it was held that a successor to Gale had been duly elected at the regular time for electing a judge for that court, and he had duly qualified, and this ended Gale's term and tenure, notwithstanding McCord died before entering upon the discharge of the duties of the office, and before his term began, and hence there was a vacancy, and a special election was properly ordered, and Seay was entitled to hold the office. It was pointed out, however, that if McCord had died after he was elected, but before he had qualified, there would have been no vacancy in the office, and Gale would have been entitled to hold over until the next regular time for holding an election to fill that office.

The cases relied on by the defendant do not support defendant's contention that there was a vacancy in the office of justice of the peace for the fourth district in St. Louis. The *Thomas Case*, 102 Mo. 85, 14 S. W. 108, decided that the charter and ordinances of St. Louis expressly provided for a special election in the exigencies present in that case. In *Stonestreet's Case*, 99 Mo. 361, 12 S. W. 895, it was decided that, when a regularly elected or appointed officer had served out his fixed term, he became a mere *locum tenens* until his successor was elected or appointed, and that such a successor had been legally appointed at the proper time in that case, and hence such successor was entitled to the office. *Manning's Case*, 84 Mo. 661, and *Spitz's Case*, 127 Mo. 248, 29 S. W. 1011, simply hold that when there is a vacancy in the office of justice of the peace it is proper to fill the vacancy until the next regular election thereafter held, as the statutes then provided (the act of 1891 changed the law so as to provide that the appointment shall be for the unexpired term), at 47 L. R. A.

which time an election to fill the unexpired term should be held. In both of these cases a successor to the incumbent had been elected and qualified. In the *Manning Case* the successor died after he had been elected and qualified and entered upon the duties of the office, and in the *Spitz Case* the successor resigned after being elected and qualified, and after entering upon the duties of the office. There was, therefore, clearly a vacancy in the office, as defined in *Seay's Case*, 64 Mo. 89, 27 Am. Rep. 206. In *Powles' Case* his successor had been duly elected and qualified, and therefore his tenure had ended, and he was properly ousted. In *Perkins' Case*, 139 Mo. 106, 40 S. W. 650, it was held that an officer whose term is for a fixed time, and until his successor is duly elected and qualified, is entitled to hold "until his successor has been chosen and qualified," but that in that case a successor had been duly elected and qualified, and hence the successor alone could rightfully exercise the powers and perform the duties of the office.

In the case at bar, Haughton was appointed, under § 7 of the act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected, and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898. There being no vacancy, there was no power in the judges named to appoint defendant to the office, either by virtue of the act of 1891 or of any other statute, and hence their action was a nullity, and defendant has no title to the office. Inasmuch as the act of 1891 provided that there should be an election for justice of the peace in St. Louis at the regular election in 1894, "and every four years thereafter," and inasmuch as there was, in legal intentment, no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton; and as the purpose of the lawmakers is that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district in the city of St. Louis until a successor is elected at that time and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified.

The defendant having failed to show any title to the office, a writ of ouster is awarded.

Gantt, Ch. J., and Burgess, Brace, and Valliant, JJ., concur. Robinson, J., dissents. Sherwood, J., absent.

SOUTH DAKOTA SUPREME COURT.

Ex parte Grant Heatley TOD.

(.....S. D.....)

1. A court or judge authorized to issue the writ of habeas corpus is not conclusively bound by the action of the executive in issuing an extradition warrant for an alleged fugitive, but may in fact determine whether or not an offense was charged, or whether or not the petitioner is a fugitive from justice, and whether or not the governor actually issued the warrant.
2. A person is not a fugitive from justice subject to surrender by extradition warrant, when he comes into the state at the request and in pursuance of the business of the party who demands his surrender.
3. An extradition warrant which the governor did not in fact issue is null and void, as the power to issue it is one which he cannot delegate.

(January 18, 1900.)

APPEAL by petitioner from an order of the Circuit Court for Lawrence County refusing a writ of habeas corpus to release him from the custody of the sheriff to which he had been committed in interstate rendition proceedings preparatory to his removal to another state. *Reversed.*

The facts are stated in the opinion.

Mr. Charles E. Davis, for appellant:

The courts have ample authority upon habeas corpus to inquire into the cause of the detention, and for this purpose, while not having the power to direct the executive discretion, they may review the manner in which it was exercised.

7 Am. & Eng. Enc. Law, p. 655; *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Ex parte Hart*, 25 U. S. App. 22, 28 L. R. A. 801, 63 Fed. Rep. 249, 11 C. C. A. 165; S. D. Comp. Laws, 4644.

If there is no charge of crime against the person in the demanding state, there is no duty devolving upon the executive to surrender a citizen of the state.

People ex rel. Lawrence v. Brady, 56 N. Y. 182; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Smith v. State*, 21 Neb. 552, 32 N. W. 594; *Davis' Case*, 122 Mass. 324; *Re Manchester*, 5 Cal. 237; *Ex parte Sheldon*, 34 Ohio St. 319; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; 7 Am. & Eng. Enc. Law, p. 638; *Ex parte Slauson*, 73 Fed. Rep. 667.

NOTE.—On the question who are fugitives subject to extradition, see *State v. Hall* (N. C.) 28 L. R. A. 239, and *note*; *Re Sultan* (N. C.) 28 L. R. A. 294; and *Drinkall v. Spiegel* (Conn.) 36 L. R. A. 486.

For habeas corpus to review extradition proceedings, see *State v. Jackson* (D. C. E. D. Tenn.) 1 L. R. A. 370, and *note*; and *Re Sultan* (N. C.) 28 L. R. A. 294.

47 L. R. A.

The complaint only charges a breach of contract.

2 Bishop, Crim. Law, 665; *Bainham's Case*, cited in 1 Salk. 379; *Re v. Bradford*, 2 Ld. Raym. 1327; *Ex parte Slauson*, 73 Fed. Rep. 667.

The petitioner was not a fugitive from the justice of the state of Nebraska.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

On habeas corpus the prisoner may show that he is not a fugitive from justice.

8 Enc. Pl. & Pr. 823; 12 Am. & Eng. Enc. Law, 2d ed. p. 601; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Re Keller*, 36 Fed. Rep. 681; *White v. Vallery*, 14 U. S. App. 87, *sub nom. Re White*, 55 Fed. Rep. 54, 5 C. C. A. 29; *Re Cook*, 49 Fed. Rep. 833; *United States v. Fowkes*, 3 U. S. App. 247, 53 Fed. Rep. 13, 3 C. C. A. 394; *Ex parte State*, 73 Ala. 503, 49 Am. Rep. 63; *Hartman v. Avenue*, 63 Ind. 352, 30 Am. Rep. 217.

The governor of the state is not required to surrender a citizen upon demand, unless it is made to appear in some proper manner that he is a fugitive from justice.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Hartman v. Avenue*, 63 Ind. 352, 30 Am. Rep. 217; *Re Doo Woon*, 18 Fed. Rep. 899.

The executive cannot issue his warrant upon the grounds of public policy.

Ex parte Morgan, 20 Fed. Rep. 298.

The petitioner cannot be convicted in Nebraska for receiving in South Dakota a draft mailed to him in this state, in payment of his salary upon contract.

State v. Jackson, 36 Fed. Rep. 258, 1 L. R. A. 370.

The mere fact that the petitioner was in the state of Nebraska about the time he is accused of committing the alleged fraud will not do.

Patterson's Case, 18 Alb. L. J. 190; Wharton, Crim. Pl. & Fr. 31; *Re Doo Woon*, 18 Fed. Rep. 898.

Proceedings of legal extradition are in abridgment of liberty, and all intendment is indulged in favor of the person who claims the benefits of the writ of habeas corpus.

Ex parte Morgan, 20 Fed. Rep. 298; *Ex parte Smith*, 3 McLean, 126, Fed. Cas. No. 12,968.

Mr. John L. Pyle, Attorney General, for respondent.

Corson, J., delivered the opinion of the court:

On July 21, 1899, Grant Heatley Tod presented a petition to the honorable judge of the circuit court of the eighth judicial circuit, in and for the county of Lawrence, setting forth that since the 16th day of September, 1898, he had been a resident of said Lawrence county; that he was then unlawfully restrained of his liberty by the sheriff of Lawrence county, who claimed some right

to detain him; and that such detention was unlawful; and praying that he (said petitioner) might be forthwith discharged from custody. Thereupon the said circuit judge issued a writ of habeas corpus, commanding the said sheriff of Lawrence county to produce before him the body of said Tod, together with the cause of his detention. The sheriff made return that he detained the petitioner under and by virtue of an extradition warrant purporting to be issued by the executive of this state; also, a warrant of arrest purporting to be issued by the said executive of this state, directed to the sheriff, coroner, or any other peace officer of Lawrence or any other county of this state; a requisition purporting to be issued by the executive of the state of Nebraska; and a warrant purporting to be issued by the county judge of York county, state of Nebraska. To this return the petitioner interposed a demurrer, which was overruled. Thereupon the petitioner filed an answer, in which he denied that he was a fugitive from justice from the state of Nebraska, and alleged "that at the time of leaving the state of Nebraska, on the 17th day of September, 1898, your petitioner acted through the request of the officers and agents of the York Mining & Development Company, Limited; that on or about the 15th day of May, 1899, at the request of the York Mining & Development Company, your petitioner visited the city of York, Nebraska, and while there all accounts and business was fully and finally settled and approved by the said company; that thereafter your petitioner was specially requested to return to the state of South Dakota as the employee of the said company, and thereupon the said company purchased and delivered to this petitioner transportation to go from the city of York, Nebraska, to the city of Deadwood, and it was in pursuance of the business of the said company, and not as a fugitive from justice from the state of Nebraska, that your petitioner has returned to the state of your petitioner's residence." The petitioner further alleged, "upon information and belief, that the warrant set forth in the return of the respondent, W. I. Lancaster, the agent of the state of Nebraska to receive and transport your petitioner to the state of Nebraska, and the warrant in said return directing the sheriff of Lawrence county, South Dakota, to arrest your petitioner, were not executed by his excellency, Andrew E. Lee, governor of the state of South Dakota; that on the 18th day of July, 1899, at the time said warrants purport to be signed, the said Andrew E. Lee was at the town of Vermillion, in South Dakota, and never saw the said warrants, or either of them, nor did he upon that day see the agent of the state of Nebraska, W. I. Lancaster, or read the requisition of the executive of the state of Nebraska requiring the surrender of your petitioner as a fugitive from justice, but that each of the said warrants have been theretofore signed by the governor of the state of South Dakota in blank, and were filled out by other persons than the said governor of 47 L. R. A.

the state of South Dakota, and that the said papers were never read or seen by the executive after the said blanks were filled out, and before the same were delivered to W. I. Lancaster, agent of the state of Nebraska; and for the reasons aforesaid the said warrants, and each of them, were at the time of the delivery thereof, and at all times have been, and now are, illegal and void." The answer also contained a copy of the affidavit or complaint alleged to have been made before the county judge of York county, in the state of Nebraska, upon which the requisition of the governor of the state of Nebraska was based. The circuit judge at the close of the hearing made an order remanding the petitioner to the custody of the said sheriff. A motion was made to the circuit court to vacate and set aside said order, and to grant the petitioner a new trial, which was denied; and from the order denying the same the petitioner has appealed to this court.

The counsel for the petitioner and appellant contends, (1) that the affidavit or complaint upon which the requisition issued by the governor of the state of Nebraska was based does not charge an offense; (2) that there was no evidence before the governor of this state or before the court tending to show that he was a fugitive from justice; (3) that the extradition warrant purporting to be issued by the governor of this state, as well as the warrant for his arrest, never in fact having been issued by the executive of this state personally, is null and void; and, (4) if there was any proof before the executive of this state tending to show that the appellant was a fugitive from justice, that evidence was clearly overcome by the proof of the appellant on the hearing that he was not a fugitive, and that he was not a subject for extradition under the law of Congress. The grounds for holding the appellant and remanding him to the custody of the sheriff of Lawrence county were not stated by the judge in his order, and hence what those grounds were are matter of conjecture. The learned circuit judge evidently overlooked the requirement of § 7843, Comp. Laws (habeas corpus act), which provides: "It shall be the duty of the court or judge remanding him to make out and deliver to the sheriff or other person to whose custody he shall be remanded, an order in writing stating the cause or causes of remanding him."

The attorney general takes the position in this court that it was not competent for the circuit judge to proceed further in the examination of the case upon the writ of habeas corpus than to determine whether or not the extradition warrant purporting to have been issued by the executive of this state was sufficient in form, and stated the facts required to be stated in such a warrant to authorize the appellant to be held and taken to the state of Nebraska, and that it was not competent for the court to enter into an investigation as to whether or not an offense was charged, or whether or not the appellant was a fugitive from justice, or

whether or not the warrant purporting to be issued by the governor was in fact issued by him. Upon the questions presented the decisions of the courts have not been in entire harmony, but we are of opinion that the weight of authority is in favor of the doctrine that all of these questions may be investigated by the court or judge authorized to issue the writ of habeas corpus, and that it is his duty to investigate them, when properly presented, and that he is not conclusively bound by the action of the executive in issuing his extradition warrant. The law of Congress providing for the extradition of fugitives from justice provides as follows: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory." United States Rev. Stat. § 5278. Under the provisions of this section the party sought to be extradited must be charged with the commission of a crime, and be a fugitive from justice, to authorize the executive of the state upon whom the demand is made to issue his warrant.

In *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, the Supreme Court of the United States says: "It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as

he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; 12 Am. & Eng. Enc. Law, 2d ed. p. 601; 8 Enc. Pl. & Pr. p. 823. It must also be affirmatively shown that he is a fugitive from justice, and such fact should be recited in the extradition warrant. In the warrant issued in this case the only recital upon this subject is that the "said Grant H. Tod, alleged to be within the jurisdiction of this state, is a fugitive from the justice of the state of Nebraska." Undoubtedly the warrant of the governor would be prima facie sufficient to prove that all the necessary prerequisites of the statute have been complied with prior to its issue by him, but this prima facie case may be overcome by competent evidence on the part of the person sought to be held upon the habeas corpus proceeding. Upon this question the Supreme Court, in *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, says: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

The affidavit in this case, or the so-called complaint, made against the appellant in the state of Nebraska, is apparently insufficient to warrant the holding of the appellant, and his extradition to the state of Nebraska. The affidavit or complaint is exceedingly lengthy, and no useful purpose would be subserved by reproducing it in this opinion. The authorities are quite harmonious in holding that the affidavit, indictment, or information upon which the party is sought to be held must charge a public offense; and, as we have seen, this is a question of law for the judge or court to determine upon the habeas corpus proceeding. In this case the complaint or affidavit is entitled as follows: "In the District Court of York County, Nebraska. State of Nebraska, Plaintiff, vs. Grant H. Tod, Defendant. Complaint. State of Nebraska, York County—ss." And it proceeds: "This complaint of H. C. Page, made before me, M. M. Wildman, county judge of said county, who, being first duly sworn, deposes

and says that Grant H. Tod on or about the 15th day of September, 1898, in the county of York, state of Nebraska, intending unlawfully to cheat and defraud the York Mining & Development Company, Limited, did then and there falsely, knowingly, designedly, and unlawfully pretend," etc. The affidavit or complaint then proceeded to set out certain pretenses by which the company was induced to enter into a contract with him in regard to certain mining operations in South Dakota, and concludes as follows: "Subscribed and sworn to before M. M. Wildman, county judge. Filed July 14th, 1899. M. M. Wildman, County Judge." It was also shown on the hearing that by the laws of the state of Nebraska the county court and the district court are different courts of record, and a judge of one of said courts does not exercise the functions of a judge of the other, or interchangeably. It was further shown that informations in that state must be prosecuted by the prosecuting attorney. It will thus be seen that the proceeding is a very irregular one, and apparently not authorized by the laws of the state of Nebraska. But in addition to this irregularity, which would probably vitiate the whole proceeding, the so-called complaint itself would seem to be insufficient, in that it states no public offense. But, in the view we take of the case, it is not necessary to discuss this question at this time.

On the hearing of the habeas corpus proceeding it was clearly shown by the appellant that he came to this state at the request of the said mining company, and in May, 1899, he returned to Nebraska at their request, and had a final settlement with the company, and again returned to this state, upon the special request of the said company. Certainly under these circumstances the appellant could not be regarded as a fugitive from justice. Leaving that state, and coming to this state upon the request of the party alleged to have been defrauded, remaining here a number of months in its employ, returning to that state for the purpose of a settlement, and again coming back to this state, not only with the knowledge but at the special request of the said company, negatives the alleged fact that he is a fugitive from justice. While it may not be necessary, to make a person a fugitive from justice, that he should leave the state where the offense is alleged to have been committed, with the intention or for the purpose of avoiding a prosecution, still we think it must appear that he left the state without the knowledge or consent, actual or implied, of the parties alleged to have been defrauded. Liberal as the rule laid down by the Supreme Court of the United States is, in holding parties to be fugitives from justice, the appellant would not come within that rule.

It was also shown on the hearing that the warrant purporting to be signed by the executive of this state was never in fact issued by him, but was issued by some person other than the governor. The duty of examining requisition papers, passing upon their valid-

ity, and issuing his warrant devolves upon the governor personally. It is a power that cannot be delegated to any other person. The liberty of the citizen is involved, and he can only be restrained of that liberty by the personal act of the governor, upon whom the power has been conferred by the Constitution and laws of the United States, and the Constitution and laws of this state. The execution of the power requires careful examination of the requisition papers, and involves the exercise of a sound judgment, aided, in case of necessity, by the advice of the attorney general of the state. The liberty of the citizen would be in great danger if any person could be allowed to issue such extradition warrants in the absence of the governor.

We are clearly of the opinion that the circuit judge erred in remanding the appellant to the custody of the sheriff of Lawrence county, and that the circuit court erred in not vacating and setting aside the order made by the circuit judge.

The order of the Circuit Court is reversed, and that court is directed to enter an order discharging the appellant from custody.

STATE of South Dakota *ex rel.* W. H. TOMPKINS *et al.*, *Receipts*,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, *Appl.*

(.....S. D.....)

Authority of railroad commissioners to order a railroad company to build and maintain a depot or station house for which there is a clear and pressing public necessity, at a certain station, is conferred by Laws 1897, chap. 110, § 2, giving them "general supervision of all railroads," and providing that they shall inform a railroad corporation of "the improvements and changes which they adjudge to be proper," whenever in their judgment "any addition to or change of its stations or station houses . . . is reasonable and expedient in order to promote the security, convenience, and accommodation of the public."

(January 10, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Hanson County in favor of relators in a proceeding to compel the construction and maintenance of a depot at Farmer village. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to authority of railroad commissioners, see also *Railroad Comrs. v. Oregon R. & Nav. Co.* (Or.) 2 L. R. A. 195, and *note*; *Cleveland, C. C. & I. R. Co. v. Closser* (Ind.) 9 L. R. A. 754, and *note*; *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 12 L. R. A. 436; and *Jacobson v. Wisconsin, M. & P. R. Co.* (Minn.) 40 L. R. A. 389.

For delegation of power to such commissioners, see *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 1 L. R. A. 744; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 18 L. R. A. 393; and *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 24 L. R. A. 141.

Mr. Thomas Wilson, with Messrs. H. H. Keith and L. K. Luse, for appellant:

A court has no power to make such an order or grant such relief as is here applied for, unless such authority is clearly conferred by the legislature.

Northern P. R. Co. v. Washington Territory ex rel. Dustin, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; *Com. v. Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555.

Statutes in derogation of the common law are to be strictly construed.

Sedgw. Stat. & Const. L. p. 267; Sutherland, Stat. Constr. § 290; Kirby v. Western U. Teleg. Co. 4 S. D. 463, 57 N. W. 202; *Minnehaha County v. Thorne*, 6 S. D. 449, 61 N. W. 688.

This rule has been frequently applied to statutes like the one now under consideration.

State v. Wabash, St. L. & P. R. Co. 83 Mo. 144; *Railroad Comrs. v. Oregon R. & Nav. Co.* 17 Or. 65, 2 L. R. A. 195, 19 Pac. 702.

There is nowhere in this statute any command to the railway company to obey the notice or to make such changes in the method of doing its business as the commission may think or adjudge proper.

It is absurd to attribute to the legislature the intent that an *ex parte* order should be made under § 2 without opportunity to be heard, which would cause a forfeiture of the franchises of a railway company.

Section 2 should be so construed as that the commissioners in the exercise of their judgment notify the railway companies of what changes they deem proper in respect to the matters enumerated, and that such notice is advisory only to the railway companies, and that these matters are brought, by report, to the attention of the legislature, leaving it to act in the premises.

State ex rel. Ives v. Kansas C. R. Co. 47 Kan. 497, 28 Pac. 208; *State v. Mason City & Ft. D. R. Co.* 85 Iowa, 516, 52 N. W. 490; *State v. Des Moines & K. C. R. Co.* 87 Iowa, 644, 54 N. W. 461.

Messrs. John L. Pyle, Attorney General, and T. H. Null, for respondents:

Section 2 of the act of 1897 is identical with the Iowa act of 1878, and standing alone, as it did in Iowa until 1884, there would be no authority for the order.

State v. Mason City & Ft. D. R. Co. 85 Iowa, 516, 52 N. W. 492.

In 1884 that part of the act providing for filing complaints with the commission and a method of disposing of the complaints was adopted, and at the same time provision was made by which the attorney general should bring suits to secure obedience to the orders of the commission.

In 1888 the section was adopted which empowered the commission to institute proceedings to enforce their orders.

In Iowa they now have the two remedies; one under the act of 1884, and one under the act of 1888.

47 L. R. A.

This provision has always been regarded by the courts of Iowa as furnishing the authority which the act of 1878 lacked, and they have ever since 1884 upheld and enforced orders of the commission.

Smith v. Chicago, M. & St. P. R. Co. 86 Iowa, 202, 53 N. W. 130; *State v. Chicago, M. & St. P. R. Co.* 86 Iowa, 641, 53 N. W. 323.

Fuller, P. J., delivered the opinion of the court:

On the 16th day of September, 1897, certain citizens engaged in business at the village of Farmer, a station on defendant's line, applied by petition stating sufficient facts to the board of railroad commissioners for an order requiring the defendant to provide a depot at that place for the receipt and discharge of passengers and freight, the only present accommodation of that nature being a platform and side track. A copy of this petition, together with a notice of the time and place of hearing, were duly served on defendant, who appeared before the commissioners, and, in effect, admitted the existence of facts sufficient to entitle petitioners to the relief sought, but denied the legal authority of the commissioners to order it to build and maintain a depot or station house. After an orderly examination of numerous witnesses, and a careful investigation of the matter, full findings of fact were prepared, and the conclusion was reached by the board of commissioners that the depot should be built, and it was accordingly so ordered. Defendant having thereafter advised the board of commissioners in writing that its order would not be complied with, and that no depot would be constructed at the station of Farmer, the matter was, by said board, and in the manner provided by statute, presented to the circuit court, and this appeal is from an order overruling a demurrer to a petition which confessedly states facts sufficient to show the necessity for and public utility of such a building at that station. As the authority of the commissioners to require the construction of a station house in any event, and the power of the court to enforce such an order, is the only question presented by the demurrer, no specific statement of the grievance complained of is essential to a determination of the point. For the purposes of the demurrer it is admitted that there is a clear and pressing public necessity for the building of a proper station house on appellant's railway at the town of Farmer, and its ability to comply with the order requiring such improvement is not questioned. Having constructed and maintained a platform and a side track for the receipt and delivery of freight and passengers at the village of Farmer, the question is not whether a railroad company may be compelled to build a depot and stop its trains at a place where no station has been established. A station, says Bouvier, is "a place where railroad trains regularly come to a stand for the conven-

ience of passengers, taking in fuel, discharging freight, or the like," and, as thus defined, Farmer is shown clearly to be one of appellant's stations, the gross receipts of which in the way of earnings amount to \$10,000 annually, and where the ordinary lines of business are represented as follows: "One general store, one blacksmith shop, one livery barn, one machinery firm, one hardware, one saloon, two grain elevators, and coal sheds, stock shippers, and other enterprises waiting for a depot." Section 2 of chapter 110 of the Laws of 1897 provides that "the railroad commissioners shall have the general supervision of all railroads in the state, . . . and shall from time to time carefully examine and inspect the condition of each railroad in this state and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience. . . . Whenever, in the judgment of the railroad commissioners, . . . any addition to or change of its stations or station houses . . . is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, said railroad commissioners shall inform such railroad corporations of the improvements and changes which they adjudge to be proper by notice thereof in writing, . . . and a report of the proceedings shall be included in the annual report of the commissioners to the legislature." Counsel for appellant with much ingenuity maintains that the provisions of this statute are advisory merely, and designed only to authorize the commissioners to gather information, to notify railroad companies of what changes or improvements are deemed proper, and report the same to the legislature. From a cursory examination and isolated view of the section, there appears to be force in the contention, but when considered, as it must be, in its place as a part of a uniform system, it is clear that a most liberal legislative grant of authority has been conferred upon the commissioners, both as to subject-matter and the mode of procedure. In order to make effective the statutory "supervision of all railroads in this state," and carry into operation all reasonable recommendations and orders of the board of commissioners, the following was enacted as a part of chapter 110, Laws 1897 (§ 16): "Any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier, . . . may apply to said commissioners by petition, which . . . shall be forwarded by said commissioners to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time to be specified by the commissioners. . . . If such common carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for inves-

tigating said complaint, it shall be the duty of said commissioners to investigate the matter complained of by such means as said commissioners shall deem proper." Section 17: "Whenever an investigation shall be made by said commissioners after notice as provided by § 16 of this act, it shall be their duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commissioners are based, together with its or their recommendations or orders as to what reparation, if any, should be made by the common carrier to any party or parties who may have been found to be injured; and such findings, so made, shall thereafter in all judicial proceedings be deemed and taken as prima facie evidence as to each and every fact found. All reports of investigations made by said commissioners shall be furnished to the party who may have complained, or any other person or persons directly interested, and to any common carrier that may have been complained of." Section 19: "Whenever any common carrier as defined in and subject to the provisions of this act shall violate or refuse or neglect to obey any lawful order or requirement of the said board of railway commissioners, it shall be the duty of said commission and lawful for any company or person interested in such order or requirement, to apply in a summary way, by petition to the circuit court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line of road passes or is operated, or in which the violation or disobedience of such order or requirement may happen, alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier, his or its officers, agents, or servants in such manner as the court shall direct, and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. . . ." Independently of any specific statutory requirement, the duty of providing suitable station houses is so intimately connected with the common welfare that a modern author vigorously adopts the view that under every railroad charter or enabling statute there is an implied obligation on the part of the company to provide and maintain a suitable depot at every station where public interest demands it. 6 Thomp. Corp. 7828. Public utility is the consideration for the right of eminent domain, and in a certain sense partial compensation for the taking of private property for railway purposes. No such power is ever given to purely private corporations, nor to individuals; and, while a railroad is private property, it is also a common carrier of freight and passengers, a public highway depending upon and devoted to the use of the

public. In *State v. Hartford & N. H. R. Co.* 29 Conn. 538, the court says: "All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created,"—and, in the absence of legislation, it was held, both in Illinois and Nebraska, that the duty of erecting and maintaining suitable warehouses or depots at all appropriate points upon a railway line rests upon and is enforceable under the principles of the common law. *People ex rel. Hunt v. Chicago & A. R. Co.* 130 Ill. 175, 22 N. E. 857; *State ex rel. Mattoon v. Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329. In sustaining the authority of the railroad commissioners to require the erection and maintenance of a depot for freight and passengers, under a statute less specific than our own, the court in *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208, takes occasion to say: "While, therefore, we are by no means of the opinion that the public would have been without remedy in respect to the grievance complained of through the supreme judicial tribunal of the state, if the act of 1871 had not been passed, we see nothing in that act that conflicts with the rights of the corporation represented by the defendant." The foregoing cases are cited to the point that the existence of a right implies the existence of a remedy, and, if no specific remedy be provided, the courts will enforce the right by appropriate remedy, either at law or in equity. However, the grant of authority to the commissioners of this state, by which they are required to take upon themselves "the general supervision of all railroads in the state," and authorized in the due course of law to make the order complained of, subject to judicial review, upon notice as to its being reasonable, imposes upon the appellant an imperative duty. We are therefore not called upon to resort to the doctrine invoked by the above-mentioned courts, whose decisions we mention for the purpose of showing that a liberal construction of statutes designed to carry into effect the will of the legislature with reference to the subject is fully justified.

It is further contended by counsel for appellant that the power to order a station house to be built cannot be inferred from the right to adjudge proper "any addition to or change of its stations or station houses," but to us it seems reasonably plain that the building of a depot is as clearly an addition to the station as an enlargement of the station grounds or extension of side tracks.

For the reasons above stated, the order appealed from is affirmed.

Haney, J., concurs in the result, upon the ground that under existing statutes it is defendant's duty, regardless of the action taken by the commissioners, to provide a suitable station house at the station established by itself.

47 L. R. A.

TOWN of ST. LAWRENCE *et al.*, Appts.,
v.

Peter GROSS, Resp't.

(.....S. D.....)

1. A complaint for an injunction against the removal of a building, on the ground that a nuisance will be thereby created by leaving a dangerous excavation under the sidewalk and a part of the street, is insufficient where there is no allegation that the owner threatens or intends to leave his premises in a dangerous condition.
2. An injunction against the removal of a building from a town until the bonded and warranted indebtedness of the town shall be paid cannot be granted at the suit of taxpayers on the ground that its removal will so far diminish the taxable property of the town as to render it difficult for the town to meet its current expenses and the principal and interest of its indebtedness, and impose an excessive burden of taxation on the remaining taxpayers.

(January 10, 1900.)

APPEAL by plaintiffs from an order of the Circuit Court for Hand County sustaining a demurrer to the complaint in an action brought to enjoin defendant from removing a building beyond the limits of the plaintiff corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wilmarth & Simmons, for appellants:

The town of St. Lawrence is entitled to the injunction to prevent the removal of this building, which would create a dangerous place to the traveling public by leaving an excavation 8 feet deep and 25 feet long in, under, and by the side of the sidewalk.

Huron v. Bank of Volga, 8 S. D. 449, 66 N. W. 815.

If the plaintiffs have not this remedy by injunction they have no remedy whatever. "Equity suffers not a right to be without a remedy."

High, Inj. § 1236; 6 Am. & Eng. Enc. Law, p. 685, note 1; 1 Bl. Com. § 92.

When a municipal corporation is about to do an illegal act, the effect of which will be to impose a heavy burden upon the property of its taxpayers, an injunction will be granted, at the instance of the taxpayers, to prevent such act.

High, Inj. 3d ed. § 1236.

An insolvent tenant may be enjoined from removing crops out of which he is entitled to his share.

High, Inj. § 403.

The relief is granted in such case because of the inadequacy of a remedy at law.

3 High, Inj. § 430; *Parker v. Garrison*, 61 Ill. 250; *Lewis v. Christian*, 40 Ga. 187; *Schmitt v. Cassilius*, 31 Minn. 7, 16 N. W. 453.

NOTE.—For injunction against prospective nuisance in the use of premises, see *Pfingst v. Senn* (Ky.) 21 L. R. A. 569; and *Windfall Mfg. Co. v. Patterson* (Ind.) 37 L. R. A. 381.

The question as to the power of the court to prevent a man from removing taxable property from a town while the town is indebted is an altogether novel one.

Where it is shown that the land without timber is inadequate security for a debt, an injunction will lie to prevent cutting the timber.

3 High, Inj. § 480.

Formerly an injunction in restraint of waste was issued during the pendency of an action, but it has since been extended when no action is pending.

3 High, Inj. § 662.

Mr. S. V. Ghrist, for respondent:

There are no unpaid taxes or assessments against this property in question, and, even if there were, an action could not be maintained by these plaintiffs. A municipal corporation has no lien for taxes.

Desty, Taxn. p. 734.

Where the statutory remedy and the remedy by mandamus prove ineffectual, equity can confer no relief.

15 Am. & Eng. Enc. Law, p. 1315.

Corson, J., delivered the opinion of the court:

This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The action was brought to obtain an injunction to restrain the removal by defendant of a certain brick building from the town of St. Lawrence. The facts as alleged in the complaint may be briefly stated as follows: That the town of St. Lawrence is a municipal corporation, and within the corporate limits there are 1,200 acres of land, of which not over 240 acres are platted; that the defendant is the owner of a certain two-story brick building situated in the town of St. Lawrence, and is now making preparations to remove the same to the town of Miller; that said building has a basement 8 feet in depth, excavated from the line of the sidewalk 14 feet into the street under the sidewalk, and that, if said building is removed, it will leave a deep and dangerous excavation and pitfall endangering the safety of the traveling public; that said building was constructed in 1889 at a cost of \$5,000; that the assessed value of all the real property within the corporate limits of the town of St. Lawrence for the year 1887 was \$46,297, and the value of the personal property was \$63,268; in 1899 the assessed value of the real property within the corporate limits of said town was \$19,267, and of the personal property, \$6,706; that during the year 1889 eight buildings, of the value of \$9,000, were destroyed in said town by fire, and subsequently an elevator and a mill, of the value of \$20,000, were so destroyed; that since 1886 fifty-two buildings have been removed from said town, which were of the value of \$25,000, and no other buildings have been built to replace them; that during the year 1886 said town issued bonds in the sum of \$4,400 for the purpose of constructing waterworks, and in 1894, together with the township of St. Lawrence, issued \$11,000 in bonds for the purpose of constructing artesian wells, under the irrigation act of 1891, and there is now outstanding and unpaid \$3,400 in town warrants, upon which a large amount of interest has accrued; and in 1885

school bonds to the amount of \$3,000 were issued; that to pay the interest upon said bonds it is necessary to levy and collect an annual tax of \$700; that the plaintiffs Taylor, King, and Davey are residents and taxpayers of the town of St. Lawrence, and are owners of real property therein. Plaintiffs further allege that if defendant's building is removed, the taxes which must necessarily be paid by the taxpayers of said town will be much increased, and that by the removal of defendant's building the taxes of the plaintiffs and other taxpayers similarly situated will become burdensome, intolerably excessive, and amount practically to a confiscation of their property; that said town of St. Lawrence, if this and other buildings in contemplation of removal are removed, will be unable to levy and collect sufficient taxes to meet the running expenses of said town, its proportionate share of the school expenses, and meet the principal and interest of its bonded indebtedness, and, if said buildings are allowed to be removed, it will seriously impair the ability of the town to pay the principal and interest of its bonded indebtedness; that the plaintiffs have no adequate and speedy remedy at law; and that the facts herein stated were known to the defendant at the time he purchased the building herein described. Wherefore plaintiffs pray for an order enjoining the defendant from removing such building until such time as the bonded and warranted indebtedness of the town shall be entirely paid.

One of the grounds upon which plaintiffs' complaint seems to be based is that the removal of the building by the defendant will create a nuisance by leaving a dangerous, unfilled excavation under the sidewalk and a part of the street. So far as the complaint is based upon that theory, it is sufficient to say that there is no allegation in the complaint that he threatens or intends to leave his premises in a dangerous condition. It is to be presumed, therefore, that upon the removal of the building he will cause the basement to be made secure and safe for the public.

Appellants further contend that the removal of this building from the town of St. Lawrence will so far diminish the taxable property in said town as to render it difficult for the town to meet its current expenses and the principal and interest of its indebtedness, and it will largely increase the burden of taxes of the remaining residents of said town and township, and that the taxpayers in said town have such an interest in retaining the taxable property within the same as to enable them to maintain this action. The appellants do not claim that the indebtedness of a municipal corporation, either bonded or floating, creates a lien upon the property of individuals within the municipality, but do claim that the property of the respondent within the town of St. Lawrence, as soon as the bonds were issued, became subject to and was liable for its proportionate share of all bonds issued by the town, and that said property was purchased by the defendant with the fraudulent intent

of removing the same from the town of St. Lawrence for the purpose of avoiding payment of the taxes that might be assessed thereon. The learned counsel for the appellants have not referred the court to any adjudicated cases sustaining their position, and the court, in its own researches, has not been able to find any.

Counsel for appellants have also failed to point out under what head of equity jurisprudence their complaint can be sustained. It is true, courts of equity will protect property of one against unlawful invasion by another where irreparable injury may result from such invasion, but those courts do not undertake to relieve parties in all cases who may suffer from the acts of another. It is only when a party has done some wrongful act which injures another that courts of equity will grant to such injured party relief. The law seems to be well established that the owner of real property not encumbered by any liens may dispose of such property in any manner that he may deem proper, and that he has an undoubted right to sell or remove any building constituting a part of the realty, using care that in removing said building he does no injury to the person or property of another; and hence, in removing his building from the town of St. Lawrence, defendant will do no wrongful act of which the town or taxpayers have a right to complain. *Re Utica, C. & S. Valley R. Co.* 56 Barb. 456-460. It is certainly a novel claim that parties having no interest in or lien upon the property of the defendant have the right to restrain him from removing his building to a locality where he may desire to rebuild the same. It may be unfortunate

for the plaintiff taxpayers that by the removal of this building their taxes may be increased, but it is one of those incidents in the ownership of property for which neither courts of law nor courts of equity afford a remedy. It is quite clear, therefore, that the municipality of the town of St. Lawrence and the taxpayers therein cannot maintain this action. Neither the town of St. Lawrence nor the taxpayers have any right to insist that parties who were the absolute owners of property in such town when the indebtedness of said town was incurred shall continue as owners of such property, or that purchasers of the same shall continue to keep it in the same condition it was in when the indebtedness was incurred. We fail, therefore, to discover any law, legal or equitable, upon which this action could be maintained.

It is contended by appellants that this case comes within the principle by which proceedings of municipal corporations at the suit of citizen taxpayers, where such proceedings encroach upon private rights, are restrained. But courts of equity exercise their jurisdiction in such cases on the ground that the municipality is charged with, and made the depository of, a public trust, and that by the performance of the threatened acts they are violating such trust. High, Inj. § 1236. The owner of property within a municipality sustains no such relation to the municipality or the taxpayers therein. We are of the opinion, therefore, that the court was clearly right in sustaining the demurrer.

The order of the Circuit Court is therefore affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

City of NORFOLK, *Plff in Err.*,
v.

William A. YOUNG.

(97 Va. 728.)

1. An assessment for a street improvement made under the charter of the city of Norfolk, Virginia, § 25, under a resolution of the council declaring the improvement expedient, and after public notice of such resolution by publication in newspapers, is unconstitutional as a deprivation of property without due process of law, where the notice wholly failed to designate any tribunal before which, or place where, or time when, a party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property.
2. A notice of an assessment for a local improvement must be such that persons of ordinary intelligence may understand when, where, and before whom they have the right to appear to protect themselves from it.

NOTE.—As to the constitutionality of assessment for local improvements, see also *Asberry v. Roanoke* (Va.) 42 L. R. A. 636, and *note*; *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289; and *Shroder v. Overman* (Ohio) 47 L. R. A. 156. 17 L. R. A.

legal or erroneous assessments, without being compelled to employ attorneys to determine these questions for them.

(January 18, 1900.)

ERROR to the Circuit Court for the City of Norfolk to review a judgment in favor of plaintiff in a proceeding brought to enjoin defendant from proceeding to collect certain street paving assessments which had been levied against plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Mr. Walter H. Taylor, for plaintiff in error:

The passage and publication of the resolution could have been intended for no other purpose than to give notice to those interested.

The publication of the preliminary resolution was legal notice to all parties.

In judging what is due process of law respect must be had to the cause and object of taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements or none of these, and, if found to be suitable

or admissible in the special case, it will be adjudged to be due process of law.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

Personal citation to the parties interested is not necessary, no particular form of notice is required, and the legislature may determine how it is to be given.

Violett v. Alexandria, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Pittsburgh, C. O. & St. L. R. Co. v. Backus*, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Chamberlain v. Cleveland*, 34 Ohio St. 570; *Garvin v. Dausseman*, 114 Ind. 429, 18 N. E. 829; *Hyland v. Brazil Block Coal Co.* 128 Ind. 335, 26 N. E. 674.

If the charter provided for notice, even in the absence of a specific provision for a hearing, an opportunity of being heard was also provided for.

Notice and an opportunity to be heard are not essential to due process of law in all cases.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Heth v. Radford*, 96 Va. 274, 31 S. E. 8.

The distinction between the circumstances when notice is required and when not is shown by the cases of—

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The legislature has the power to determine, without notice to the parties, the proportion of benefit each lot receives, as well as the total amount of the benefit received by all.

Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

An opportunity to be heard was given as a right.

Kentucky Railroad Tax Cases, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Pittsburgh, C. O. & St. L. R. Co. v. Backus*, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Hyland v. Brazil Block Coal Co.* 128 Ind. 335, 26 N. E. 673.

Messrs. Borland & Wilcox, for defendant in error:

The owner of the property sought to be affected must not only have notice, but must also have an opportunity to be heard, and before an impartial tribunal.

Violett v. Alexandria, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619; *Santa* 47 L. R. A.

Clara County v. Southern P. R. Co. 18 Fed. Rep. 410; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Buchanan, J., delivered the opinion of the court:

It was held in the case of *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909, and may now be regarded as the settled law of this state, that local assessments by municipal corporations for street improvements are an exercise of the taxing power of the state, that article 14 of the Amendments to the Constitution of the United States applies to such assessments, and that a law which authorizes them, without giving to the person of whom such assessments are exacted reasonable notice and opportunity to appear and contest the legality, justice, and correctness of the assessment before it is finally determined upon, deprives such person of his property without due process of law, and is therefore void. It was further held that "due process of law" requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any final order can be made affecting his rights of property, and that such notice and opportunity must be provided for in the laws under which the assessment is made. *Heth v. Radford*, 96 Va. 272, 31 S. E. 8.

The local assessment complained of in this case, and whose constitutionality is denied, was made under the twenty-fifth section of the charter of the city of Norfolk, which provides that "whenever any street shall be laid out, a street graded or paved, a culvert built, or any other public improvement whatsoever made, the city councils may determine what portion, if any, of the expense thereof ought to be paid from the public treasury, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. But no public improvement shall be made to be defrayed, in whole or in part, by a local assessment, until first requested by a petition signed by a majority of the owners of property to be assessed for such improvement, or unless the councils shall by a vote of a majority of all the members elected to each council, declare the said improvement to be expedient; and shall furthermore give public notice of such resolution in two or more newspapers, published in said city for twenty days, and shall thereafter, by a like majority vote, order and determine that the said improvement shall be made." Acts 1883-84, p. 38.

That section limits the manner in which local assessments can be made. It can only be done upon the petition of a majority of the owners of property to be assessed for the improvement, or by a resolution, passed by a majority vote of all the members of each council, that it is expedient to make the improvement. This resolution of expediency must be published for twenty days in two or more newspapers published in the city;

and after such publication has been made the councils, by a like majority vote, can determine that the improvement shall be made. The assessment in this case was made under the latter method. The question presented, therefore, is whether the notice required by that section was intended to give the persons to be affected an opportunity to contest the legality, justice, and correctness of the assessment, and, if so, whether it was sufficient.

We do not think that the notice required by that section was intended to furnish the landowners to be affected an opportunity to contest the legality, justice, or correctness of the assessment. If it had been, there would have been a like provision for notice to the landowners who had not petitioned for the improvement, when the improvement was made upon the petition of a majority of the landowners to be assessed for such improvement. Those landowners who had not petitioned for the improvement, if not all to be affected by it, were entitled to an opportunity to be heard, just as much as where the improvement was made by the other method. Why give one class of persons notice and an opportunity to be heard, and not give another class equally entitled to it, when both classes are embraced in the same section—indeed, in the same sentence—of the charter? It cannot be presumed that the legislature had in mind the constitutional rights of the parties to be affected by such assessments, and intended to guard those rights as to one class, and to ignore or disregard them entirely as to the other class.

If the object of the provision in question had been to give the landowners an opportunity to contest the legality, justice, or correctness of the assessment, it would be reasonable to expect that provision would have been made for a tribunal before which, a place where, and a time within which, they could and must make the contest, but nothing of the kind is done.

The object of the provision was manifestly to enable the councils to get the benefit of the judgment or opinion of the landowners to be affected, as to the necessity or wisdom of making the improvement.

When an improvement is ordered to be made upon petition, the petition furnished the councils with the views and wishes of a majority of those to be affected. When the improvement is made by resolution of expediency, the notice required is to give the people to be affected an opportunity to be heard as to the expediency of making the improvement, and thus to enable the councils the better to determine whether or not the proposed improvement should be ordered. But if the notice was intended to give the persons to be affected an opportunity to contest the legality, justice, and correctness of the assessment, we do not think it was sufficient. The object of notice in such cases is

to secure to the owner the opportunity to protect himself or his property from an illegal or erroneous assessment. In order to be effectual, it should be full and clear enough to disclose to persons of ordinary intelligence, in a general way, what is proposed, and when and where they may be heard.

In the case of *Santa Clara County v. Southern P. R. Co.* 18 Fed. Rep. 410, Mr. Justice Field, whose language is quoted by this court with approval in the case of *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909, said: "The notice to which we refer need not be a personal citation. It is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule, only a statutory notice is given.

... All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain."

And in the case of *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S., at page 318, 43 L. ed. 462, 19 Sup. Ct. Rep. 206, it was said by Mr. Justice Brewer that if the service is made by publication only, as in this case, "that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed, and when and where he may be heard." *Violett v. Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Heth v. Radford*, 96 Va. 272, 31 S. E. 8.

The notice required and given wholly failed to designate a tribunal before which, a place where, or a time when, the party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property.

Neither do we think that persons of ordinary intelligence would have inferred from the notice required and given that they had the right (even if that be the law, as appellant's counsel insists) to appear before the town councils at one of their regular meetings, and demand a hearing from them, in order that they might have any wrong done them redressed. Persons skilled in the law might have advised such a course, but the notice which the law requires in such cases is such that persons of ordinary intelligence may understand when, where, and before whom, they have the right to appear to protect themselves from illegal or erroneous assessments, without being compelled to employ attorneys to determine these questions for them.

I am of opinion that there is no error in the decrees appealed from, and that it should be affirmed.

Camillo MAIA, Admr., etc., of Arnaldo
Maia, Deceased, *Piff. in Err.*,

v.

Directors of the EASTERN STATE HOSPI-
TAL.

(97 Va. 507.)

1. The Eastern State Hospital of Virginia, which was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the state and supported by the state, having no stockholders and no members except directors, who are without any interest in it or its affairs, but are appointed by the governor and are in fact public rather than corporate officials, liable to fines for any failure to perform their duties,—is not liable for injury to an inmate, occasioned by the negligence or misconduct of the persons in charge of the hospital.
2. An action for damages will not lie against a state institution against which judgment cannot be enforced, merely for the purpose of fixing the amount of damages in order to make a claim for presentation to the legislature.

(Harrison, J., dissenting.)

(November 16, 1899.)

ERROR to the Circuit Court of the City of Richmond to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Samuel D. Davies and R. E. Frayser, for plaintiff in error:

If it be conceded that this corporation is a part of the state government, consent to be sued has been given by the law.

Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163; *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

The Eastern Lunatic Asylum was constituted a corporation by the act of March 6, 1841 (Acts 1840-41, p. 38), with express authority and capacity to sue and be sued, along with other corporate powers and duties.

Western Lunatic Asylum v. Miller, 29 W. Va. 329, 1 S. E. 740.

Mr. A. J. Montague, Attorney General, for defendant in error:

The defendant in error is a public corporation and an agency of the commonwealth in the administration of governmental functions.

Ang. & A. Priv. Corp. 9th ed. § 31; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L. R. A. 42, 41 N. E. 407.

Assuming that the defendant in error is a public corporation, under the control of the legislature; that it is an agency of the state and maintained by her taxation; then such corporation is not liable in damages for negligent or malicious injuries to an inmate.

Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 23 L. R. A. 200, 24 S. W. 1065; *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L. R. A. 655, 58 N. W. 1092; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 60 N. W. 42; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461.

The defendant in error is a corporation, engaged in the administration of a public trust or charity upon a profound and beneficent scale. The funds of this trust are in no way amenable for judgments for torts, and it would be a diversion of the trust to subject such funds to the satisfaction of such judgments.

Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L. R. A. 417, 15 Atl. 553; *Ford v. Kendall Borough School Dist.* 121 Pa. 543, 1 L. R. A. 607, 15 Atl. 812.

Mr. William R. Aylett also for defendant in error.

Buchanan, J., delivered the opinion of the court:

This cause was heard at a former term of the court, and an opinion and judgment rendered reversing the judgment complained of. Upon a petition to rehear, that judgment was set aside, and at this term of the court the cause was again argued and submitted.

The plaintiff in error, who was the plaintiff in the court below, brought an action of trespass on the case to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant, or its agents, in requiring and permitting the intestate, while a patient and inmate of the defendant's hospital for the insane, to dig and excavate in the side of an embankment, the property of the defendant, without providing props or supports to prevent the overhanging earth from falling upon him.

The defendant demurred to the declaration, and to each count thereof, upon the ground that it was a public corporation,—an agency of the state for the exercise of purely governmental functions,—and that no action would lie against it for the injury complained of.

The first question to be considered is the character of the defendant corporation. Is the defendant a public corporation,—an agency of the state, exercising exclusively governmental functions?

By an act of the house of burgesses passed in the year 1769, after a preamble reciting that persons of insane or disordered minds had been frequently found wandering in different parts of the colony, and no certain provision had been yet made either towards effecting a cure of those whose cases are not become quite desperate, nor for restraining others who might be dangerous to society, fifteen persons (among them, John Blair, Peyton Randolph, and George Wythe) were "constituted trustees for founding and es-

NOTE.—As to the nature of incorporated institutions belonging to the state, see *note* to *State ex rel. Little v. Board of Regents* (Kan.) 29 L. R. A. 378; also *Lane v. Minnesota State Agri. Soc.* (Minn.) 20 L. R. A. 708; *Sterling v.* 47 L. R. A.

Regents of the University (Mich.) 34 L. R. A. 150; *Oklahoma Agri. & Mechanical College v. Willis* (Okla.) 40 L. R. A. 677; *Gross v. Kentucky Bd. of Managers of World's Columbian Exposition* (Ky.) 43 L. R. A. 703.

tablishing a public hospital for the reception of such persons as from time to time, according to the rules and orders established by this act, may be sent thereto. And the said trustees shall be called and known by the name and style of the court of directors of the public hospital for persons of insane or disordered minds." 8 Hen. Stat. p. 378.

By an act of the general assembly passed in 1785, the directors of the public hospital which had been organized and conducted under the act of 1769 and amendments thereto was created a corporation (12 Hen. Stat. p. 198), and has ever since existed as a corporation under various names, and is now known as the "Eastern State Hospital." See Code 1819, chap. 109; Code 1849, chap. 85; Code 1887, chap. 75; Acts 1893-94, p. 397.

An examination of the statutes creating and continuing this hospital shows that it was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the state. It has no stockholders,—no members, even, except directors, having no interest in it or its affairs, who are appointed by the governor, by and with consent of the senate, and are in fact public rather than corporate officials, endowed with a corporate being for a more convenient administration of the duties imposed upon them by law, and are made liable to fines for any failure to perform their duties.

The money necessary to defray the expenses of maintaining and caring for its inmates is provided by annual appropriations made by the general assembly out of the public treasury, and the manner of keeping and disbursing its funds is prescribed by statute. The directors are required to make quarterly reports to the auditor of public accounts, showing in detail how they have disbursed the funds, and to report annually to the governor, for the information of the general assembly, the condition of the hospital, and the sums received and disbursed by them.

It is plain, under the authorities, and especially under the recent case of *Phillips v. University of Virginia*, 97 Va. 472, 34 S. E. 66, that the defendant is a public corporation, governed and controlled by the state, and acts exclusively as an agency of the state for the protection of society, and for the promotion of the best interests of the unfortunate people of the commonwealth, of insane or disordered minds.

The next question is whether the defendant, a public corporation,—an agency of the state exercising exclusively governmental functions,—is liable for the injuries complained of in the declaration.

In the case of *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461, the liability of a municipal corporation for the negligence of its agents when in the exercise and performance of governmental powers and duties was considered. That was an action to recover damages for the loss of a slave who it was alleged had lost his life by reason of the careless and negligent conduct of the agents of the city in permitting him to escape, while

insane, from the smallpox hospital of the city, into which he had been admitted for treatment in pursuance of the ordinance of the city. In that case the distinction was drawn between powers and duties which are granted to or imposed upon a public body as an agency of government, to be exercised and performed exclusively for public, governmental purposes, and those powers and privileges which are exercised by the corporation or body for its own private advantage, and are for public purposes in no other sense than that the public derives a common benefit from a proper discharge of the duties arising from the grant.

For the negligent exercise or performance of the former class of powers and duties it was held that the city was not liable, and, as the injury complained of belonged to that class, it was held that the action would not lie, while it was admitted that, if the injury had resulted from negligence in the exercise or performance of the latter class of powers and duties, the city would have been liable in the same manner as an individual or private corporation. The doctrine enunciated in that case was recognized, and the case cited with approval, in *De Voss v. Richmond*, 18 Gratt. 344, 98 Am. Dec. 647; *Petersburg v. Applegarth*, 28 Gratt. 343, 344, 26 Am. Rep. 357; *Noble v. Richmond*, 31 Gratt. 278, 31 Am. Rep. 726; *Orme v. Richmond*, 79 Va. 89; and in the very recent case of *Terry v. Richmond*, 94 Va. 537, 544, 545, 38 L. R. A. 834, 27 S. E. 429, the distinction was again recognized and acted upon.

If a municipal corporation, which has a twofold character, one public and the other private, is exempt from liability for the negligence of its agents when in the exercise and performance of its powers and duties as an agency of the government, a public corporation which was created and exists for no other than governmental purposes must necessarily be exempt from such liability. Otherwise, there would be this anomaly: That for such negligence a corporation created partly for governmental purposes would be exempt from liability, while one created wholly for such purposes would not be, when the reason for such exemption is solely because it was in the exercise of governmental functions when the negligence occurred. But we are not left to determine this question upon reason merely. We have authority upon the subject.

In the case of *Sayre v. Northwestern Turnp. Road*, 10 Leigh, 454, which was an action of trespass on the case to recover damages for the washing away of the plaintiff's saw and grist mills and milldam, caused by the alleged negligent planning and construction of a bridge by the defendant corporation over the steam upon which they were built, it was held that the action would not lie, because the defendant corporation was composed, in the language of President Tucker, who delivered the unanimous opinion of the court, exclusively of officers of the government, having no personal interest in it or in its concerns, and only acting as

the organ of the commonwealth in effecting a great public improvement.

This conclusion is fully sustained, I think, by the weight of authority. See *Nugent v. Mississippi Levee Comrs.* 58 Miss. 197; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L. R. A. 33, 41 N. E. 407; *Ford v. Kendall Borough School Dist.* 121 Pa. 543, 1 L. R. A. 607, 15 Atl. 812; *Jordan v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L. R. A. 655, 58 N. W. 1092; Cooley, Torts, 2d ed. pp. 738-743; 1 Shearm. & Redf. Neg. 5th ed. §§ 260a, 295, 319.

It is insisted by the plaintiff's counsel that the defendant is made a corporation by the express language of the Code (§ 1661), and, as there is no qualification or restriction respecting its character as a corporation, it must be deemed in all respects a corporation, under the general law, with the liability to be sued in like manner as any other corporation; that this was expressly so held in the case of the same corporation (under its then corporate name of Eastern Lunatic Asylum) in *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163, 174; and that that decision is conclusive of the plaintiff's right to maintain this action.

It is true that it is expressly provided by the section of the Code cited that the defendant may sue and be sued, that this court did sustain an action of trover against it, and that Judge Staples, in delivering the opinion of the court, did say that "the asylum is a corporation, and as such may sue or be sued in trespass or trover;" but it does not necessarily follow that because the act incorporating a public corporation provides that it may be sued, and that this court has held that an action of tort would lie against it, it can be sued in all cases of tort in which a private corporation may be sued. If that contention were true, a municipal corporation whose charter provided that it might sue and be sued would be liable in all cases of tort, like a private corporation; yet, notwithstanding such provision in its charter, we know that an action will not lie against it for the negligence of its officers or agents when exercising its governmental functions. By the terms of most, if not all, acts of incorporation, whether for public or private purposes, it is provided that they may sue and be sued. The reason for such legislations, and the construction such language should receive, is considered and commented on by Judge Allen in *Dunnington v. Northwestern Turnp. Road*, 6 Gratt. 160, 170. In that case, as in the *Garrett Case*, the point was made that the action would not lie against the defendant because it was a public corporation acting as an agency of the state. That was an action of assumpsit for work and labor done and materials furnished, and the court held that the action would lie; and in distinguishing that case from the case of *Sayre v. Northwestern Turnp. Road*, 10 Leigh, 454, Judge Allen said: "The question really is not whether any action will lie against this company, but whether, having regard to the objects of the corporation, the

action will lie for the particular grievance complained of. It was not decided in the case of *Sayre v. Northwestern Turnp. Road*, 10 Leigh, 454, that no action will lie against this corporation. All that the case decided was that the action would not lie against this company for the injury there complained of." Applying the principle laid down in that case, that, in order to determine whether an action will lie against a public corporation like this for the grievance complained of, regard must be had to the objects for which the corporation was created, there is no difficulty in reaching the conclusion that the decision in the *Garrett Case* is not in conflict with the *Sayre Case*, and that the court did not intend to overrule it by an opinion which makes no reference to it, and does not discuss or even refer to it or the questions involved in it.

That was a wholly different case from this. There is no similarity between the two, except both were actions of tort.

During the Civil War the military forces of the United States took possession of Williamsburg, where the defendant asylum was and is located, and held it until the end of the war. Upon their approach to the city the authorities in charge of the asylum left it, and did not return. In January, 1865, the Federal officer who was in command there sent out a party some miles into the country, and took by force from the farm of the plaintiff, who had left his home, corn and bacon, which was sent to the asylum, and used for the support of the inmates. After the war the plaintiff brought an action of trover against the asylum to recover the value of the articles taken and used. It was held in that case (1) that, by the laws of war, property could not be taken without compensation for the purpose of feeding the inmates of the asylum; (2) that, the property having been taken without lawful authority, the plaintiff's title to it was not divested, and, it having been applied to the defendant's use, he could recover its value from the asylum in an action of trover.

Although the action in that case was in tort, it could as well have been in assumpsit. 3 Rob. Fr. (new) 399.

It was to recover the value of property which the defendant had the right to purchase for the maintenance of those intrusted to its care, and pay for out of the appropriation made for that purpose by the state; and, the plaintiff's property having been converted to the use of the corporation for the same purposes for which it had authority to purchase it, it ought to have paid for it, and the court very properly held that an action would lie to compel it to do so.

The directors in this case clearly had no right to pay damages for the grievance complained of out of any funds under their control. Those funds were appropriated by the state to pay the expenses of caring for and maintaining the inmates of the hospital, and not for paying damages resulting from the negligent management of those in charge of it. If such damages were chargeable on the

funds or property under the control of the directors, their payment might prevent the accomplishment of the very object for which the money was appropriated. The taxpayers might thus become insurers against the negligence of public officials, instead of being contributors for the support and maintenance of a great public charity. That an unfortunate inmate of the hospital should suffer from the negligence or misconduct of the persons administering the powers of the corporation, or their agents or employees, is indeed a hardship; but we do not think that this hardship should be remedied by giving damages to such a one, or his representatives, at the expense of the other inmates of the hospital, or of the taxpayers of the state. For such negligence he should be left to his remedy against those by whose negligence he was injured, and whose liability for their own acts of negligence must be determined by the rules of law applicable to such cases.

It seemed to be conceded in argument that, if the plaintiff could maintain his action and obtain judgment against the defendant he could not subject its buildings and grounds, or other property, to the satisfaction of the judgment, but would have to look to the legislature for payment. If this be so, as we think it is, it shows that this action will not lie against the defendant; for, if the plaintiff has no right to compel the defendant to compensate him for the grievance complained of, it is clear that he has no cause of action against it, for, as was said by Lord Holt in *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith, Lead. Cas. 454, 483, "it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." To make out a cause of action against a defendant, the plaintiff's legal rights must have been violated, and the defendant must be answerable therefor. Pom. Rem. & Rem. Rights, § 519; Cooley, Torts, 2d ed. 20. The courts of this state have no jurisdiction to ascertain and fix the damages for injuries which the plaintiff may have suffered in a case where the defendant is not liable, in order that the plaintiff may present his claim to the legislature for payment.

We are of opinion that the demurrer to the declaration was properly sustained, and that the judgment of the Circuit Court should be affirmed.

Harrison, J., dissenting:

I am unable to concur in the decision pronounced in this case. The question raised by the demurrer is the right of the plaintiff to maintain this action. This question is, in my opinion, *stare decisis* in this state, and ought not to be reopened. For years the statute law of this state has declared the Eastern Lunatic Asylum, now the Eastern State Hospital, to be a corporation. There is no qualification respecting its character as a corporation, and it has therefore been deemed in all respects a corporation under the general law (§ 1068 of the Code), with liability to be sued like other corporations. The contention that this in-

stitution, as a part of the state government, is not liable to be sued, was presented in the petition for a writ of error in the case of *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163. In that case Judge Staples, in speaking of this same institution, and in direct response to the question raised by the petition, says: "The asylum is a corporation, and as such may sue or be sued in trespass or trover;" and it was held liable, accordingly, for the wrongful conversion of chattels. in an action of trover, which is an action arising *ex delicto*, and judgment given against it.

In the case of *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977, where the statute of limitations was relied on to defeat a claim asserted by the asylum against the administrator of a deceased patient for support, the contention was made that the asylum stood in the shoes of the state, and that the maxim, *Nullum tempus occurrit regi*, was applicable in its favor; but this court held the contention unsound, sustained the plea of the statute, and declared the asylum to be a corporation, with power to sue and be sued, and entitled to, and amenable to, all legal defenses pertaining to private persons.

Each of the cases cited, it seems, is necessarily overruled by the conclusion reached in the case at bar; for if the asylum be the state, in the broad sense it is now held to be, then it cannot be sued, and time does not run against its demands.

The decision in *Garrett's Case* has been acquiesced in, as a correct determination of the question presented by this record, for more than twenty years; and in like manner the decision in *McClanahan's Case* has been accepted as a correct construction of the statute for nearly eight years.

Although the legislature is called upon at every session to deal with the interests of these institutions, it has never seen fit to declare, by any change in the phraseology of the law, its disapproval of the view taken in either of the cases cited. Since the decision in *Garrett's Case*, there has been a complete revision of the laws of the state; and it is worthy of note that the learned judge delivering the opinion in that case was one of the revisers, and yet no change in the law was then suggested in consequence of that decision. On the contrary, Rev. Code 1887, § 1661, significantly declares that "the directors for each of said asylums and their successors shall respectively continue to be corporations."

It is a familiar rule of construction that when a statute has been construed by the courts, and is then re-enacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts. *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364. With great respect, it seems to me that the conclusion of the majority of the court wholly disregards this wise and well-settled canon of construction.

It is contended that a judgment in this

case would be ineffectual if obtained, there being no property out of which it could be made. This question does not arise on demurrer, and, if it did, we ought not to be influenced in determining the right to maintain the action by any consideration of the plaintiff's ability to make his judgment available.

If it be true, as contended, that application to the legislature for payment of the judgment, if obtained, would be the only way in which satisfaction could be secured, the aggrieved party is denied that resource by the conclusion that he cannot maintain his action at all; for, until the amount of damage sustained has been ascertained by a jury, he has no claim to present.

R. M. SANDERS, *Plff. in Err.*,
v.

Gertrude COLEMAN.

(97 Va. 690.)

A man is excused for breach of a contract of marriage when, after it was made, he, without fault on his part, developed a grave malady of such a character that marriage would endanger his life or health.

(December 7, 1899.)

ERROR to the Circuit Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of promise of marriage. *Reversed.*

The facts are stated in the opinion.

Messrs. C. Harding Walker and J. W. Chinn, Jr., for plaintiff in error.

Messrs. Downing & Smith and A. B. Chandler for defendant in error.

Harrison, J., delivered the opinion of the court:

This is an action brought by the plaintiff to recover damages for an alleged breach by the defendant of his promise to marry her on the 27th day of April, 1898.

The declaration states with sufficient clearness and particularity the cause of action, and the demurrer was therefore properly overruled.

It appears that in December, 1897, the defendant, a man fifty-two years of age, received from the plaintiff, who was then twenty years old, a Christmas card. The defendant had met the plaintiff three years before, which was the first and only time he had seen her, though he had in the meantime sent her messages through mutual friends. A correspondence between the parties followed the receipt of the card, which resulted in a visit by the defendant to the plaintiff, in Princess Anne county, where she was

teaching school, on the 19th of January, 1898. On this visit the defendant addressed the plaintiff, and in a few days was accepted, and the 27th day of April, 1898, fixed for the marriage.

The defendant filed a special plea in which he admits the engagement, and that the 27th of April, 1898, was agreed upon as the time for its consummation. The plea then denies that the defendant had broken his promise to marry the plaintiff, and avers that after making the promise, and before the time for its fulfillment, the defendant had, by the act of God, and without his own fault, become and was sick of a bodily disease which rendered him unfit to marry on the day agreed upon, and that, on the advice of his physician, he, in good faith, wrote to the plaintiff, and asked for a postponement, to which she agreed; that afterwards, on the 27th day of April, 1898, he being still sick of his disease, and doubtful if he should ever recover from the same, wrote a letter to the plaintiff, informing her of his continued sickness, and of his belief that he would be doing her an injustice to marry her in his condition of health, and requesting the plaintiff for that reason to release him from his engagement.

It appears that about the middle of March, 1898, the defendant became afflicted with some trouble about the urinary organs, causing much uneasiness and suffering, and for which he was being treated by a physician, who, however, knew nothing of defendant's contemplated marriage. On the 4th day of April, 1898, the defendant took a drive with his friend and neighbor, Dr. Hubbard, into the country. On this occasion he was suffering very much, and described his symptoms fully to Dr. Hubbard, and told him that he expected to be married on the 27th of the month. The doctor told him that he was not in a condition to get married; that he was suffering from one of three diseases, either of which would be aggravated or made worse by marriage; that, if he married in his then condition of health, it might lead to serious results. The defendant then asked what could he do; that the preparations for his marriage were made. The doctor replied: "I will advise you to do what I would do myself under like circumstances; I would ask for a postponement until you can see the result of your symptoms." The doctor urged upon the defendant the importance to himself and the plaintiff of not marrying at the time then agreed upon. In consequence of this advice the defendant on the same day wrote the plaintiff the following letter:

Whitestone, Va., April 4, 1898.

Dear Miss Gertrude:

I deeply regret that circumstances over which I have no control will prevent me from keeping my engagement on the 27th of this month.

Trusting you will pardon me, I remain,
yours, etc.,
R. M. Sanders.

Upon the receipt of this letter the plain-

NOTE.—For disease as a defense for breach of promise to marry, see also *Shackleford v. Hamilton* (Ky.) 15 L. R. A. 531, and *note*.
47 L. R. A.

tiff demanded an explanation, in response to which the defendant wrote as follows:

Miami, Va., April 7, 1898.

Dear Miss Gertrude:

Your letter received to-day, and I hasten to reply. The only explanation I can give you is this: I am not in a condition at this time to get married, and my physician advised me to put it off a while longer, which I hope will meet with your consent.

Hastily, yours,
R. M. Sanders.

The plaintiff replied to this letter, consenting to postpone the marriage until the defendant recovered. Subsequently the defendant wrote the following letter:

Miami, Va., April 27, 1898.

Dear Miss Gertrude:

I received your letter to-day, and will answer at once. You can't imagine what I have suffered about this affair, and you seem to think someone else has something to do with it, but I can assure you that such is not the case, and that I was honest with you all the time; but I thought two wrongs did not make a right, and that I would be doing you a greater wrong in marrying you, considering my condition, than in not doing it, and for this reason, and this alone, I am going to ask you to release me from the engagement. I could write more, but think this is sufficient. But I will ask, before closing, that you will think kindly of me, as I will always do of you.

Hastily, your friend,
R. M. Sanders.

To this letter there was no reply, but in a few days thereafter the plaintiff was consulting counsel, and in June following this suit was brought.

In the progress of the trial a number of questions were passed upon, which have been brought before us by bills of exception; but, in the view we take of this case, it is only necessary to consider the assignment of error which relates to the action of the lower court in refusing to set aside the verdict in favor of the plaintiff as contrary to the law and the evidence.

It has been argued with much force that the letters already quoted, which are relied upon by the plaintiff as constituting the breach, are insufficient to show a refusal on the part of the defendant to perform his promise. Without expressing an opinion on that question, but conceding, for the purposes of this case, that the plaintiff had a right to so regard them, we are brought to a consideration of the defendant's plea that after the making of the promise, and before the time for its fulfilment, he had, by the act of God, and without his own fault, become sick of a bodily disease which rendered him unfit to marry on the day agreed upon.

Under the expression "the act of God" are 47 L. R. A.

comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence it is held that "illness," being beyond the power of man to control or prevent, is the act of God. *Story*, Bailm. §§ 25, 511; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859.

It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Shackelford v. Hamilton*, 93 Ky. 80, 15 L. R. A. 531, 19 S. W. 5; *Bishop*, Mar. & Div. § 219.

In the case at bar the evidence (as to which, in our opinion, there is no real conflict) shows that there was a predisposition in the defendant's family to physical trouble of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed, and was suffering with, a grave malady, involving the urinary organs, which had continued and kept him constantly under the advice and treatment of a physician up to the time of the trial; that he had cystitis, with probable inflammation of the urethra, complicated with enlargement of the prostate gland, and that an indulgence in sexual intercourse would aggravate his disease, and likely shorten his life; and that it would be, not only a wrong and injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. On the contrary, an indulgence in sexual intercourse would aggravate his disease, and enhance the chances of a fatal result. As said by a learned judge: "I desire to speak with all reserve; but to possess the lawful means of gratifying a powerful passion, with the alternative of abstaining or periling life, is, indeed, to incur a risk of intense misery, instead of mutual comfort."

Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff.

For these reasons the judgment of the lower court must be reversed, the verdict of the jury set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

Thomas ADKINS, Plff. in Err.,
v.

City of RICHMOND.

(.....Va.....)

1. A question as to the constitutionality of a license tax upon a merchandise broker is affirmatively shown by the record so as to give jurisdiction to the court of appeals, where a bill of exceptions has been duly taken to the refusal of an instruction to find in favor of the broker, if he carried on business only as a resident sales agent for nonresident principals, although no reference was made in terms to the commerce clause of the Federal Constitution.
2. A license tax on merchandise brokers is invalid as a regulation of interstate commerce, when applied to a citizen and resident of a city whose occupation is solely the solicitation of orders in the city by personal application and by exhibition of samples, for nonresident merchants, who are his principals, for the negotiation of sales of goods which are not in the state.

(February 8, 1900.)

ERROR to the Hustings Court of the City of Richmond to review a judgment affirming a judgment of a police justice fining defendant for carrying on the business of broker without having obtained a license. *Reversed.*

The facts are stated in the opinion.

Mr. S. S. P. Patteson, for plaintiff in error:

The fact that Congress has not legislated upon the subject of interstate commerce is equivalent to the declaration that it shall remain free and untrammelled.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The only way in which commerce between the states can be legitimately affected by state laws is when the state exercises its police power by which it provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property within its jurisdiction.

McCall v. California, 136 U. S. 104, 34 L.

NOTE.—As to right to take orders in interstate business, see also *State v. Coop* (S. C.) 41 L. R. A. 501, and other cases cited in footnote thereto; also *Laurens v. Elmore* (S. C.) 45 L. R. A. 249.
47 L. R. A.

ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *State Freight Tax Case*, 15 Wall. 232, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Leloup v. Port of Mobile*, 127 U. S. 641, 32 L. ed. 312, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1; *State v. Coop*, 52 S. C. 508, 41 L. R. A. 501, 30 S. E. 609; *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348; *Brown v. Maryland*, 12 Wheat. 446, 6 L. ed. 688.

Mr. Henry E. Pollard, for defendant in error:

Almost every one of the numerous decisions of the supreme court, bearing upon this question, have been made by a divided court.

After the first decisions the court seemed to gravitate for a number of years towards holding state statutes unconstitutional which even indirectly affected interstate commerce.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

The case of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, seems to mark a reaction against the extreme Federal view.

In *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, the reaction is marked, and a return to the proper limits of state power in the premises may be recognized.

In the midst of those conflicting decisions, two general propositions have been recognized by all of the learned judges who delivered opinions. The contrariety of the decisions has arisen solely from the application of these principles to the particular case under consideration, and not from any divergence of opinion thereon.

It has been invariably held that the statute would be unconstitutional—

(1) Where the law discriminates against nonresidents, in favor of resident parties.

Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; *Com. v. Myer*, 92 Va. 809, 31 L. R. A. 379, 23 S. E. 915.

(2) Where the tax was a direct tax on interstate commerce.

Lyng v. Michigan, 135 U. S. 161, 34 L. ed.

150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 10 Sup. Ct. Rep. 881; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The city ordinance, in requiring a "broker," having his residence and place of business in Virginia, to pay a license tax, does not place a burden upon interstate commerce which is so direct as to justify the courts in declaring the ordinance in contravention of the Constitution of the United States.

State Tax on Railway Gross Receipts, 15 Wall. 284, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164; *State Tax on Foreign-held Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

In all of the cases where the law was declared unconstitutional because of its direct interference with interstate commerce, either the person actually engaged in interstate commerce resided in another state, or the tax was laid upon the actual agent of such person residing within the state where the tax was imposed.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 646, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

Where the tax is laid upon a business, without reference to its relation to interstate commerce, and without discrimination, it is not objectionable to the constitutional prohibition.

Western U. Teleg. Co. v. Richmond, 28 Gratt. 1; *Com. v. Myer*, 92 Va. 809, 31 L. R. A. 379, 23 S. E. 915.

Riely, J., delivered the opinion of the court:

The question involved in this case is the validity of the license tax imposed by the city of Richmond upon the plaintiff in error as a merchandise broker, and for the nonpayment whereof he was prosecuted and fined.

It was objected by the counsel for the city that this court was without jurisdiction of the case, upon the ground that the record does not specially show that the tax was imposed on constitutional grounds. We are not aware of any requirement that it must specially appear in the record by some appropriate plea or other proceeding that the constitutionality of an act of the legislature, or an ordinance of a municipal corporation, or of any other matter involved in the litigation, 47 L. R. A.

tion, was raised and decided by the lower court in order to call forth the jurisdiction of this court upon that ground. On the contrary, the constitutionality of a law has been repeatedly passed upon on a general demurrer to the pleading in the lower court and even where the question was raised for the first time in the petition to this court for the writ of error. *Speer v. Com.* 23 Gratt. 935; *McCready v. Com.* 27 Gratt. 985; *Brown's Case*, 91 Va. 762, 28 L. R. A. 110, 21 S. E. 357; and *Southern Exp. Co. v. Com. ex rel. Walker*, 92 Va. 59, 41 L. R. A. 436, 22 S. E. 809.

The jurisdiction of this court must affirmatively appear from the record, but it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the Federal or state Constitution. Any proceeding which necessarily puts its validity in issue, whether it be a demurrer, plea, instruction, or otherwise, is sufficient to give this court jurisdiction of the case.

The authorities relied upon by the counsel for the city for his contention were all, with a single exception, cases of the Supreme Court of the United States, where the rule invoked unquestionably prevails, but that is because that court by express statute has jurisdiction to review a judgment of a state court only when the record shows that some right under the Federal Constitution or authority of the United States was "specially set up or claimed," and denied by the state court. *Chicago & N. W. R. Co. v. Chicago*, 104 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Ozley State Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; and U. S. Rev. Stat. § 709.

Upon the trial of the case the plaintiff in error asked the court to instruct the jury as follows:

"If they shall believe from the evidence that Thomas Adkins, trading under the name of Thomas Adkins & Co., only carried on business as a resident sales agent for non-resident principals, and that his employment is exclusively confined to representing non-resident principals in the negotiations of the sales of goods which are in other states, then they must find for the defendant Adkins." But the court refused so to instruct the jury, whereupon a bill of exceptions was duly taken to its ruling.

While the instruction does not, in terms, refer to the commerce clause of the Federal Constitution, it is manifest that the defendant intended by the instruction asked for to invoke its protection, and that the court, by refusing to give the instruction, decided that the business of a resident sales agent, though limited exclusively to nonresident principals, was not within the protection of article 1, § 8, cl. 3, of the Constitution of the United States. This was the question presented to and decided by the lower court against the contention of the defendant. The record, therefore, shows affirmatively that

the validity of the tax was directly drawn in question, and that this court has jurisdiction of the case.

The evidence in the record shows that the plaintiff in error is a citizen and resident of the city of Richmond, Virginia, that his occupation is soliciting orders in Richmond by personal application and by the exhibition of samples solely for nonresident merchants who are his principals; that his employment is confined exclusively to the negotiation of sales of goods which are not in the state of Virginia, but in other states; that for the period for which the license tax was assessed against him, and for a long time prior thereto, he had not conducted any other business; that when he secures an order he reports it to his principal, who, if the sale and credit are satisfactory, fills the order by shipping the goods to the resident merchant; that no settlements are made through the agent, but by the resident merchant directly with the agent's nonresident principals, who remit to him the small commission which is his compensation for negotiating the sale; and that he has no storehouse or warehouse, but simply rents a room in the city of Richmond, in which he keeps his samples and conducts his correspondence.

The tax which the defendant refused to pay, and for the nonpayment whereof he was prosecuted and fined, was imposed on him under an ordinance of the city prescribing a license tax for the privilege of prosecuting the business of a broker. The ordinance does not define the term "broker," or explain the sense in which it was used. A commercial broker is defined in the revenue statutes of the state to be, among other things, one who negotiates the sale of merchandise without possession or control of it as commission merchants have of it in their business (Acts 1889-90, p. 226, chap. 244, § 64); and a broker, without special designation, is defined in the text-books to be "an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called brokerage." Story, Agency, § 28, and 4 Am. & Eng. Enc. Law, 2d ed. 960.

Tested by these definitions, the defendant was conducting the business of a broker in the city of Richmond, in violation of its ordinance, in that he had not paid, and refused to pay, the license tax required for the privilege of prosecuting such business. The question is, therefore, directly presented whether the ordinance under which the tax was assessed against him is, as respects the special and limited business of a broker, followed by the defendant, a regulation of interstate commerce, and therefore void, on account of its repugnancy, to article 1, § 8, cl. 3, of the Federal Constitution.

The Supreme Court of the United States which is the authoritative and final arbiter of all questions arising under the Constitution of the United States, has repeatedly declared that "no state has the right to lay a

tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Lyng v. Michigan*, 135 U. S. 165, 34 L. ed. 152, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, and *Leloup v. Port of Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, and cases there cited. It follows, of course, that, as a state cannot levy such a tax, a municipal corporation—a creature and agency of the state—cannot do so.

In *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. ed. 678, 687, in which a law of the state requiring an importer to take out a license and pay \$50 before he should be permitted to sell a package of imported goods, was declared unconstitutional, Chief Justice Marshall said: "But, if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of an article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

In *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, the same principle was announced. It was there said by Mr. Justice Field: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

Again, in *Leloup v. Port of Mobile*, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1382, Mr. Justice Bradley said: "Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation

of doing a business is surely a tax on the business."

The principle above declared; that a state has no power to tax the agencies or instruments utilized in negotiating sales of property when it could not tax the property itself, has been broadly stated and uniformly adhered to in all the cases. It is as applicable to brokers as any other agency engaged in interstate commerce. It has been applied by the supreme court in many cases that have come before it. We cannot do more than refer to a few of the leading and most pertinent ones.

In *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was decided that a statute of the state of Tennessee imposing a license tax on all drummers and persons offering for sale or selling goods, wares, or merchandise by sample was invalid with respect to drummers for firms or individuals doing business in other states, upon the ground that such a tax was a regulation of interstate commerce. It was conceded in the opinion, as has been held in *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, that when goods, prior to their sale, have been sent from one state into another state to be sold, and the latter state has become the situs of the property, or, in consequence of their sale, have been brought into the latter state, and become a part of its general mass of property within the state, they are liable to be taxed by it in the same manner as other property of a similar character; but that to tax the sale of such goods or the offer to sell them, before they are brought into the state, was a very different thing, and clearly a tax on interstate commerce itself.

In that case the line was clearly drawn between the taxation of goods which have been sent into a state for sale, after their arrival in the state, and it has become their situs, and their taxation or the taxation of the agency or instrumentality utilized in their sale and introduction into the state; their sale after their arrival in the state being domestic commerce, and their taxation legitimate, while their sale prior to their introduction into the state is interstate commerce, and their taxation or the taxation of the instrument or means of their introduction is unlawful, because such taxation is a direct burden upon commerce between the states, which, under the Constitution, cannot be imposed by the state without the assent of Congress; and the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it shall be absolutely free. *Brennan v. Titusville*, 153 U. S. 289, 303, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; and *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 32 L. ed. 637, 639, 9 Sup. Ct. Rep. 47 L. R. A.

256. This distinction has not been departed from or qualified by any subsequent decision.

In *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1, and in *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256, the principle laid down in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 409, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, was again carefully considered, and affirmed.

In *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881, an agent in the city and county of San Francisco, California, for the New York, Lake Erie, & Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and operating a continuous line of road between Chicago and New York, was convicted and fined for not taking out the license and paying the tax of a railroad agency, as required by an order of the board of supervisors of the said city and county. His duties as such agent consisted in soliciting passenger traffic in that city and county over the said railroad. His employment was confined exclusively to inducing persons in the state of California to travel from that state over the line of the road he represented to the city of New York. It was held that his business was an agency of interstate commerce, and that the order under which he was prosecuted was obnoxious to the commerce clause of the Constitution, and therefore invalid. "The object and effect of his soliciting agency," said Mr. Justice Lamar in delivering the opinion of the court, "were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, the court held that the plaintiffs in error, having taken out licenses as general merchandise brokers under the law imposing the tax, whereby they were authorized to do any and all kinds of commission business, they were legally liable to pay the privilege tax in question, although their principals happened during the previous year as to the one party, to be wholly nonresident, and, as to the other, largely such, as this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents. "The tax," said Mr. Chief Justice Fuller, "was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a

general business." Distinguishing this case from that of *Robbins v. Shelby County Taxing Dist.*, he said: "In the *Case of Robbins* the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again: "No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state Constitution in that regard; and, where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

In concluding the opinion in that case it was said: "What position they [the complainants] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record." The particular question thus left open in that case is that which is directly presented in the case at bar.

The decision in the above case was thought by some to be a departure from the principles laid down in the other cases we have referred to, but in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, Mr. Justice Brewer in delivering the opinion of the court in that case, said: "The case of *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, is no departure from the rule of decision so firmly established by the prior cases. At least no departure was intended, though, as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the state's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the state. Of the power of a state to impose a license tax upon such a general business there can be no question."

In the case of *Brennan v. Titusville*, just referred to, the plaintiff in error was convicted of the violation of an ordinance of the city of Titusville, in the state of Pennsylvania, which required all persons canvassing or soliciting orders for goods, books, paintings, etc., to pay a license tax. As agent for his principal, who was a manufacturer of frames and maker of portraits in the city of Chicago, in the state of Illinois, Brennan solicited orders for pictures and picture frames in the city of Titusville, in the state of Pennsylvania, without procuring a license and paying the tax required by the ordinance. 47 L. & A.

It was held, upon a review of the cases to which we have referred, and of others in accordance with the principles established by them, that the license tax imposed on the plaintiff in error was a direct burden on interstate commerce, and was, therefore, beyond the power of the state, and void.

The case of *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, was much relied upon as authority for the validity of the tax assessed against the defendant in the case before us. The relief sought in that case was based on an act of Congress entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" (26 Stat. at L. 209), and the bill was filed against certain residents of the state of Kansas, who were members of a voluntary unincorporated association known and designated as the Kansas City Live-Stock Exchange. It was alleged that the members of the exchange had adopted for their government certain articles of association, rules, and by-laws, which were in restraint of trade and commerce between the states. It was held otherwise; but it will be seen running all through the opinion of the court that stress was laid upon the fact that the business of the members was wholly concerned with buying and selling live stock after their arrival at Kansas City, and that the distinction made in the cases heretofore cited between the sale or offer to sell in one state property which is situated in another state, and the sale of property after it has been brought into the state in which the sale is negotiated, was kept steadily in view,—the one being interstate commerce, and subject only to the regulation of Congress, and the other being domestic and subject to legislation by the state. Said Mr. Justice Peckham, in delivering the unanimous opinion of the court: "The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such services is not, therefore, a combination in restraint of that trade or commerce."

It appeared that the members of the exchange sent solicitors into other states to induce the consignment of stock to them for sale. In reply to the argument that these solicitors were engaged in interstate commerce, the court said: "The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. It was said in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, that the negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation

is made is interstate commerce. But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree, that when they send it to market for sale, they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them, and account to them for the proceeds thereof. Unlike the drummer who contracts in one state for the sale of goods which are in another, and which are to be thereafter delivered in the state in which the contract is made, the solicitor in this case has no goods or samples of goods, and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business."

The plaintiff in error in the case at bar did not take out license as a general merchandise broker, or in fact any license, because he did not consider that the business he was pursuing was subject to state or municipal taxation; nor was he engaged in a general commission business, but confined his business to selling or offering to sell by sample and personal application, for nonresident principals exclusively, goods belonging to them in another state, for the purpose of introducing them into the state in which the sale is negotiated. His business related wholly to interstate commerce. Upon the reasoning of the cases which have been cited, and in accordance with the principles enunciated in them, it must be held that the license tax imposed by the city upon the plaintiff in error for the privilege of pursuing his said business was a direct burden upon interstate commerce, and was, therefore, beyond the power of the city. The ordinance under which the tax was assessed was not in any manner the exercise of the police power reserved to the states, which, it is well settled, may be exercised by them (*Norfolk & W. R. Co. v. Com.* 93 Va. 749, 34 L. R. A. 105, 24 S. E. 837, and the numerous cases therein cited and reviewed), but an ordinance adopted simply and wholly for the purpose of raising revenue.

The judgment of the Hustings Court must be reversed, the verdict of the jury set aside, and a new trial awarded the plaintiff in error.

I. N. MAY

v.

W. A. POINDEXTER.

(.....Va.....)

1. Re-enacting an existing general statute, and making it applicable only to a

NOTE.—As to duty to fence out cattle, see *Bulph v. Matthews* (Ill.) 22 L. R. A. 55, and *note*; *Clarendon Land Invest. & Agency Co. v. McClelland Bros.* (Tex.) 22 L. R. A. 105, and 47 L. R. A.

particular county, do not repeal, supersede, or affect the operation of the general law.

2. The common-law rule which requires the owner of animals to keep them on his own land or within inclosures is not in force in Virginia, being inconsistent with Acts 1893-94, p. 941, and other legislation of the state making provisions as to what shall constitute a lawful fence, except in counties which have adopted what is known as the "No Fence Law;" thereby restoring the common-law rule in those localities.

3. A "lawful fence" required by Acts 1893-94, p. 941, is a condition precedent to the right to recover for trespass on lands by the animals of others running at large.

4. The owner of land is not deprived of the inherent right to "the means of acquiring and possessing property," or of the constitutional guaranty against taking his property for public uses without just compensation, by a statute denying him any recovery for trespass on his lands by animals, unless he has inclosed the premises by a lawful fence.

5. One who turns his cattle upon his neighbor's premises, which have not been inclosed with a lawful fence such as the statute requires in order to entitle the landowner to recover for trespass thereon by animals running at large, is liable for the damages thereby caused to the landowner, since the statute requiring a lawful fence as a protection against animals running at large does not repeal, or in any way impair, the full force and effect of the common-law rule with respect to willful or malicious trespass, or the ancient maxim that no man shall take advantage of his own wrong in his prosecution or defense against another.

(February 15, 1900.)

CROSS-APPEALS from a decree of the Circuit Court for Louisa County in a proceeding brought to enjoin defendant from permitting cattle to trespass on plaintiff's property; the plaintiff appealing from so much of the decree as refused to restrain defendant from allowing his cattle to stray upon plaintiff's land, and defendant appealing from so much as restrained him from turning his cattle upon plaintiff's land. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. G. May, A. K. Leake, and D. H. Leake, for plaintiff:

At common law, no man is bound to fence his lands against the cattle of another, but by that law the owner of the beasts is bound to restrain them, and is answerable for any trespass which they may commit upon the lands of another.

Tyler, *Boundaries & Fences*, p. 341; 3 Bl. Com. 311.

By act approved March 1, 1898, Acts 1897-98, p. 651, § 2038, defining a lawful fence, is amended and re-enacted. This statute superseded all others defining a lawful

note; also same case on second appeal 31 L. R. A. 669; see also *Morgan v. Hudnell* (Ohio) 27 L. R. A. 862; and *Briscoe v. Alfrey* (Ark.) 30 L. R. A. 607.

fence, commencing "definition of a lawful fence." By this act, § 2038 is made to apply only to the county of Accomac. To give it a broader scope would be to make it contravene § 15, art. 5, of the Constitution.

Alexandria County Supers. v. Alexandria, 95 Va. 469, 28 S. E. 882.

The act of March 1, 1898, amends and reenacts § 2038, and provides that it shall be amended so as to read as follows: This amendment, therefore, repeals all contained in the section of the original statute not reenacted, and displaces the old rules and statutes.

23 Am. & Eng. Enc. Law, pp. 487, 488; *Combined Saw & Planer Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976; *Sutherland, Stat. Constr.* §§ 87, 102, 184; *Endlich, Interpretation of Statutes*, § 196; 3 Va. L. Reg. 463.

The authority conferred by the new act is expressly declared to be in addition to the authority conferred by the former acts. Addition is not substitution.

Ex parte Yergor, 8 Wall. 104, 19 L. ed. 339; *Endlich, Interpretation of Statutes*, § 210; *Davies v. Oughton*, 33 Gratt. 696; *Fulkerson v. Bristol*, 95 Va. 5, 27 S. E. 815.

The taking away of remedies is not favored by the law, nor is the annulment of the common law; it can be done only by express legislation or by necessary implication.

Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; 2 Greenl. Ev. 460; 1 Minor, Inst. 40, 7c; *Insurance Co. of Valley of Virginia v. Barley*, 16 Gratt. 384; *Booth v. Com.* 16 Gratt. 529.

Should it be considered that the landowner would have had no basis for an action at law unless he had a "lawful fence," surely it will not be seriously questioned that he would have been entitled to relief in equity, by injunction or otherwise, when it is remembered that:

(1) The most important ground of equity jurisdiction is that there is no remedy at law, or no adequate one.

(2) Equity jurisdiction was in its infancy confined to and owed its birth largely to cases of trespass *ex necessitate rei*, there being then, as now, no adequate remedy at law.

(3) Injury done to young fruit trees, flowers, shrubbery, or any other species of real property is not only equitable waste, but seems to amount to a misdemeanor.

Va. Code, 3729; 2 Story, Eq. Jur. special chapter on *Injunctions* (paragraphs touching trespasses and irreparable injuries).

The imaginary line, which, in legal contemplation, separated one man's land from another, answered all purposes at law and in equity as artificial buttresses.

3 Bl. Com. 210; 2 Tucker, Com. 191.

The redress for a breach thereof was actual damage in all cases amounting to a trespass; exemplary damages when trespass is wanton.

3 Bl. Com. 209; 2 Tucker, Com. 191 (a) note.

The obligation to fence can only arise by 47 L. R. A.

statute, by prescription, or by agreement, and in this case such obligation could only exist by statute. The police power of the state has no application, for that only relates to the health, morals, and safety of the people.

7 Am. & Eng. Enc. Law, p. 890; *Harrison v. Brown*, 5 Wis. 27; *Looke v. First Div. of St. Paul & P. R. Co.* 15 Minn. 350, Gil. 283; *Lyman v. Gipson*, 18 Pick. 422.

If it is true that the statutes take away the common-law remedies for trespassing stock, unless the landowner has an enclosure such as is denominated "a lawful fence" under 2038 of the Code, then they are unconstitutional.

Const. art. 1, § 1, Bill of Rights; 3 Bl. Com. 208; *Morrison v. Cornelius*, 63 N. C. 351; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Tyler, Boundaries & Fences*, p. 372.

Messrs. Lyons, Campbell, & Johnston, for defendant:

The act of 1893-94, p. 941, is not expressly repealed, as no reference is made to it either directly or indirectly in the subsequent legislation of 1897-98; nor is it repealed by implication, as there is no "irreconcilable inconsistency" in the two acts.

Henderson's Tobacco, 11 Wall. 652, *sub nom.* *United States v. Three Hundred & Fifty-Six Caddies of Tobacco*, 20 L. ed. 235; *The Distilled Spirits*, 11 Wall. 356, *sub nom.* *Harrington v. United States*, 20 L. ed. 167.

The reason of the law was, and is, that the farmers, each of whom is both a tiller of the soil and an owner of stock, thought it to their advantage to fence their comparatively small cultivated areas rather than fence in their cattle, when they usually owned much larger tracts of uncultivated, yet good, grazing lands. In other words, it was a provision of the law for the mutual benefit and convenience and welfare of the community, and was in no way a discrimination against one class of citizens by taking their property for the benefit of others, but only an arrangement for the common good, and, as such, clearly within the police power of the state.

Richmond, F. & P. R. Co. v. Richmond, 26 Gratt. 83; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 28, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Wills v. Walters*, 5 Bush, 351; *Clark v. Stipp*, 75 Ind. 114; *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Chase v. Chase*, 15 Nev. 261; *Bileu v. Paisley*, 18 Or. 47, 4 L. R. A. 840, 21 Pac. 934.

Laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances.

They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner.

Richmond, F. & P. E. Co. v. Richmond, 26 Gratt. 83; *Roanoke Gas Co. v. Roanoke*, 83 Va. 810, 14 S. E. 665.

The statutes must of necessity repeal the common law upon this subject.

Fox v. Com. 16 Gratt. 1; *Barker v. Bell*, 46 Ala. 221; *Com. v. Dennis*, 105 Mass. 162; *Chase v. Chase*, 15 Nev. 259; *Blaine v. Chesapeake & O. R. Co.* 9 W. Va. 252; *Baylor v. Baltimore & O. R. Co.* 9 W. Va. 270.

A "lawful fence" is a condition precedent to relief. The statute itself plainly indicates this. To hold otherwise would be to annul the whole system of the law on the subject and bring to naught the purpose of legislation covering a period of centuries.

Chase v. Chase, 15 Nev. 259; *Smith v. Williams*, 2 Mont. 195; *Clarendon Land Invent. & Agency Co. v. McClelland Bros.* 89 Tex. 483, 31 L. R. A. 669, 34 S. W. 98, 35 S. W. 474; *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814; *Runyan v. Patterson*, 87 N. C. 343; *Studwell v. Ritch*, 14 Conn. 293; *Mann v. Williamson*, 70 Mo. 661; *Oil v. Rowley*, 69 Ill. 469; *Cooley, Torts*, 597 *et seq.*; 16 Cent. L. J. 345.

The law imposes on the landowner no obligation to fence; but if he does not fence he cannot recover damages for roaming stock. 22 Cent. L. J. 196, and cases cited.

The statutes do not give the cattle owner a right in his neighbor's land, but simply deny the landowner remedy in the courts for the trespass. He may drive the cattle off and keep them off, provided he uses proper care not to injure them in so doing.

Lord v. Wormwood, 29 Me. 282, 50 Am. Dec. 586; *Totten v. Cole*, 33 Mo. 138, 82 Am. Dec. 157; *Wilhite v. Speakman*, 79 Ala. 400.

Harrison, J., delivered the opinion of the court:

The bill in this case alleges that appellee is the owner of a tract of land in Louisa county, with young fruit trees, grass, and herbage growing thereon; that said land is inclosed by a fence, but not such a fence as is defined by the Code of Virginia to be a lawful fence; that appellant is in the possession and management of adjacent land, with cattle and horses thereon, and has been in the habit of turning said cattle and horses upon the lands of appellee, and still continues thus to trespass upon him, thereby injuring his fruit trees, and destroying his grass and herbage; that, inasmuch as appellee's fence is not such as the law prescribes as a lawful fence, appellant claims the right to turn his stock upon appellee's land, and says he will continue to do so until prohibited by some competent authority. The bill further alleges that appellant is utterly insolvent, and that, unless restrained, irreparable injury and mischief will result to appellee from such trespass. The prayer of the bill is that appellant may be restrained from further violation of appellee's rights.

A temporary injunction was granted restraining and enjoining appellant from al-

lowing, permitting, or suffering his cattle and horses to trespass upon appellee's premises until the further order of the court. At the following term of the court, appellant filed his demurrer and answer, in which he admits the statements contained in the bill to be true, and insists that, inasmuch as appellee's land is not inclosed by a lawful fence, as defined by the Code of Virginia, his cattle and horses have a right to run thereon, and that appellee is entitled to no remedy for the injury complained of.

Upon a final hearing the circuit court of Louisa overruled the demurrer, and decreed that the injunction awarded, restraining and enjoining appellant from allowing, permitting, or suffering his cattle and horses to trespass upon appellee's premises, be modified so as to perpetually restrain appellant from turning his horses and cattle in and upon the lands of appellee.

The appellant assigns as error (1) the action of the court in overruling the demurrer, and (2) its action in granting the injunction restraining him from turning his cattle upon appellee's land.

Under rule 9 the appellee assigns as error the action of the court in refusing to restrain appellant from allowing, permitting, or suffering his cattle to stray upon appellee's land.

The questions involved arise, alike, upon the demurrer and upon the hearing, and will be considered in the order best calculated to subserve convenience in statement.

The first contention of appellee is "that there is no statute law in Virginia requiring the landowner to maintain a lawful fence, as defined by § 2038 of the Code, as a condition precedent to his right to recover damages for trespassing cattle, except as to the county of Accomac."

The entire fence law of Virginia, at the time of the adoption of the present Code (1887), was to be found in chapter 93 of that revision, from § 2038 to § 2061, inclusive. Section 2038 defined what should constitute a lawful fence. Since the adoption of the Code several acts have been passed, which appellee claims have had the effect of repealing § 2038, and leaving no general statute in Virginia defining what shall be deemed a lawful fence. This section seems to have had singular treatment at the hands of the legislature, but, when the several acts touching it are carefully examined, we think it will clearly appear that, although the section *eo nomine* has disappeared, still the law, in the same words, has survived the difficulties and dangers to which it has been subjected.

By Acts 1889-90, p. 945, § 2038 of the Code was re-enacted, and made to apply only to Orange county. This act was repealed by Acts 1893-94, p. 948, which last-named act concludes with these words, "And section 2038 of the Code of 1887 is hereby re-enacted." The legislature, no doubt, seeing that this mode of re-enacting § 2038 was invalid because in conflict with article 5, § 15, of the

state Constitution, which provides that, when a law is re-enacted, it must be published at length, passed on the same day (Acts 1893-94, p. 941) an act in these words: "Be it enacted by the general assembly of Virginia, that every fence five feet high, which, if the fence be on a mound shall include the mound to the bottom of the ditch, shall be deemed a lawful fence as to any of the stock named in section two thousand and forty-two of the Code of Virginia, which could not creep through the same." The title to this act is as follows: "An Act to Define What shall be a Lawful Fence in Virginia."

This act is in the words of § 2038 of the Code, which had, as we have seen, been repealed, as a general law, by Acts 1889-90, p. 945. It, however, makes no reference to that section, and is therefore an independent general statute defining what shall be deemed a lawful fence in the state of Virginia.

By Acts 1897-98, p. 651, § 2038 of the Code is again re-enacted, but is, by the express terms of the title, made to apply alone to the county of Accomac. Why this act should have been passed when the act of 1893-94, in the same words, was on the statute book, and applicable to Accomac county, it is difficult to understand. While, however, it adds nothing to the fence law of Accomac county, it in no way repeals, supercedes, or affects the general law found in Acts 1893-94, p. 941.

This review of these several enactments brings us to the conclusion that the general fence law of Virginia is now to be found in chapter 93 of the Code of 1887, except § 2038, and the amendments thereof, together with Acts 1893-94, p. 941, which is in the words of § 2038.

It is further contended that these statutes do not repeal, either expressly or by implication, the common-law rule which requires the owners of cattle to keep them upon their own lands on pain of becoming liable in trespass for their entry upon the lands of others, and that, therefore, the landowner can, as at common law, maintain his action for trespass, in case the cattle of another stray upon his land, although he may not have a lawful fence, such as the statute prescribes.

From the early history of Virginia as a colony to the present time, her laws touching the subject of "inclosures and certain trespass" have been, in effect, the same. The statute of 1631 (1 Hen. Stat. p. 176) provides that "every man shall inclose his ground with sufficient fences upon their own peril." The act of 1632 (Id. p. 199) reads: "Every man shall inclose his ground with sufficient fences or else to plant upon their own peril." The act of 1657 (Id. p. 458) provides that, if the landowner does not maintain a sufficient fence, whatsoever trespass or damage he shall sustain "shall be his own loss or detriment;" and provides fur-

ther that he shall be liable for any damage to stock going upon his land, when his fence is not such as required by the statute, and that he shall be liable to double damage if the injury to such stock be wilful; and that, if the landowner shall maintain such a fence as the statute requires, then the owner of any cattle shall be liable to make compensation for any damage or trespass committed by his cattle upon the land so inclosed. Thus the law has continued, varying somewhat in form, but little in substance, until the present time. The ancient statutes from which we have quoted show what has been the policy of the law in respect to the matter of "inclosures and certain trespass" for centuries.

As already seen, the act of 1893-94 defines what shall be deemed a lawful fence. Section 2042 of the Code of 1887, as amended by Acts 1897-98, p. 524, provides, in effect, that, where a man has a lawful fence, and his lands are trespassed upon by the cattle of another, then the owner of the cattle shall be liable for damages, and also to a fine, etc.

Section 2048, as amended by Acts 1895-96, p. 466, provides that the board of supervisors of any county may declare the boundary lines of each lot or tract of land in each county, or in any magisterial district or any selected portion thereof, to be a lawful fence, and that, when this is done in the mode prescribed, § 2038, defining a lawful fence, shall be inoperative.

It is unnecessary to prolong this opinion by quoting at length from the statutes referred to as comprising the present fence law. It is sufficient to say that the rule of the common law which requires the owner of animals to keep them on his own land, or within inclosures, is not in force in Virginia, being inconsistent with the legislation of the state touching the subject of "inclosures and certain trespass," except in those counties where the boards of supervisors have acted under § 2048 as amended, and adopted what is commonly known as the "No Fence Law;" the common-law rule being restored in the localities where such action has been taken.

The general law imposes on the landowner no obligation to fence, but, when land is left uninclosed, the owner takes the risks of trespass thereon by the animals of others running at large, and can maintain no action for such trespass. A "lawful fence" is, necessarily, a condition precedent to the right to recover. The statute plainly indicates this, and to hold otherwise would annul the whole law on the subject.

In the case of *Baylor v. Baltimore & O. R. Co.* 9 W. Va. 270, where this subject was considered, the president of the court, after showing that the law of that state was taken largely from ours, says: "On examination of the statutes of Virginia and West Virginia, above referred to, I am of opinion that the said common-law rule, requiring the owners of cattle to keep them upon their

own lands, on pain of becoming liable in trespass for their entry upon the lands of owners, was not in force within the boundaries of this state, . . . except those which are unruly and dangerous, and that, if it was ever in force in Virginia, it was repealed at an early day in her history. I am not aware of any case in which it has ever been held in Virginia or West Virginia that the owner of cattle who suffered his cattle to run at large from his own lands upon the unfenced lands of others was liable, as a trespasser, to damages, to other landowners upon whose lands his cattle strolled, when they were not unruly or dangerous; nor, indeed, in any case, except the land entered was inclosed by a lawful fence."

It is further contended that the fence law is unconstitutional, because in violation of the inherent right secured to everyone of "the means of acquiring and possessing property," and also because in violation of the further constitutional provision that "private property shall not be taken for public uses without just compensation."

Although the people of Virginia have been living under these fence laws for nearly 300 years, and there have been several Constitutions adopted since the foundation of the government, in which no reference is made to the subject, this is the first time, so far as we know, that their constitutionality has been questioned in this court.

We entertain no doubt of the validity of the laws under consideration. They were intended for the mutual benefit, convenience, and welfare of all the citizens of the commonwealth. They do not appropriate private property for public use, but simply regulate its use and enjoyment. Nor do they interfere with "the means of acquiring and possessing property." There is nothing in the statutes in question which gives or pretends to give any right to any person to enter upon another's land, and commit any trespass thereon, whether the land be fenced or not. They do not impair the rights of private property, nor in any manner interfere with the disposal thereof. They provide a reasonable protection for the rights of owners of inclosed land, and limit the right of redress for trespass to those injuries which result from their own noncompliance with the law. The legislature has the power to regulate

the relative rights and responsibilities of the proprietors of inclosed land and the owners of stock that is allowed to run at large, and can, therefore, take from every man his remedy for a trespass by cattle, unless he inclose his lands with a lawful fence, without violating any right guaranteed by the Constitution of the state or the United States.

The constitutionality of laws similar to our own has been upheld in a number of the states. *Wills v. Walters*, 5 Bush, 351; *Clark v. Stipp*, 75 Ind. 114; *Chase v. Chase*, 15 Nev. 259; *Bileu v. Paisley*, 18 Or. 47, 4 L. R. A. 840, 21 Pac. 934. See also *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.

It is further contended by appellee that, if the fence law be valid, it can only apply to the trespassing cattle of a person owning or legally occupying an adjoining close. It is a sufficient answer to this that the bill alleges, and all of its allegations are admitted by the answer, that the land is in the possession and under the management of appellant, who has in his possession and under his control on said farm the stock complained of. And the statute provides that if any cattle, etc., shall enter into any grounds inclosed by a lawful fence the owner or manager of any such animal shall be liable, etc.

The position taken by appellant that he has a right, under the fence law, to turn his cattle in and upon his neighbor's premises, where the latter has failed to inclose his land with a lawful fence, is wholly without merit. The fence law has not repealed, or in any way impaired, the full force and effect of the common-law rule with respect to wilful or malicious trespass. The ancient maxim that no man shall take advantage of his own wrong in his prosecution or defense against another is also in force and controlling in this connection.

While the statutes in question do not require the owner to restrain his cattle from passing of their own accord upon the unfenced lands of another, they give him no authority to drive them there, and, if he do so, he is answerable for whatever damage they may do while there. *Melody v. Reab*, 4 Mass. 471; *Delaney v. Erickson*, 11 Neb. 533, 10 N. W. 451; *Caulkins v. Matthews*, 5 Kan. 199.

For these reasons, the decree appealed from must be affirmed.

KENTUCKY COURT OF APPEALS.

G. W. MCGRAW, *Appt.*,
v.

Town of MARION.

(98 Ky. 673.)

1. An ordinance imposing a license tax on transient persons other than citizens of the municipality for selling goods is unconstitutional and void.
2. The enforcement of a void and unconstitutional ordinance or by-law by officers of a municipal corporation will render the municipality liable to a person who is thereby injured.

(February 12, 1896.)

NOTE.—Municipal liability for arrest and imprisonment under invalid ordinance.

It is to be regretted that the court did not point out the exact distinction between *MCGRAW v. MARION* and *Taylor v. Owensboro*, 98 Ky. 271, 32 S. W. 948, which case is not even mentioned in the opinion. In the latter case the arrest was for breach of the peace, and it appeared that the ordinance under which the arrest purported to be made was void, but the arrest was held to be authorized by a state statute. The court, however, says that the absence of the statute would have made no difference, that municipal corporations are auxiliaries of the state government. The officers charged with keeping the peace are officers of the commonwealth and a breach of the peace is an offense against the commonwealth, so that the municipal corporation is not liable for the acts of its officers in making a wrongful arrest for such breach. The court further says that the case rests on the ground that municipal corporations represent the commonwealth, and municipal officers while engaged in duties relating to the public safety and the maintenance of public order are the servants of the commonwealth.

In *MCGRAW v. MARION* the ordinance under which the arrest was made was an ordinance enacted for the benefit of the town, and not for the preservation of the public peace, so that there is a ground for distinction between the two cases in that in the one case there was an attempt to enforce general police ordinances, while in the other case the attempt was to enforce what might be called a local police ordinance for the benefit of the citizens of the municipality alone. But in *MCGRAW v. MARION* the court says: "It seems to us that both reason and authority require that a municipal corporation should be answerable for the damage done to a party by its officers enforcing a void and unconstitutional ordinance or by-law;" while in *Taylor v. Owensboro* the court says: "A municipal corporation is not liable for the acts of its officers in enforcing . . . penal ordinances of the city;" and since the ordinance in the latter case was unconstitutional, the word "void" must be read into that statement so that the municipality will be absolved from liability for enforcing void penal ordinances of the city.

The distinction upon which the action is maintained in *MCGRAW v. MARION*, namely, that in so far as municipal corporations exercise powers not of a character pertaining to the administration of general laws made to enforce the general policy of the state,—“voluntary, assumed powers,—intended for the private ad-

A PPEAL by plaintiff from a judgment of the Circuit Court for Crittenden County in favor of defendant in an action brought to recover damages for alleged wrongful arrest and imprisonment. *Reversed.*

The facts are stated in the opinion.

Messrs. James & James and *A. C. Moore* for appellant.

Messrs. Cruce & Nunn and *E. C. Flannery* for appellee.

Guffy, J., delivered the opinion of the court:

This action was instituted in the Crittenden circuit court by the appellant, G. W. McGraw, against the town of Marion, seek-

vantage and benefit of the locality and its inhabitants, there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers, for purposes essentially private, would be liable,—does not appear to have been applied to the enforcement of penal ordinances, which results in arrest in any other case, the rule generally being that there is no liability for arrests made in enforcing void ordinances regardless of the purpose for which they were enacted.

Thus, in *Trescott v. Waterloo*, 26 Fed. Rep. 502, where an attempt was made to enforce a void ordinance regulating peddlers, the court held that a municipal corporation is not liable to action by one who served out his sentence for violating an unconstitutional municipal ordinance. The court says that in Iowa police regulations are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public, and that consequently the city is not liable for enforcing such regulations, and that the action of the city in adopting the ordinance was a legislative act, and the exercise of the right of sovereignty primarily belonged to the state.

For errors of judgment in the exercise of such powers, the cities are not liable in their corporate capacity. So, in *Worley v. Columbia*, 88 Mo. 106, which was an action for enforcing an ordinance requiring a license from auctioneers, the court held that a municipal corporation is not liable for trespass committed by its officers in the enforcement of a void ordinance. The court says the raising of revenue is unlawful when sought to be derived from subjects and vocations exempted and privileged from taxation by such corporations. The case is not one involving an irregular exercise of a power, lawfully possessed, and which it could exercise in some proper and legal mode, but is an attempt to raise revenue without any authority and under a void ordinance. It was without power to act in that behalf. So the officers were without any authority to do the acts complained of, they were not the officers or agents of the corporation, and it is not responsible for the damages occasioned thereby.

The city is acting in a governmental capacity in attempting to exercise police powers, and it will not be liable for the acts of its officers in enforcing a void ordinance. *McFadin v. San Antonio* (Tex. Civ. App.) 54 S. W. 48.

In *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, where the attempt was to enforce a void ordinance against retailing liquors, the court says municipal corporations are created by the state for political objects, and invested

ing to recover damages in the sum of \$10,000, on account of the arrest and imprisonment, and injuries to appellant growing out of the enforcement of an alleged unconstitutional by-law enacted by the authorities of said town. The petition, in apt language, alleges the organization and incorporation of the town; the election and qualification of trustees, police judge, marshal, secretary and treasurer, and prosecuting attorney.

It is further alleged as follows: "He states that the defendant, by its board of trustees aforesaid, is by virtue of said law vested with power and authority to pass ordinances in and for the town of Marion aforesaid, not in conflict with the Constitution or laws of this commonwealth or of the United States. He states that, since said town so organized and elected its officers aforesaid, the board of trustees of said town enacted and passed the following pretended, illegal, unconstitutional ordinances, to wit: Sec. 21: 'All transient persons (other than a citizen of this town), who shall sell any goods, wares, or merchandise of any kind, at auction or retail, in the town of Marion, shall first pay to the clerk or treasurer of said town the sum of, to wit: Peddler of general merchandise, \$2.50 per day for each man employed; peddlers of patent medicines, \$1.00 to \$10.00 per day, in the discretion of the clerk or treasurer; peddler of jewelry,

spectacles, or minor wares, \$2.50 per day.' Section 22: 'Any person who shall violate any of the provisions required by § 21 of these by-laws shall, upon conviction thereof, be fined in any sum not less than \$5.00 nor more than \$50.00, and upon default of payment of any fine and costs imposed by § 21 of these by-laws, shall be committed to the county jail, at the rate of one day for each fifty cents of said fine, and costs, or may be put to hard labor on the streets or public work of the town of Marion at the rate of fifty cents per day until said fine and costs are paid, in the discretion of the court.' That said by-laws or ordinances of the defendant pretendedly took effect on and from the 10th of August, 1893."

It is further alleged in the petition as follows: "He states that all of the money arising from license, fines, and prosecutions under said §§ 21 and 22 of said pretended by-laws aforesaid inure to the exclusive use and benefit of the defendant, the town of Marion, and that said ordinance, in said section aforesaid, is not in pursuance nor in aid of any law of the commonwealth of Kentucky, nor is same by authority of any law of this commonwealth, or in defendant vested by virtue of the law creating the municipality of the defendant, the town of Marion. He states that said §§ 21 and 22 discriminate as between citizens living in the town of Marion and those living without said town,

with a portion of governmental power to be exercised for local purposes connected with the public good. For acts done by them in their public capacity and in the discharge of the duties imposed on them for the public benefit, cities and towns incur no liability to persons who may be affected or injured by them. So that, neither for the act of the council in passing a void ordinance, nor of the mayor in issuing warrants, nor of the marshal in executing them and making the arrest, is the town liable.

All the laws and ordinances intended to secure the peace and good order, or to preserve the health and morals, of the public are in the nature of police regulations, and are essentially governmental in their character. Their enactment and enforcement are functions of the sovereignty, and they are designed for the benefit of the public. An officer whose duty is in whole or in part to enforce observance of such ordinances while so engaged is acting for the public, and is not the agent of the municipal corporation in its corporate capacity. *Laurel v. Blue*, 1 Ind. App. 128, 27 N. E. 301. In that case the marshal was attempting to make an arrest without a warrant, under an ordinance alleged to be illegal, and the court said he was attempting to execute a public duty, and for this the town cannot be held responsible. The court also says that it is unnecessary to pass upon the question of the validity of the ordinance, thereby intimating that that question was immaterial upon the question of liability.

The rule that a municipal corporation is not liable for the acts of its officers in attempting to enforce its police regulations for the reason that in such matters the officers can in no sense be regarded as the agents of the municipal corporation, applies to a case where the officer attempts to enforce an illegal ordinance so as to relieve the municipal corporation from liability for arrest made thereunder. *Easterly v. Irwin*, 99 Iowa, 694, 68 N. W. 919. 47 L. R. A.

A municipal corporation is not liable to an action for false imprisonment for the acts of its officers in enforcing invalid ordinances. *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 947.

In *Harrison v. Columbus*, 44 Tex. 418, there was an allegation of arrest under a void ordinance, but no notice is taken of that fact in the opinion, the court saying there are some cases in which municipal corporations may be liable in damages for the wrongful acts of their officers, but that the case made by the pleadings before the court was not one of them.

It would seem that the passage of an ordinance requiring nonresidents to pay for the privilege of transacting business within the corporation is an attempted exercise of the sovereign power within the principle of the decisions which exempt the municipality from liability for acts done under it if such decisions are sound in principle, and not of a mere administrative or corporate power, within the authorities which hold municipal corporations liable for acts done in the exercise of such powers.

Consequently the distinction made in *McGraw v. Marion* must be that between compulsory duties and permissive powers which the corporation may exercise for the benefit of its inhabitants, which in another connection is clearly brought out in *Platt Bros. & Co. v. Waterbury* (Conn.) 45 Atl. 154, *post*. That distinction, so far as it affects liability for enforcing an ordinance by arrest, appears to have been made for the first time in *McGraw v. Marion*, although it is not new in other departments of municipal activity. That question, together with the broader one of the soundness of the reasons for exempting municipal corporations from liability for torts committed by them through their officers, is not considered in this note, since such consideration would require the examination of cases covering a wide range of corporate action, and could not be determined from cases involving liability for arrest alone.

H. P. F.

and discriminate as between citizens of the defendant town of Marion, and nonresident citizens of the state, in this: that it allows citizens living within the corporate limits of the defendant, the town of Marion, to sell goods, wares, and merchandise, such as this plaintiff sold and offered for sale, without a license, or paying defendant anything whatever for said privilege of so doing, without subjecting themselves to arrest, prosecution, fine, or imprisonment,—to all of which penalties a person not residing within the defendant, the town of Marion, is subjected, unless license under said pretended §§ 21 and 22 of defendant's by-laws is procured, and he alleges that said discrimination aforesaid brings said §§ 21 and 22 of defendant's said by-laws within the inhibition of § 2 of article 4 of the Federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, and is therefore unconstitutional, null, and void from its incipency; and for the further reason that said §§ 21 and 22, nor either of them, do not fix the amount of license to be charged or collected by the defendant, but leave the amount to the discretion of the defendant's town clerk or treasurer from \$1 to \$10, thereby placing it in the power of defendant's said clerk or treasurer to discriminate as between applicants for license for said privileges."

It is further alleged in the petition that plaintiff was, at the time of the injury complained of, a citizen and resident of the state of Indiana, engaged in the business of selling, by public auction in different states, soaps, hair restoratives, and other articles, and on the 12th of March, 1894, he was so engaged in the said town of Marion; and that he tendered to said clerk of said town \$1.25, being the sum for which said clerk had formerly granted him license to sell said articles, which sum the clerk refused to accept, demanding a higher price, which plaintiff refused to pay; and thereafter on said day the said town of Marion, in pursuance of said pretended by-laws, wrongfully and without authority of law, had the plaintiff arrested upon the charge of selling and peddling at public auction articles of general merchandise without a license to so do, which warrant was issued by the defendant's police judge, H. F. Ray, in pursuance of said by-laws, and executed by defendant's town marshal, J. F. Loyd, by taking plaintiff into custody, and taking him away from his business, and to the office of said judge, where he was, over his objection, put upon trial under said pretended law, and wrongfully fined by said court in the sum of \$5, and \$11.60 costs, for the nonpayment of which he was, wrongfully and without authority of law, upon the mittimus of said defendant's said court, addressed to the jailer of Crittenden county, lodged in jail, and there kept by said jailer, until he was liberated therefrom upon a writ of habeas corpus, before J. A. Moore, judge of the Crittenden county court. That, in order to de-

fend himself before the defendant's police court, and to have himself liberated from said jail, he had to, and was forced to and did, employ counsel, at a cost of \$100, which sum was reasonable. That defendant had notice of the unconstitutionality of said by-laws. That he, plaintiff, was greatly damaged in his business, mind, and feeling, and character, and expense incurred in his defense, in the sum of \$10,000, for which sum he prays judgment. The defendant entered a general demurrer to the petition, which demurrer was sustained by the court, and, plaintiff failing to amend, the petition was dismissed. To reverse that judgment this appeal is prosecuted. It is insisted by the appellant that the by-laws under or by virtue of which he was prosecuted were unconstitutional and void, and that the license required, and the punishment inflicted upon him, were alike illegal and wholly without authority of law. Ordinances or by-laws of towns similar to the one complained of in this case have been so often decided by the Supreme Court of the United States, as well as this court, to be unconstitutional and void, that further discussion of that question is deemed unnecessary. See *Fecheimer v. Louisville*, 84 Ky. 306, 2 S. W. 65. But counsel for appellee insist very earnestly that the town corporation or municipality is not liable for the injury or wrong inflicted, if, indeed, any injury has been done appellant. It may be conceded that that question has never been decided by this court. We have before us a case where, according to the allegations of the petition, a party has been arrested, fined, and imprisoned without authority of law. It necessarily follows that someone must be liable to answer for the damages caused by the wrong. Perhaps it will be conceded that the persons arresting and putting plaintiff in prison are liable; but if they were but acting at the request of, and for the benefit of, the town, it would seem unjust to them to say that they alone should be responsible, and it would likewise be unjust to the injured party to require him to look alone to a few individuals for redress in such cases. This court, in *Prather v. Lexington*, 13 B. Mon. 560, 56 Am. Dec. 585, recognized the doctrine that a municipal corporation, in a certain class of cases, would be responsible for injuries to an individual, where the acts done would warrant a like action against an individual. The same doctrine is recognized in *James v. Harrodsburg*, 85 Ky. 196, 3 S. W. 135. The rule is thus stated in 15 Am. & Eng. Enc. Law, p. 1141: "While the difficulties surrounding all attempts to state a rule embracing the torts for which a private action will lie against a municipal corporation have been often deplored, yet it is believed that the following formula is both accurate and complete: So far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be

deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters they should stand as does sovereignty whose agents they are, subject to be sued only when the state by statute declares they may be. In so far, however, as they exercise powers not of this character,—voluntarily assumed powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers, for purposes essentially private, would be liable." In 2 Dillon on Municipal Corporations, § 771 (§ 973, 3d ed.), it is said: "A municipal corporation may be liable, as respects illegal and void acts, where these are within the scope of the general powers of the corporation, and where the enforcement of such acts by its officers under its authority has been compulsory, resulting in injury to individuals."

It is manifest that the by-law in question was enacted for the sole benefit of the municipal corporation of Marion, and of its citizens; hence the case at bar falls within the rule laid down in 15 Am. & Eng. Enc. Law, *supra*, holding the corporation liable for the injury complained of. The liability of a municipal corporation in action of tort for the acts of its officers was decided by the supreme court of Massachusetts in *Thayer v. Boston*, 19 Pick. 513, 31 Am. Dec. 157. In that case the plaintiffs alleged that they were seized in fee, as tenants in common, of a messuage in Boston (describing the same); that the defendants took up the pavement in front of the messuage and range of building, dug up the soil, etc., erected stalls, benches, etc., on the passageway, and obstructed the communication with the messuage, etc. The defendants objected that the action could not be maintained against them for any of the acts complained of, because they were performed, not by the city, but by the surveyor of highways and other officers, duly authorized by law; and if the officers were not so authorized, they, and not the city, were responsible for their unlawful acts; that the corporation could not be made answerable for any unauthorized trespasses of the officer; and that, in fact, it was incapable of committing a trespass. Chief Justice Shaw delivered the opinion of the court, and, after stating the case, says: "The action is an action of the case against the city in its corporate capacity, for special damages alleged to have been done to the plaintiffs in their estates, by the officers of the city having authority over the streets and highways of the city, by acts which they professed to do by virtue of their offices, and for the use and benefit of the city. It is a well-settled rule of law that if an individual suffer special damage, by any unlawful act in obstructing a highway, he shall have his action, although the party doing the act is li-

able to an indictment; but without such damage, although the act is unlawful, and although more injurious to one proprietor, on account of his proximity to the highway, than another, still he cannot have an action, because actions would thereby be multiplied indefinitely; but the offender shall be prosecuted by indictment, by which the offense shall be punished and the wrong redressed once for all. What is special damage to sustain the *per quod*, and enable one to have his several action, for an injury common to the whole community, is often a difficult question. It seems to be settled by authorities that it must be something, not merely differing in degree, but in kind, from that which must be deemed common to all. But, as this subject has been fully considered in the other case alluded to, it is not necessary in this to discuss it more at large. Supposing this to be a public highway, and the plaintiffs to have sustained a special damage, so as to enable them, upon general principles, to maintain an action, then it is argued that such an action, sounding in tort, cannot be maintained against the city in its corporate capacity; and whether such action can be maintained is the question which has been mainly considered in the present case. The argument strongly pressed by the defendants is that, if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts must be deemed justifiable, and nobody is liable for damages; and if any individual sustains loss by the exercise of such lawful authority, it is *damnum absque injuria*. But if they do not act within the scope of their authority, they act in a manner which the corporation have not authorized, and in that case the officers are personally responsible for such unlawful and unauthorized acts. But the court are of opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results. There is a class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time,—if it was an act done by the officers having competent authority, either by express vote of the city government, or by nature of the duties and functions with which they are charged by their offices, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party

injured no means of redress except against agents employed—and by what at the time appeared to be competent authority—to do the acts complained of, but which are proved to be unauthorized by law. And it may be added that it would be injurious to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers, and subordinate persons might well refuse to act under the directions of its government in all cases where the act should be merely complained of and resisted by any individual as unlawful, on whatever weak pretense; and, conformably to the principle relied on, no obligation of indemnity could avail them. The court are therefore of opinion that the city of Boston may be liable in an action of the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where,

after the act has been done, it has been ratified by the corporation by any similar act of its officers. That an action sounding in tort will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham & S. Gaslight Co.* 1 Ad. & El. 526. And there seems no sufficient ground for a distinction, in this respect, between cities and towns, and other corporations. *Clark v. Washington*, 12 Wheat. 40, 6 L. ed. 544; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421."

It seems to us that both reason and authority require that a municipal corporation should be answerable for the damage done to a party by its officers enforcing a void and unconstitutional ordinance or by-law.

For the reasons indicated, *the judgment of the court below is reversed*, and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Rehearing denied.

CALIFORNIA SUPREME COURT.

Philip HANLEY, *Appt.*,
v.

CALIFORNIA BRIDGE & CONSTRUCTION COMPANY, *Respt.*

(.....Cal.....)

1. All the evidence submitted by plaintiff is within the rule that upon motion for nonsuit the evidence should be interpreted most strongly against defendant.
2. The caving in of the completed portion of a tunnel, causing injury to a servant employed in constructing the tunnel, is not one of the risks assumed by the servant, but the completed portion is to be deemed an appliance or means furnished by the master by which the remaining work is to be prosecuted, and which it is the duty of the master to make safe.
3. A superintendent of the construction of a tunnel, who visits the place once or twice a day is presumed to have as much knowledge as the men under him have with regard to the general requirements to make the place reasonably safe.
4. A workman in a tunnel who has had no knowledge of or experience in running tunnels is not chargeable, as matter of law, with contributory negligence in working therein without having the tunnel timbered to prevent the fall of overhanging rock, when his fellow workmen, who are experienced in the business, give him no intimation that the tunnel is dangerous, and the superintendent of the work, who visits the place daily, gives no warning and takes no steps for the safety of the workmen.

(*McFarland, J., dissents.*)

(December 20, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.* The facts are stated in the Commissioner's opinion.

Messrs. Henley & Costello, for appellant:

The complaint states a cause of action, and it was gross error on the part of the court to grant the motion for nonsuit.

When a master employs a person to work in a dangerous place it is a breach of the master's duty to expose such servant, even with his own consent, to such danger without giving him proper instructions.

Ryan v. Los Angeles Ice & Cold Storage Co. 112 Cal. 253, 32 L. R. A. 524, 44 Pac. 471; *Union P. R. Co. v. Jarvi*, 10 U. S. App. 439, 53 Fed. Rep. 67, 3 C. C. A. 433; *Elledge v. National City & O. R. Co.* 100 Cal. 282, 34 Pac. 720; *Kelley v. Wilson*, 21 Ill. App. 141; *Kelley v. Fourth of July Min. Co.* 16 Mont. 484, 41 Pac. 273.

Messrs. Davis & Hill, for respondent:

The plaintiff was a fellow servant of Timon and Cooper.

Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Donnelly v. San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559.

That the three were fellow servants was a matter of law, to be determined by the court.

Callan v. Bull, 113 Cal. 593, 45 Pac. 1017;

NOTE.—As to the necessity of furnishing a safe place for miners to work, see *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 25 L. R. A. 848, and *note*; *Petaja v. Aurora Iron Min. Co.* 47 L. R. A.

(Mich.) 32 L. R. A. 485; *Turner v. St. Clair Tunnel Co.* (Mich.) 36 L. R. A. 184, 47 L. R. A. 112; also *Williams v. Thacker Coal & Coke Co.* (W. Va.) 40 L. R. A. 812.

Donnelly v. San Francisco Bridge Co. 117 Cal. 417, 49 Pac. 559.

The employer is not liable to one who is injured by the negligence of a fellow servant, though working in different capacities and upon different grades of work.

Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017.

In this case, and for the purpose of the question involved, the employer did not furnish the "place" for the men to work in.

Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

The nature of the work he engaged to do,—wheeling away the rock as it was blasted down,—and the character and condition of the tunnel itself, were open, visible facts, seen and known by the plaintiff from the first, and whatever dangers were incident to the employment were a matter of common knowledge, and the plaintiff assumed the risks of such employment.

Vaughn v. California O. R. Co. 83 Cal. 18, 23 Pac. 215; *Lovejoy v. Boston & L. R. Corp.* 125 Mass. 79, 28 Am. Rep. 206; *Smith v. Peninsular Car Works*, 60 Mich. 506, 27 N. W. 662; 14 Am. & Eng. Enc. Law, p. 42.

The risks thus assumed by the employee include as well those dangers which arise in the course of the employment as those which exist at its commencement.

Sowden v. Idaho Quartz Min. Co. 55 Cal. 443.

Chipman, C., filed the following opinion:

Action to recover damages for personal injury while working in a tunnel. The pleadings are verified. The cause was tried by a jury, and at the close of plaintiff's evidence the court granted defendant's motion for judgment of nonsuit. The appeal is from the judgment and from an order denying motion for new trial.

Plaintiff introduced evidence tending to show the following facts: Defendant was engaged in the construction of a tunnel at Baker's Beach, in San Francisco, and plaintiff was employed by defendant as a laborer, his duty being to load and haul away rock and debris from this tunnel with a wheelbarrow. He was inexperienced in running tunnels, and was working with experienced miners, who were skilled, and had had long experience in such work. He had been working six and one half days when the accident happened by which he was injured. The tunnel ran into the face of a receding rock bluff which rose up from the ocean beach. As driven in at that time, it measured about 18 feet at the bottom and about 15 feet at the top, and was 8 feet wide and 9 or 10 feet high. Defendant had a superintendent, who was in charge of the work, and employed the men, and who visited the tunnel once or twice a day, but gave no instructions to the men concerning the work, except generally for them to go on with the tunnel: and he never gave any instructions to the plaintiff, except that when he employed plaintiff he directed him to wheel out the stuff which was blasted down or loosened. On the day of the acci-

dent the plaintiff, having laid some planks upon which to run his wheelbarrow, was arranging these planks on the bottom of the tunnel, when a rock, weighing about 1,000 pounds, fell from the corner or angle where the roof and wall met, about 10 feet from the mouth and 8 feet from the back end of the tunnel, breaking plaintiff's leg, driving the bones out through the flesh, and seriously injuring him. The rock fell quickly, without giving opportunity to escape, and plaintiff heard no noise before it fell. The tunnel had passed this place three or four days before the rock fell. The rock which fell differed from the others "in that it had a kind of diamond-shaped point projecting into the tunnel," and was in size about 2 by 2½ feet. Before it fell, "plaintiff did not notice any definite boundaries around it, nor whether the edge of the rock could be seen; that he had noticed this rock hanging there for three or four days before it fell." Timon, one of the miners helping to drive the tunnel,—a witness for plaintiff,—testified: "That the bluff into which the tunnel was being driven was seamy rock. That he thought the tunnel should have been timbered three or four days before, to prevent the falling of rock, and make it reasonably safe."

That for three or four days he (Timon) had thought that rock dangerous [referring to the rock which did the injury], but that there was no visible cleavage or breaking around the rock." He "didn't tell plaintiff it was dangerous, or say anything to him about it, because he didn't think it his business to speak about it." He spoke to the other two men about it, and they paid no attention to it. The rock could not be seen from the surface, but only inside. A small stream of water ran down the face of the bluff over the tunnel, and the wall of the tunnel where this rock was located was damp, and he thought this water seeping through would loosen the rock, "and let it fall sooner than it otherwise would, on account of its not being timbered." The other two miners "were trying to let the rock hang until they had got another center. They left it, thinking perhaps it would stay there. That the way to have made the tunnel reasonably safe for the men working in it would have been to have timbered it." He was asked if there were not timbers there for this tunnel. He answered: "There was none before the rock fell. There were no timbers there before the rock fell. They were on the ground, I guess, but we did not have them in the tunnel." Being again asked, he answered: "No timbers were there until the rock fell; not that I saw; not for the tunnel. There were timbers there for the sewer, but they had no timbers in the tunnel until the rock fell upon the man." He further testified that they had, a half an hour before the accident, fired some blasts, and he was picking down the loose rock from the blasts when the rock fell, and plaintiff stood near him. Their custom was to light the fuse to fire the blasts, and go out to await the explosion, and then return quickly, and "by using the pick, and striking the walls and listening, would

discover where rock had been loosened, and was liable to fall, and pick that down, in order to avoid the danger of falling rock." This was done just before the accident. A blast had been put in, in the front of the tunnel, and one opposite this rock at the top of the tunnel, and one opposite, near the bottom. After the explosion, witness went into the tunnel, and "was picking down the loose rock. The plaintiff went about adjusting the planks on which to run the wheel barrow." At this time it was "the rock fell, and without noise, and plaintiff received his injuries." Sheridan, a witness for plaintiff, testified: That he had been engaged thirty years in constructing tunnels, and had gone out to look at this ground with a view to bidding on the contract.

Q. And from your observation of it, and your experience as a miner, I will ask you whether it is ground of such character as, to insure reasonable safety in tunneling, would or would not require timbering.

A. That would depend altogether upon the size of the excavation.

Q. Suppose the excavation was a tunnel of about 10 feet wide and 10 feet high?

A. In that character of rock, I should judge that it would require some timbering.

He further testified that many tunnels are run without timbering, depending upon the hardness of the rock and the course of the cleavage and circumstances of the case; that it is not customary in small tunnels to timber, depending upon circumstances; that a practical miner understands all these matters, and, if he wants to work in a dangerous place, it is his own risk; "but he should insist upon having it timbered where the character of the rock is dangerous,—where it is seamy;" that the timbering is generally done by the miners, but not always; that experienced miners are often deceived, "and something falls in where they have thought the tunnel safe," and "often where it looks as if the walls of the tunnel might fall in it does not fall, but remains."

1. Respondent devotes some attention to the evidence of the witness Timon to show that it is susceptible of a different meaning than that given it by appellant, and otherwise comments upon the weight of certain evidence. For example, that the result of Timon's testimony was that timbers were at the tunnel, ready to be used for timbering, and not, as claimed by appellant, that there were no timbers there except for the sewer. The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant. *Goldstone v. Merchants' Ice & Cold-Storage Co.* 123 Cal. 625, 56 Pac. 776. This rule must be applied to all the evidence submitted by plaintiff.

2. The contention of respondent may be summarized as follows: That the three experienced employees and plaintiff were fel-

low servants, and this fact was for the court to determine; that the injury resulted from the negligence of these men, and, if the duty of removing the dangerous rock rested more directly upon the skilled and experienced workmen, still the rule applies to all fellow servants, though working in different capacities, and the employer is not liable to one who is injured by the negligence of another; that, though it be the duty of the employer to furnish the employee a safe place in which to work, in the present case the rule has no application, because the employer did not furnish the place, but plaintiff and the other three furnished the place by making the tunnel (citing *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017); that the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts, and the dangers of the employment known to him, and he assumed the risks (citing *Vaughn v. California C. R. Co.* 83 Cal. 18, 23 Pac. 215, and other cases); and, finally, that the facts show contributory negligence. The complaint charges "that said defendant, in violation of its duty to furnish this plaintiff with a safe place to work, negligently and carelessly failed to properly or at all brace or timber said tunnel." This allegation is not denied. The evidence tends to show that the materials through which the tunnel was being driven were of a character requiring it to be timbered to be reasonably safe. The superintendent having charge of the work visited the tunnel once or twice a day, and must be presumed to have known as much as his workmen with regard to the general requirements to make the place reasonably safe from a danger, such as befall plaintiff, even though it does not appear that he had actual knowledge of this particular overhanging rock; and it was his duty to ascertain the condition of the tunnel as to its safety. Among the requirements necessary to the safety of the workmen, as the evidence tends to show, were timbers to be placed in the tunnel; and the evidence also tends to show that none were supplied for this purpose, although there were timbers for the sewer. I cannot agree with respondent's counsel that the rule of law which requires the master to furnish a safe place in which his servants may work does not apply to this case as it presents itself. What further evidence might disclose is not now to be considered. In *Callan v. Bull*, relied upon by respondent, the facts presented a different case from this. There the workmen were engaged in constructing a jetty. To do this, certain temporary structures were necessary, and it was through the defects in one of these that the injury occurred. In speaking of the rule we are now considering the court said: "Manifestly, the place at which the work was to be done was not provided by the defendant, nor can it be said that different portions of the work in which the laborers might be engaged as it progressed was the 'place' furnished by their employer, within the meaning of the above rule, or that the bent or trestle, from which was suspended the mat on which the plaintiff was at work at the time of his in-

jury, was one of the appliances to be furnished by the defendant." The soundness of these views need not be and is not questioned. Elsewhere in the opinion it was said that the rule "has no application when the place at which the work is to be done, or the appliances for doing the same, are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation." Among the cases cited in support of the opinion is *Coal & Min. Co. v. Clay*, 51 Ohio St. 542, *sub nom. Consolidated Coal & Min. Co. v. Floyd*, 25 L. R. A. 848, 38 N. E. 610, where certain laborers in a coal mine were injured by the falling in of the roof by reason of its not being sufficiently propped, and the court held that "the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and, instead of being a place furnished by the master for the employees, within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform." What was said in *Callan v. Bull*, and what we find in the Ohio case, must be read in the light of the facts before the court. Where a permanent tunnel is driven into a mountain to open up veins of mineral, or pierces a mountain to furnish a permanent bed for a railroad, we think that, as fast as it is completed, the finished tunnel becomes an appliance or means furnished by the master by which the remaining work is to be prosecuted. Some of the great railroad tunnels of this century—for example, the Hoosac and Mont Cenis tunnels—required years for their completion from end to end. It would be most unreasonable to hold that the laborer employed upon the unfinished portion of one of these tunnels must take a fellow servant's risk in passing through miles of completed work to get to his place of employment. Nor can we see that the case would be different where he himself helped to complete the finished portion. The evidence before us is not entirely clear as to whether the tunnel in question was completed at the point where the accident occurred, so as to bring it within the reason of the rule we are discussing, but there was not sufficient evidence on the point to justify the court in holding that portion of the tunnel not to be completed in the sense we are considering a completed tunnel. The evidence is that the tunnel had been driven in about 18 feet, and that it was about 8 feet wide and from 9 to 10 feet high; that the rock that fell was in the top of the tunnel, and was about 10 feet from the mouth and 8 feet from the back end of the tunnel; that the tunnel had passed the place where the rock fell about three or four days. These expressions seem to imply a completed

47 L. R. A.

tunnel to the extent named; at least must be so taken on this motion. There is other evidence showing that for some reason, not fully nor intelligently explained, two blasts were put in the side of the tunnel opposite where the fatal rock was hanging. This might possibly imply that at that point the tunnel was not entirely completed. We do not think, however, that we are sufficiently enlightened by the evidence as now before the court to warrant us in saying that it takes the case out of the rule we are considering. We do not think that the court, on this motion, should assume, on such evidence as this, to say that the tunnel was not completed at the point in question, and that at that particular point the "place" was not such as it was the duty of the employer to furnish and to see that it was reasonably safe.

I think the view we have taken of the rule under consideration is fully supported in *Union P. R. Co. v. Jarvi*, 10 U. S. App. 439, 53 Fed. Rep. 65, 3 C. C. A. 433, and in *Kelley v. Fourth of July Min. Co.* 16 Mont. 484, 41 Pac. 273. In the first of these cases Jarvi was a coal miner. He was injured by a rock falling upon him from the roof of one of the tunnels by which he had access to the place where his particular work called him. The case was heard before Caldwell and Sanborn, circuit judges, and Shiras, district judge. The opinion presents a careful review of the law upon the question here. The court said: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employee may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. . . . For a failure to exercise this care, resulting in injury to the employee, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended." Further, as to the duty of the master and the rights of the servant, it was said: "The latter [the servant] has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself." Upon the question of contributory negligence it was said: "The degrees of care required of the master and servant also differ, because defects in a piece of machinery or in the roof of a mine that to

the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no significance to a laborer or miner who has had no experience in watching and caring for machinery or roofs of slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicate. The dangers and defects merely must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." These principles are supported by numerous cases cited in the opinion, and seem to us a clear and sound exposition of the law. Applying these rules of law to the facts of this case, ought the court to have nonsuited the plaintiff? In actions like the present one, questions of negligence are for the jury to determine; and it is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them, that the question of negligence is ever considered one of law for the court. *Union P. R. Co. v. Jarvi*, 10 U. S. App. 439, 53 Fed. Rep. 65, 3 C. C. A. 433, and cases cited. We do not think the case, as it comes to us here, is one where all reasonable men must draw the inference that the plaintiff was guilty of, or the defendant free from, negligence. In *Kelley v. Fourth of July Min. Co.* 41 Pac. 273, plaintiff was working in a mine, and was an experienced miner. His work was at the face of the tunnel which he was helping to run. He was injured by the falling of rock from the roof of the tunnel a short distance behind where he worked. The facts were not in all particulars as in this case, but they presented the question now before us, and it was decided that: "Where a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free of debris as not to obstruct his escape in case of accident." (Syllabus.) 16 Mont. 484. Plaintiff had no knowledge of or experience in running tun-

nels. He neither knew, and, because he was inexperienced, had not the means of knowing, that the tunnel was unsafe without timbers. He saw this overhanging rock, but it presented to him no evidences of loosening, and no cleavage from around its edges was visible, and it was high above his head, and beyond his reach. His fellow servants were skilled in mining, and they gave him no warning, although at least one of them thought it liable to fall. The superintendent visited the mine daily, and he gave no warning and took no steps for the safety of plaintiff. A witness of long experience in running tunnels testified that, in his opinion, the tunnel would require some timbering, and in this opinion he was corroborated by the witness Timon. We cannot say that the facts were such that the court had the right to consider the question of negligence involved as one of law for the court.

We do not deem it necessary to discuss the other points made by defendant, for, conceding that the men on the work were fellow servants, it was still the duty of defendant to furnish them a reasonably safe place in which to work. Whether the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts, and the dangers of the employment were known to plaintiff, were questions of fact as to which there was at least some evidence which should have gone to the jury. The decision of the lower court seems to have turned on the proposition that the case was similar to *Callan v. Bull*, and was controlled by the rules applied in that case. But we think the circumstances attending the injury in this case clearly distinguishable from those found to exist in *Callan v. Bull*, and that the cases in 53 Fed. and 41 Pac., *supra*, more nearly illustrate the principles which should govern here. It is advised that the judgment and order should be reversed.

We concur: **Gray, C.; Haynes, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment and order are reversed.*

McFarland, J.:

I dissent, and think that the judgment should be affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

F. ROMEO, Appt.,

v.

Guiseppe MARTUCCI.

(.....Conn.....)

1. An ordinary contract of consignment does not estop the consignor from setting up his title as against an innocent purchaser of the goods from the consignee, who buys them on the same day the

goods are received, as part of his purchase of the entire stock and business.

2. The sale of goods received on consignment is not within the scope of the consignee's authority, so as to pass title to them even to an innocent purchaser, when made on the day the goods are received, as part of the sale of the entire stock, fixtures, goodwill, and business.

(*Andrews, Ch. J., and Hall, J., dissent.*)

(January 4, 1900.)

NOTE.—As to the title to goods consigned to an agent for sale, see also *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.* (W. Va.) 22 L. R. A. 850; also *Arbuckle Bros. v. Kirkpatrick* (Tenn.) 36 L. R. A. 285
47 L. R. A.

APPPEAL by plaintiff from a judgment of the Court of Common Pleas for New Ha-

ven County in favor of defendant in an action brought to recover possession of certain groceries which had been consigned by plaintiff to a third person for sale at retail, and sold by him to defendant in gross without any accounting for the proceeds. *Reversed.*

Statement by **Hamersley, J.:**

The finding stated the facts on which judgment is founded as follows: "(1) The plaintiff, F. Romeo, is in business in the city of New York, engaged in the wholesale grocery, provision, and wine business under the name of F. Romeo & Co. (2) On January 3, 1899, through F. S. Savarese, his agent at New Haven, the plaintiff agreed to ship to Orlando Ricciardelli & Bro., then engaged in the retail grocery business at 169 Wallace street, in said New Haven, a lot of groceries, being the goods more specifically described in the complaint in this action, of the value of \$559.57, which goods were shipped to said Ricciardelli & Bro. upon consignment, to be sold by them at retail in their business as retail grocers in their store at New Haven; the title to said goods to remain in the plaintiff until the same were sold at retail; the said Ricciardelli & Bro. acting as agents for the plaintiff, and to account to the plaintiff from time to time for the proceeds of such sales; said goods to be returned if not sold by the said Ricciardelli & Bro. Said goods were shipped January 11, 1899, and received by said Ricciardelli & Bro., at New Haven, January 20, 1899. (3) The defendant resides in New York, and is in the business of supplying laborers to contractors, and heard, through a barber, whose name was unknown to him, that the store and business of Ricciardelli was for sale. This was prior to January 20, 1899. He came to New Haven on said January 20, 1899, went to the store, examined it, made inquiries in regard to the character of the Ricciardelli brothers, and about the store, and thereupon, returning, agreed with said Ricciardelli & Bro. to buy the business and stock at said store for \$965. (4) The defendant and Ricciardelli & Bro. went to the office of one Joseph R. Manning, who is engaged in the real-estate and insurance business in New Haven, and had him draw up a bill of sale of the goods in said store and the goodwill of said business, which said bill of sale was executed in the presence of said Manning, a copy of which bill of sale is hereto annexed, and marked 'Exhibit A.' (5) Said Manning saw no money passed, and had no part either in payment of any money, or in the transfer of the possession of said goods. (6) The defendant testified that he paid said sum of \$965 to said Ricciardelli for said goods, and, there being no evidence to contradict, the court finds that he did pay said sum for said goods. (7) The goods consigned by the plaintiff to Ricciardelli & Bro. were in said store, and at the time of the sale were a part of the stock transferred in the sale, and there was nothing to indicate that they were held by said seller on any different terms than was the remainder of the stock. Neither was any notice given to the defendant that anyone had a claim on said goods. (8) The price paid 47 L. R. A.

for said stock and goodwill was not less than a reasonable price for the same. (9) The said Ricciardelli & Bro. put the defendant into possession of said store, and immediately left town, and have never returned, and have never accounted to the plaintiff for said goods, or any part thereof. (10) The plaintiff, through his agent, F. S. Savarese, upon the following day learned of the transfer, and immediately made demand upon the defendant for said goods. The defendant refused to give up and deliver the same to the plaintiff. (11) The plaintiff thereupon brought this action of replevin. Upon these facts the plaintiff claimed: (a) That the alleged sale from Ricciardelli & Bro. to Martucci was not bona fide, but fraudulent. (b) That the defendant was not in the lawful possession of said goods, as said alleged sale was fraudulent. (c) That the said Ricciardelli & Bro. had no title to said goods, and had no right or authority to sell the same as a whole to the defendant or any other person whatsoever. (d) That no title to said goods passed to the defendant, because said Ricciardelli & Bro. had no title or authority to sell said goods in any manner or form except at retail in their business as retail grocers. (e) That said goods were the lawful property of the plaintiff, and he was entitled to the immediate possession thereof; the said Ricciardelli & Bro. having abandoned the same. (f) That the defendant had no title in said goods, and the said Ricciardelli & Bro. had no title in said goods; that the title was and remained in the plaintiff. (g) That the said Ricciardelli & Bro. never sold said goods to the defendant, having sold him only what they had title to, as appeared by the covenant of warranty in said bill of sale. The court overruled said claims of the plaintiff, and rendered judgment for the return of the goods replevied in said action, and for the defendant to recover his costs."

Exhibit A:

Know all men by these presents, that I, Orlando and Fioravanta Ricciardelli, of the city and county of New Haven, state of Connecticut, for and in consideration of (\$965) nine hundred and sixty-five dollars, receipt of which is hereby acknowledged, do grant, bargain, and sell unto Guiseppe Martucci, formerly of the city and state of New York, now of the city and county of New Haven, state of Connecticut, all of the stock, fixtures, implements, tools, household furniture, and goodwill of the business located at 169 Wallace street, in said New Haven, consisting of stock of groceries, provisions, meats, candies, cigars, and tobacco, boxes, cases, bottles, jars, and all other apparatus for holding the same, that is now contained in the said store, 169 Wallace street, fixtures, seals, furniture, implements of business, and all other tools now contained in the store No. 169 Wallace street, including bed, stove, two tables, household dishes, while contained in the rear of store No. 169 Wallace street, the goodwill, stock, fixtures, furniture, and tools used in his business as a grocer. To have and to hold the said granted and bargained property as described above unto the said

Guisepppe Martucci, his heirs and assigns, forever, to his proper use and behoof forever; and the said Orlando and Fioravanta Ricciardelli does vouch himself to be the true and lawful owner of the property herein referred to, and has a good and lawful right and authority to sell the same in the manner as aforesaid. And he does, for himself, his heirs, assigns, and administrators, forever warrant and defend the said Guisepppe Martucci from whatsoever demand they or all others may make. In witness whereof, the said Orlando and Fioravanta Ricciardelli have hereunto set their hand and seals this 20th day of January, 1899.

Orlando Ricciardelli. [L. S.]

Fioravanta Ricciardelli. [L. S.]

The said Orlando and Fioravanta Ricciardelli acknowledge the same to be their free act and deed, before me, this 29th day of January, 1899.

Joseph R. Manning, Notary Public.

Mr. Richard H. Tyner, for appellant:

A consignment of goods for sale is ordinarily a bailment. The very term imports an agency, and that the title is in the consignee.

Harris v. Coe, 71 Conn. 163, 41 Atl. 552; *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; *Roller v. Great Western Ins. Co.* 3 Keyes, 17; *Powell v. Wallace*, 44 Kan. 566, 25 Pac. 42.

A contract or agreement under which the title to goods is not at any time to pass to the purchaser is not a contract of sale, either absolute or conditional, and therefore the act requiring a recording of certain agreements does not apply.

Pub. Acts 1895, chap. 212; *Harris v. Coe*, 71 Conn. 165, 41 Atl. 552; *Johnson v. Allen*, 70 Conn. 744, 40 Atl. 1056.

Fraud in most cases is impossible to be proved directly, but a consideration of the condition and circumstances of the parties and the character of the transaction generally raises an inference or implication of its existence, which, unexplained, as in this case, supports a finding of fraud.

Morford v. Peek, 46 Conn. 384.

As agents of the plaintiff, with or without any agreement with the plaintiff, the title to said goods remained in the plaintiff.

Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452; *Duguid v. Edwards*, 50 Barb. 297.

Persons dealing with agents are bound to take notice of the extent of the agents' authority, and any transfer not authorized creates no rights in the purchaser as against the principal.

12 Am. & Eng. Enc. Law, 2d ed. p. 697; *Guerreiro v. Peile*, 3 Barn. & Ald. 616; *Kauffman v. Beasley*, 54 Tex. 563; *Ladd v. Franklin*, 37 Conn. 62.

And it makes no difference that the purchaser did not know of the agency at the time he made the purchase.

Potter v. Dennison, 10 Ill. 590.

A bona fide purchaser acquires no title as against the principal, when the agent exceeds his authority.

47 L. R. A.

Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Rodiak v. Coburn*, 68 Me. 170.

No one can give what he has not himself, and therefore no one can give good title if he has no good title. The original owner may reclaim his property wherever it may be, and take it without any payment to the holders.

Parsons, Contr. 520; *Dunn v. Hartford & W. H. R. Co.* 43 Conn. 435; *Putnam v. Lamphier*, 36 Cal. 151.

If an agent sell goods to a person in a manner not within the scope of his authority, the principal may disaffirm the sale and recover the goods from the vendee.

Peters v. Ballistier, 3 Pick. 495; *Nash v. Drew*, 5 Cush. 422; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278; *Brown v. M'Gran*, 14 Pet. 479, 10 L. ed. 550.

Possession is not title.

Ketchum v. Brennan, 53 Mass. 596; *Dunn v. Hartford & W. H. R. Co.* 43 Conn. 435; *Ballard v. Burgett*, 47 Barb. 646.

Where there is a condition that the title shall remain in the vendor until payment, security, or the like, such condition is a condition precedent to the vesting of the title in the vendee, and his sale before the fulfilment of this condition confers no rights, even upon an innocent purchaser.

Hirschorn v. Canney, 98 Mass. 149; *Ballard v. Burgett*, 40 N. Y. 314; *Hotchkiss v. Hunt*, 49 Me. 213; *Putnam v. Lamphier*, 36 Cal. 151; *Couee v. Tregent*, 11 Mich. 65; *Griffin v. Pugh*, 44 Mo. 326; *Clark v. Wells*, 45 Vt. 4, 12 Am. Rep. 187; *Clayton v. Hester*, 80 N. C. 275; *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 433, 28 Atl. 540.

The vendor of property under a conditional bill of sale may reclaim the property, even from one who has purchased from the vendee in good faith and without notice.

C. B. Cottrell & Sons Co. v. Carter R. & Co. Corp. 173 Mass. 155, 53 N. E. 375; *Wentworth v. S. A. Woods Mach. Co.* 163 Mass. 28, 39 N. E. 414; *Hirschorn v. Canney*, 98 Mass. 149; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Ex parte Crawcour*, L. R. 9 Ch. Div. 419; *Crawcour v. Salter*, L. R. 18 Ch. Div. 30; *Forbes v. Marsh*, 15 Conn. 384; *Lewis v. McCabe*, 49 Conn. 149, 44 Am. Rep. 217.

A wholesaler may make a contract with a retailer, that he may dispose of goods as they may be called for at retail, but as between themselves title does not pass.

Rogers v. Whitehouse, 71 Me. 222; *Burbank v. Crooker*, 7 Gray, 159, 66 Am. Dec. 470; *Lewis v. McCabe*, 49 Conn. 149, 44 Am. Rep. 217.

An agent cannot bind his principal by the disposition of goods, except in the ordinary course of business.

12 Am. & Eng. Enc. Law, 2d ed. p. 632; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 15 N. E. 701; *Easton v. Clark*, 35 N. Y. 225; *Neill Bros. v. Billingsley*, 49 Tex. 161; *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Jones v. Warner*, 11 Conn. 48; *Terry v. Bamberger*, 44 Conn. 561; *Mackay v. Dillinger*, 73 Pa. 85.

Persons who do not purchase in the usual

course of trade, of a consignee or holder of property under a conditional sale, can acquire no title as against the original vendor.

Whitney v. Eaton, 15 Gray, 226; *Deshon v. Bigelow*, 8 Gray, 159; *Hench v. Eacock*, 21 Ind. App. 444, 52 N. E. 85; *Burbank v. Crooker*, 7 Gray, 159, 66 Am. Dec. 470; *Rogers v. Whitehouse*, 71 Me. 222; *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Robinson's Appeal*, 63 Conn. 296, 28 Atl. 40; *New Haven Wire Co. Cases*, 57 Conn. 386, 5 L. R. A. 300, 18 Atl. 266; *Maak v. Story*, 57 Conn. 411, 18 Atl. 707.

Mr. James E. O'Connor, for appellee:

Apparent authority operates by way of estoppel, and takes the place of real authority, when some innocent person has acted on the appearance.

Winton v. Hart, 39 Conn. 16; *Felts v. Walker*, 49 Conn. 93; *People v. Bank of North America*, 75 N. Y. 548; *Pickering v. Busk*, 15 East, 38; *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541.

Plaintiff, under the facts found by the court, is estopped from following his goods into the hands of the defendant.

Baldwin v. Porter, 12 Conn. 482; *Brown v. Wheeler*, 17 Conn. 352, 44 Am. Dec. 550; *Kinney v. Farnsworth*, 17 Conn. 361; *Ros v. Jerome*, 18 Conn. 138; *Pickering v. Busk*, 15 East, 38; *Saltus v. Everett*, 20 Wend. 268, 32 Am. Rep. 541; *Barnard v. Campbell*, 55 N. Y. 456; *Marine Bank v. Fiske*, 71 N. Y. 358; *Weaver v. Barden*, 49 N. Y. 286; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329, 7 Am. Rep. 341; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *North River Bank v. Aymer*, 3 Hill, 263; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Armour v. Michigan C. R. Co.* 65 N. Y. 111, 22 Am. Rep. 603; *Merchants' Bank v. Griswold*, 72 N. Y. 472, 28 Am. Rep. 159; *Germania Nat. Bank v. Taaks*, 101 N. Y. 449, 5 N. E. 76; *People v. Bank of North America*, 75 N. Y. 548.

A bona fide sale of goods, within the apparent scope of a factor's authority, is valid against the owner.

Pickering v. Busk, 15 East, 38; *Michigan State Bank v. Gardner*, 15 Gray, 362; *Illinois v. Delafield*, 8 Paige, 527; *H. A. Prentice Co. v. Page*, 164 Mass. 281, 41 N. E. 270; *Easton v. Clark*, 35 N. Y. 232; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 444, 15 N. E. 701; *Story, Agency*, 224, 225.

If the true owner holds out another, or allows him to appear, as the owner of, or having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected.

McNeil v. Tenth Nat. Bank, 46 N. Y. 329, 7 Am. Rep. 341; *Pickering v. Busk*, 15 East, 38; *Saltus v. Everett*, 20 Wend. 268, 32 Am. Rep. 541; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Mowrey v. Walsh*, 8 Cow. 238.

Hamersley, J., delivered the opinion of the court:

The finding is in some respects strongly suggestive of bad faith on the part of the defendant. But as the court, notwithstanding the suggestive appearances, finds that the defendant paid a reasonable price, after in-

quiry, and without notice of defect in title, he must be treated as an innocent purchaser for value. We have then these facts: Ricciardelli & Bro., retail grocers in New Haven, agreed to sell on commission for the plaintiffs, wholesale grocers in New York, a quantity of groceries valued at \$559. The goods were received on consignment at New Haven on January 20, and the same day the Ricciardellis, for the lump price of \$965, sold their grocery store, stock (including the plaintiffs' property), fixtures, household furniture, and goodwill of business, to the defendant, a purveyor of contract laborers in New York, and then disappeared without accounting to the plaintiffs. This action was brought the next day.

There is no doubt as to the relation between the plaintiffs and the Ricciardellis. It is that of principal and factor,—a relation long regarded as beneficial in the transaction of business, and one whose legal effect has been defined by numerous decisions. *Lawrence v. Stonington Bank*, 6 Conn. 521, 527. The property consigned is bailed, and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of the consignment. If the consignee, in violation of the consignment, and out of the usual course of business, transfer to another, the consignor is entitled to retake his property, notwithstanding it may have been so transferred to an innocent purchaser for value. This principle is too thoroughly established to permit of argument. The transfer by the Ricciardellis was in plain violation of the consignment. No serious claim to the contrary is made or can be maintained. The only real question is whether the plaintiffs have done anything which estops them from setting up their rights as consignors. If by their voluntary action they clothed the Ricciardellis with an appearance of ownership beyond that involved in the ordinary contract of consignment, and the defendant was thereby deceived to his damage, they are estopped from denying the authority thus evidenced by their acts. This principle is rooted in justice, and has been applied to a great variety of conditions. Such action by the owner of property may furnish evidence of fraud, and the question of estoppel is sometimes confused with that of fraudulent transfer. Possession may be evidence of fraud when it conceals the usual evidence of a change of title. This applies especially to the mortgage or pledge of personal property, where the mortgagor is presumed to remain owner of the property unless there is a change of possession. But it is different where property known to belong to one man comes into the possession of another. In such case it becomes a matter of inquiry whether he has borrowed it, or hired it, or purchased it, and this ought to be ascertained by him who proposes to trust his property upon the faith of this appearance. *Forbes v. Marsh*, 15 Conn. 384, 397. Accordingly cases of conditional sale made bona fide have been held good; and, in the modern and somewhat perilous enlargement of such sales, the fact of actual

intent and good faith is made the test of the transaction. *Lewis v. McCabe*, 49 Conn. 141, 155, 44 Am. Rep. 217; *Mack v. Story*, 57 Conn. 407, 413, 18 Atl. 707. But here there is no question as to the nature of the transaction. It is the ordinary contract of consignment. There is no question of fraud on the part of the owner. The good faith of the plaintiff's conduct is neither directly nor indirectly impugned. The sole claim is that he has "voluntarily permitted another to hold himself out to the world as being the true owner, and for this purpose intrusted him with the exclusive possession or other indicia of title under circumstances which would naturally tend to mislead." The cases where the real owner has been estopped by having clothed the possessor with indicia of title for such purposes and under such circumstances are many. "But all these cases proceed upon the ground that the owner has deliberately assumed a false position, and a character inconsistent with that of owner which, if changed, would result in fraud and damage." They have no application to a case where the acts of the owner are confined to those incident to a legitimate bailment or consignment. "Every borrower or bailee for hire uses the thing bailed, in many respects, as his own, and his conduct, to some extent, furnishes a false index of property; but yet, the legal powers and duties of bailees being entirely consistent with the true position and character of the owner, the rights of the bailor will be protected against the abuse of the bailee's powers, though he were to sell the property bailed to a bona fide purchaser." *Baldwin v. Porter*, 12 Conn. 473, 482, 483. A consignee differs from an ordinary bailee mainly in that he is authorized to sell in the ordinary course of business; but if he sell out of the ordinary course of business, he abuses his powers, and against this abuse the consignor is protected, like any other bailor. When a mortgagee leaves the property mortgaged in the possession of the mortgagor, possession under such circumstances may be treated as an index of title. It is inconsistent with the real transaction, which demands a change of possession, and the mortgagee deliberately puts himself in a false position. But in the case of a consignment the reverse is true. Possession by the consignee is consistent with the transaction, and is evidence of the authority pertaining to that transaction, but furnishes no other index of title as against the consignor. Some act of the consignor inconsistent with the true relation is necessary for that purpose,—as if the bill for goods consigned were made out as one for goods sold, or a bill of lading were given which treats the consignee as owner or purchaser. In such way the consignor may put himself in a false position, so that, if the rights of an innocent purchaser intervene, he cannot change that position without fraud and damage. There may be other acts by which a consignor may be estopped from asserting his title, but they must be equivalent in force to the ones indicated.

In the present case it does not appear whether the goods consigned, and received on 47 L. R. A.

the day of the sale, had been unpacked when the defendant first examined the stock. It is immaterial, except as bearing on the good faith of the defendant. But, if he had then asked for some evidence of ownership, he could only have been shown a bill for goods consigned, and the real character of the Ricciardellis' possession would have been apparent. The defendant chose to rely on the authority of the possessors to sell in their retail business indicated only by the possession described. He would have been protected in a purchase within the scope of such authority, which was real as well as apparent. But the selling out of the whole business was not within the scope of that authority. It does not necessarily follow that a retail dealer, authorized in the ordinary course of business to sell the articles on his shelves, is therefore the owner of the whole business and every article in his possession. If he attempts to sell his business and stock as a single chattel, he enters upon an outside and independent transaction. The purchaser cannot retain, as against the real owner, portions of that stock held under consignment, unless the owner has clothed the consignee with some index of ownership beyond that incident to the fact of a consignment. Where a principal, with full knowledge, permits his factor "to transact the ordinary business of a merchant in his own name, he would even then be bound by his acts only so far as they were within the ordinary mode of transacting the particular branch of business, provided that there were no circumstances tending to show that he permitted him to use his own name with a view of imposing upon others." *Potter v. Dennison*, 10 Ill. 590, 599. The plaintiff has done nothing to mislead, unless every consignment is misleading. He gave the Ricciardellis possession, but it was the possession of consignees only. He knew that the goods were to be sold by the consignees in their retail store in connection with their other stock, and that the goods were to be sold at retail in the name of the consignees; but these are the ordinary incidents of a consignment to a retail merchant. *Ex parte Dixon*, L. R. 4 Ch. Div. 133, 136, 137; *Slack v. Tucker*, 23 Wall. 321, 330, 23 L. ed. 143, 146; *Potter v. Dennison*, 10 Ill. 598. The conduct of the plaintiff amounts to a consignment of his goods for sale in the ordinary course of business, and nothing more. The title cannot be defeated by any disposition of the property not within the agency established by such consignment. A consignee cannot transfer the property in payment of his own debt. *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298. He must sell in the market where he transacts business. *Wootters v. Kaufman*, 73 Tex. 395, 399, 11 S. W. 390; *Catlin v. Bell*, 4 Campb. 183; *Marr v. Barrett*, 41 Me. 403. He cannot sell by way of barter. *Guerrero v. Peile*, 3 Barn. & Ald. 616, 618. He cannot pledge the goods consigned. *Paterson v. Tash*, 2 Strange, 1178; *Kuckein v. Wilson*, 4 Barn. & Ald. 443, 447; *Kelly v. Smith*, 1 Blatchf. 290, 293, Fed. Cas. No. 7,676; *Gray v. Agnew*, 95 Ill. 315. To turn over the goods consigned to another by

a sale of his business and stock in trade is as distinctly a disposition foreign to the consignment, and for the benefit of the consignee, as a pledge, or sale in payment of consignee's debt, or a barter. "By the general rule, a factor cannot bind the principal by a disposition of his property out of the ordinary course of business." *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 444, 15 N. E. 701; *Warner v. Martin*, 11 How. 209, 224, 13 L. ed. 667, 673. We are asked to treat the ordinary incidents of a bona fide consignment as sufficient indicia of title to enable the consignee to bind his principal by every act of ownership as against an innocent third party. This would involve the reversal of the whole line of cases by which the contract of consignment has been recognized and defined.

The court erred in overruling the claim of the plaintiff that upon the special facts found the goods in question were still the property of the plaintiff, and that he was entitled to the immediate possession thereof. There is error.

The judgment of the Court of Common Pleas is reversed, and the cause remanded for further proceedings according to law.

Torrance and Baldwin, JJ., concurred.

Hall, J., dissenting:

Some features of the parol agreement made by the plaintiffs' agent with Ricciardelli & Bro. at New Haven suggest that a conditional sale, rather than a consignment, was really intended by the parties. We are required, however, by the finding of facts, to treat the contract as a consignment, and not as a sale. The cases cited by counsel upon the law of conditional sales are applicable only so far as they determine the respective rights of the owner of the goods and a bona fide purchaser from a conditional vendee, who was either the apparent owner, or had an apparent right to sell as owner. The cases in this state which most strongly favor the claims of the vendors in contracts of conditional sale are *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217, and *Mack v. Story*, 57 Conn. 407, 411, 18 Atl. 707. In neither of these cases was the defendant a purchaser, or one who had suffered loss from an apparent title in the conditional vendee. While in both cases, by the agreement between the vendor and vendee, the latter might, for his bar trade, use from the barrels of liquor which were sold to him, and afterwards attached by his creditors, it was not intended that the barrels of liquor themselves should be placed on sale. These decisions were governed by the law applicable to contracts of conditional sale, and only held that, as between the parties to those cases, the condition in the contract of sale that the title should remain in the vendor until the goods were paid for was not rendered void by a provision giving to the vendee a right, as agent of the vendor, to transfer the latter's title. In the opinion in the first case it is said that, if the contract of sale should be construed as authorizing the conditional vendee to sell as

owner, such a provision would be inconsistent with the retention of title in the vendor. No case in this state has gone to the extent of holding, as was held in *Burbank v. Crooker*, 7 Gray, 158, 159, 66 Am. Dec. 470, that the title of the vendor was superior to that of a bona fide purchaser from a conditional vendee, clothed with an apparent authority to sell the goods as owner. But in the case before us, the trial court having found that the goods were consigned to Ricciardelli & Bro. to be sold by them as the plaintiffs' agents, the transaction between the original parties was a bailment, and the case must be determined by applying to the facts the principles of the law of agency.

It must be conceded that it was not within the commission of Ricciardelli & Bro. to sell the entire quantity of goods to the defendant in the manner they did; and that, as they were not the owners of the goods, they had no title of their own to convey. Did they transfer to the defendant the title of the plaintiff? Or, in other words, is the plaintiff, under the circumstances, estopped as against the defendant, from denying the authority of his agents to sell the whole stock of goods to him? These are the facts relevant to those questions: The plaintiff, who was a wholesale dealer in groceries in New York under the name of F. Romeo & Co., shipped to Ricciardelli & Bro., who, under that name, were engaged in the retail grocery business at New Haven, a lot of groceries of different varieties of the value of \$559.57, upon consignment, to be sold by them at retail in their business as retail grocers in their store at New Haven, as agents of the plaintiff. After the goods had been received by Ricciardelli & Bro., and had been placed in their store as a part of their stock, with nothing to distinguish them from the goods owned by them, or to indicate that they held them on any different terms, the defendant, who had before learned that the store and business were for sale, after having visited the store, and examined it, and inquired about the character of Ricciardelli & Bro. and the store, in good faith purchased the business and entire stock for \$965, which was not less than a reasonable price, and took possession of the same. Ricciardelli & Bro. absconded without having accounted to the plaintiff. We cannot review the conclusion of the trial court that the defendant acted in good faith. He must be considered as an innocent third party, who, without knowledge or notice of the agency, dealt with Ricciardelli & Bro. as principals, and upon the belief that they were the owners of the goods. If that belief was a reasonable one under the circumstances, and was induced by the voluntary acts of the plaintiff, he, rather than the defendant, should suffer the consequences resulting from the fraudulent act of his agents and of his own misplaced confidence.

The authorities upon this subject are numerous. In the often-cited case of *Pickering v. Busk*, 15 East, 38, the action was trover, and it appeared that one who was both a broker and also engaged in the hemp trade

purchased for the plaintiff, a merchant, a quantity of hemp which, at the plaintiff's request, was delivered to the broker, and upon the wharfinger's books was transferred from the name of the seller to that of the broker. The latter, without actual authority to sell, sold the hemp to the defendant's assignors for value. Lord Ellenborough, Ch. J., said: "I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority."

... It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter.

... The sale was made by a person who had all the indicia of property." This court said in *Baldwin v. Porter*, 12 Conn. 473, 482: "It is a general principle that no man can sell property or transfer title to that which he does not own; nor can one man's property, without his consent, be rendered subject to the demands of another. To this rule there are exceptions, but they are such as become necessary to protect innocent persons against fraud. ... Therefore it has been holden that, if the owner of goods voluntarily permit another to hold himself out to the world as being the true owner, and for this purpose intrust him with the exclusive possession or other indicia of title, under circumstances which would naturally tend to mislead, he shall be concluded by the sale of it to an innocent and mistaken purchaser." *Nixon v. Brown*, 57 N. H. 34, was an action of trover. An agent, with the plaintiff's money, purchased a horse for him, taking, without authority, a bill of sale in his own name. With knowledge of the facts, the plaintiff permitted him to go away with the horse and bill of sale. The agent, having sold the horse to the defendant, who purchased for cash, and without notice of the agency, absconded. In sustaining the title of the defendant, Smith, J., said: "When the purchaser knows he is dealing with an agent, it is his duty to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly. But when the agency is not known, and the principal has clothed the agent with powers calculated to induce innocent third persons to believe that the agent owned the property, or had power to sell, the principal is bound, and strangers will not suffer." The case of *Heath v. Stoddard*, 91 Me. 499, 40 Atl. 547, decided in 1898, was an action of replevin by the owner of a piano, who had intrusted it with one Spencer, who was a dealer in pianos, to take it, and leave it at the defendant's house, but without authority to sell it; the plaintiff himself to go there in a day or two, and sell it, if he could. The plaintiff had a verdict. We quote from the opinion of the supreme court sustaining defendant's exception to the charge of the trial judge: "A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his

agent to assume, or which he holds the agent out to the public as possessing. ... Whether or not a principal is bound by the acts of his agent when dealing with a third person who does not know the extent of his authority depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, What did such third person, dealing with the agent, believe, and have a right to believe, as to the agent's authority, from the acts of the principal? Among the many other cases in which the same principle is applied are *Saltus v. Everett*, 20 Wend. 267, 268, 32 Am. Rep. 541; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Barnard v. Campbell*, 58 N. Y. 73; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *Locke v. Lewis*, 124 Mass. 1, 26 Am. Rep. 631; *Hubbard v. Tenbrook*, 124 Pa. 291, 2 L. R. A. 823, 16 Atl. 817; *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504.

The apparent authority of the agent which thus binds the principal beyond that actually conferred must always be deduced from authorized acts of the agent, and from surrounding facts with a knowledge of which the principal is chargeable, and not from the acts of the agent himself in excess of his authority, and of which the principal had no notice. The public may safely judge the agent's authority from the garb with which his principal has invested him, but not from that with which he has clothed himself. To intrust an agent or bailee with the mere possession of property does not give him an apparent authority to sell, nor will possession with power to sell always justify an inference of ownership in the agent. Whether an innocent third person may justly attribute to an agent powers which he does not possess, whether he may properly deal with him as a principal, or may treat one who is intrusted with both the possession and the power to sell as the owner of the goods, must depend to a great extent upon the facts peculiar to each case. Established customs and usages of trade, the character of the agent's business, and the manner in which it is conducted, and other circumstances which ought to warn a prudent person against treating as owner one who has the possession of personal property, and who offers it for sale, often control the decision of particular cases. In *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, the owner of a valuable diamond ring placed it in the hands of a street peddler of articles of jewelry, and who had no established place of business, with authority to obtain a match for it, or, failing in that, to procure an offer for it, but without authority to sell. The defendants, who claimed to have purchased the ring of the peddler for cash and other goods, were pawnbrokers and dealers in jewelry, who had been in the habit of selling goods to the peddler on credit. Upon these facts a verdict for the plaintiff for the value of the ring in an action of trover was affirmed upon appeal. In *Meldrum v. Snow*, 9 Pick. 441, 445, 20 Am. Dec. 469, in sustaining the title of the brewers of certain casks of beer against the attaching creditors of a retail dealer in whose hands the brewers had

placed it to be sold in his retail trade, the court said that the custom of poor persons of taking beer to sell appeared to be so general that the retailers would not be supposed to be the owners of the beer, and that, therefore, no injury could arise to their creditors. As a further reason for its decision, the court said: "It being beneficial to the community to introduce the use of beer, public policy would justify us in favoring the custom." In the present case a small retail grocery business was carried on by two brothers, at an established place of business, under their own name of Ricciardelli & Bro. There was nothing to indicate that they did a commission business, or that they had goods in their store which did not belong to them, or that they acted as the agents of anyone. On the contrary, by carrying on the business in their own names in the manner in which such a business is ordinarily conducted, they held themselves out to the world, not only by selling the goods in their store as their own, but by the various ways in which the proprietorship of such a business is advertised, as the owners of the business and of the stock in trade in their store. With full knowledge of these facts, the plaintiff shipped to them a quantity of groceries, to be placed by them in their store as a part of the stock of their said business, and to be sold by them in their said business at retail, in the same manner that they sold their own goods in their retail business. The authority thus conferred included, and doubtless contemplated, the right of Ricciardelli & Bro., not alone in selling the goods at retail, but, in the general conduct of their retail business, to hold themselves out as both having the right to sell

and as having the full title to these goods as a part of their entire stock. The right of ownership and the right to sell are, of course, to be distinguished, but in the conduct of their retail business Ricciardelli & Bro. properly represented themselves as possessing both. If they were authorized in the conduct of their retail business to hold themselves out to the public as being the owners of their stock in trade, they were clothed with the power to lead people to believe that they had such a title as would enable them to sell the entire stock at one time. The defendant evidently purchased the goods, not in reliance upon an apparent right of Ricciardelli & Bro. to sell at retail, but upon the indicia of ownership with which they were clothed by the plaintiff. The defendant visited the store, and examined it, and inquired about the business and the proprietors of it. He learned nothing to indicate that it was a commission or agency business, but everything to indicate that it was a retail grocery business, carried on in the ordinary manner; and that Ricciardelli & Bro. were the proprietors and owners of the business and stock. I am of the opinion that the facts found show that the plaintiff voluntarily clothed his agents with the indicia of a full title to the goods in question, that the defendant had reasonable ground to believe that Ricciardelli & Bro. were the owners of the goods, that the plaintiff was estopped from denying the authority of his agents to sell to the defendant, and therefore that there was no error in the judgment of the court of common pleas.

Andrews, Ch. J., concurred.

FLORIDA SUPREME COURT.

R. A. WALLING *et al.*, *Appts.*,
v.
CHRISTIAN & CRAFT GROCERY COM-
PANY *et al.*

(.....Fla.....)

- *1. The law in the state in which real estate is situated furnishes the rule as to its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such conveyances, as well as their rights under the same.
2. A married woman was made a free dealer by decree of a chancery court in the state of Alabama, under § 2731 of the Code of 1876, which did not authorize her to be made a free dealer with general powers to contract as a *feme sole*, but only in reference to her statutory and other separate estate, to the extent mentioned in the statute, and no further. She subsequently moved to this state, acquired separate statutory real estate,

*Headnotes by MABRY, J.

and engaged in the mercantile business of buying and selling goods. *Held*, that she did not acquire the status of a free dealer under the laws of this state by virtue of the decree made in the state of Alabama, and that a bill in equity was proper to subject her separate statutory property to the payment of debts contracted by her for goods used in her mercantile business.

3. Under the laws of Florida the husband and wife must join in all sales, transfers, and conveyances of the property of the wife. In reference to personal property the rule is liberal, but some joinder of the husband and wife in the disposition must be shown; and in reference to real estate it must be done by deed acknowledged by the wife, before some officer authorized to take acknowledgments, separately and apart from her husband, that she executed the deed freely, voluntarily, and without compulsion, constraint, apprehension, or fear of or from her husband.
4. A creditor, knowing that his debtor is insolvent and engaged in disposing of his property in order that it may not be reached by pressing creditors, cannot purchase more

NOTE.—As to the enforceability of contracts of married women outside of the state in which they are legally made, see *note* to *Ruhe v. Buck* 47 L. R. A.

(Mo.) 25 L. R. A. 178; also *Polson v. Stewart* (Mass.) 36 L. R. A. 771; and *Freeman's Appeal* (Conn.) 37 L. R. A. 452.

than is necessary to protect himself, of such debtor, and pay him the difference in cash.

(July 19, 1899.)

A PPEAL by defendants from orders of the Circuit Court for Jackson County in favor of petitioner in a proceeding brought to reach property of defendant R. A. Walling, which was alleged to have been transferred in fraud of creditors. *Affirmed.*

Statement by **Mabry, J.:**

A bill in chancery was filed by appellees against appellants, and the following, in substance, was alleged: That R. A. Walling was during the year 1892, and still is, a married woman, the wife of W. A. Walling; that during said year, and until the 10th day of January, 1893, she was engaged in a mercantile business in Cottondale, Jackson county, Florida, and which business was under the care and management of her husband; that said R. A. Walling was seized and possessed, as her own separate statutory estate, of a stock of merchandise employed in her said business, a lot of corn, mustang ponies, yoke of oxen, and a wagon, and also certain real estate, particularly described, situated in said county; that during the year 1892 the said R. A. Walling bought goods, wares, and merchandise from appellees, to be added to her said mercantile business; and that she has never paid for the same, though past due. The bill specifies particularly the indebtedness due to each appellee, being exhibited by open accounts, except in one case, which was a note executed by the said R. A. Walling. It is further alleged that the said R. A. Walling, combining and confederating with her said husband and H. H. Ratliff to defraud appellees and other creditors of the said wife, did, in pursuance of said purpose, pretend on the 10th day of January, 1893, to execute to the said Ratliff a bill of sale for her stock of merchandise, and a bill of sale to her said husband for the mustang ponies, yoke of oxen, and wagon, and also a pretended deed of conveyance to her said husband of all of her said described real estate; that said property pretended to be conveyed was all that the said R. A. Walling owned, and the said bills of sale and deed were executed in pursuance of a plan devised and conceived by said parties to defraud the creditors of the said R. A. Walling out of their just demands; further, that in said bills of sale and deed of conveyance the said R. A. Walling asserts herself to be a free dealer, but it is alleged that said assertion is false, and that she has never complied with the statutes of this state on the subject, and has never obtained a license from any court of chancery in this state to take charge of and manage her own estate and become a free dealer. In addition to the fraudulent intent in making said bills of sale and deed, it is alleged that the same are null and void because the husband, W. A. Walling, did not join in the execution thereof; that no consideration passed to the grantor therein, and that no change of pos-

session of the property had taken place after the pretended sale; and that the said Ratliff was a poor man, without any means to make the purchase. It is also alleged that defendants will make other fraudulent, collusive, and covinous sales of said property, unless prevented from doing so by injunction of the court. Specific interrogatories covering the allegations of the bill were submitted for appellants specifically to answer. The bill prays that the said bills of sale and deed be declared void as against appellees, and the said property be charged with the payment of their just demands, to be ascertained by the court; that an injunction issue to restrain appellants from disposing of the property; and that a receiver be appointed to take charge of the personal effects.

Appellants, as defendants below, filed a plea setting up that R. A. and W. A. Walling were married in the state of Alabama, and were resident citizens of that state during the entire year 1885, and that in December of that year, upon petition of the said R. A. Walling praying that she be declared a *feme sole*, the Honorable John A. Foster, chancellor of the eleventh district, southern chancery division of said state, entered a decree as follows: "That R. A. Walling, wife of William A. Walling, be, and she is, relieved of the disabilities of coverture as to her statutory or other separate estate, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued, as a *feme sole*." It is also alleged that the court aforesaid had jurisdiction of the persons and of the subject-matter so ordered, and that said order is still in force and unreversed; that in April, 1886, immediately upon the removal of the said R. A. and W. A. Walling to Jackson county, Florida, they had a copy of said decree recorded in Chancery Record Book B, page 11, of the circuit court of said county, and this record was made before the said R. A. Walling contracted any debts or acquired any real estate in Florida. Appellees filed before the chancellor affidavits tending to support the allegations of their bill; and appellants offered a copy of the Alabama decree, certified as a correct copy of the decree by the register in chancery in and for the eleventh district of southern chancery division. The chancellor rejected this copy, and thereupon appellants offered a copy of the same decree which had been recorded in Jackson county, Florida, and certified to by the clerk of the circuit court of said county as being a correct copy from the records in his office: This was also refused by the chancellor, and upon the bill, affidavits, and plea an injunction was granted restraining appellants from alienating said property. Answer was subsequently filed by appellants, admitting, in response to interrogatories, that R. A. Walling was a married woman engaged in the business of buying and selling merchandise, and was seized and possessed of the property, real and personal, as her own statutory separate estate, at the place and during

the time alleged in the bill. It is alleged that R. A. Walling had no visible property, except such as pertains to wardrobe and claims belonging to her mercantile business, amounting to about \$1,500, the value of which could not be stated, but it was believed that a portion could be collected by reasonable indulgence. It was admitted that R. A. Walling had executed bills of sale and deed as alleged, and that they embraced all of her visible property, except as stated; that her object in executing the same was to close her business, collect what was due her, as far as possible, pay her debts, as far as she could, and retire from the business, as she discovered that it was not prosperous, and some creditors were pressing her, though the amount of the claims due her were much larger than the amount she owed, exclusive of a note she owed her husband, upon which was due, including interest, \$1,392, said note being executed by her and her son R. E. Walling to her said husband; that the consideration of the property sold to W. A. Walling was a credit of \$1,215 on said note; that the stock of goods was sold to Ratliff & Co. for \$420, \$260 of which was borrowed money which he had loaned to R. A. Walling on several previous occasions, and \$160 was paid cash by him on the day of the transaction; that the property was sold for full value, and even more than it would bring at forced sale. It is denied that the sales were made for any purpose to defraud the creditors of the said R. A. Walling, and it is alleged that the sales were made to her creditors, who were induced to buy and pay full value for said property in order to save their claims, as suits were threatened against R. A. Walling at the time, although she had done everything in her power to obtain reasonable indulgence from her creditors, with a view to paying up her debts as far as possible; that she had not been in possession of any portion of the said property since said sale, but the said purchasers had the possession, custody, and control of the parts purchased by them, respectively, except so far as may be modified by the injunction granted.

R. A. and W. A. Walling, answering for themselves, aver that the former went into partnership as a free dealer with her son R. E. Walling, principally with funds which she received from her father as her own separate statutory estate; that in March, 1890, W. A. Walling loaned them \$1,200, and took their joint note, payable 1st of January following, with 8 per cent interest, and the value of the property sold to him was credited on said note; that R. A. Walling had no license to take charge of and manage her own estate from any court of chancery of the state of Florida, but she had been made a free dealer by decree of a chancery court of the state of Alabama, as alleged in the plea filed. Ratliff, for himself, alleges that he was not a man of very considerable means when he came to Cottondale, Florida, but had several hundred dollars, which he continued to increase from time to time after his arrival, by labor and frugality; that he

had within \$60 of the amount he was to pay for the goods, including the sums he had recently before loaned Mrs. Walling, and on the day of sale borrowed the \$60 to make up the full amount, and paid it in cash to her; that he did not profess to be an expert in the mercantile business, but had had several years' experience in such pursuit as clerk or salesman, and felt perfect confidence in his ability to manage such business. He avers that, so far as he is concerned, the transaction was fair and bona fide, for a full, valuable consideration; his principal object being to secure the money he had loaned Mrs. Walling, and not to defraud or injure anyone.

The plea of defendants was set down for hearing and overruled. Replication was then filed to answer of defendants. Defendants moved the court to dissolve the temporary injunction granted, and on the hearing offered in evidence a certified copy of the entire proceedings in the Alabama court in reference to relieving R. A. Walling, under the statutes of Alabama, of the disabilities of coverture as to her statutory or other separate estate, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued, as a *feme sole*. The court declined to consider the offered evidence, refused the motion to dissolve the injunction, and appointed receivers to take charge of the personal property.

Defendants appealed, and assign as error the granting of the temporary injunction, and refusal to consider the certified copies of the decree from the chancery court of Alabama, the overruling of the plea of defendants, and refusal of the court to dissolve the temporary injunction, and in appointing the receivers.

Messrs. D. L. McKinnon and Francis B. Carter, for appellants:

The decree and certified transcript of the Alabama court should have been admitted in support of the plea and answer.

U. S. Const. art. 4, § 1; Florida Rev. Stat. § 1109; 12 Am. & Eng. Enc. Law, pp. 148k, 148o.

A creditors' bill will not lie until after judgment obtained on the claims sought to be enforced. No judgments are alleged in this case.

Wait, Fraud. Conv. § 73, p. 111; *Robinson v. Springfield Co.* 21 Fla. 203.

The law does not require foreign decrees and records to be recorded in this state to give them the same force they have in the state where rendered; and where the law does not require an instrument to be recorded its record is unnecessary.

Crowell v. Skipper, 6 Fla. 588.

When appellant came to the state of Florida, she came with her legal status as fixed by a decree of the Alabama court.

Her status as fixed by that decree was a personal status inseparably attached to her person, which she could neither relinquish nor be deprived of, any more than she could

relinquish or be deprived of the status given her incidentally by a divorce decree.

3 Am. & Eng. Enc. Law, p. 522; *Polydore v. Prince*, 1 Ware, 413, Fed. Cas. No. 11,257; *Thompson v. Ketohum*, 8 Johns. 189, 5 Am. Dec. 332; *Freeman*, Judgm. §§ 559-575, 584, 585, 606, 608-610; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 4 L. R. A. 488, 17 Atl. 964; *Re Ingram*, 78 Cal. 586, 21 Pac. 435.

No facts as alleged in the bill show that there was any irreparable injury, and no apparent necessity for continuing the temporary injunction; therefore the ordinary rule to dissolve should have been observed.

Hayden v. Thrasher, 20 Fla. 715; *Linton v. Denham*, 6 Fla. 533.

Where there is a valuable consideration for the sale there must be an express intent to defraud, hinder, or delay creditors, on the part of the vendee, to authorize or justify the court in setting it aside.

2 Pom. Eq. Jur. §§ 971, 972; *Wait*, Fraud. Conv. § 192; *McKeown v. Coogler*, 18 Fla. 866.

The question of fraud is one of motive and intent.

Ballard v. Eckman, 20 Fla. 661.

The husband's consent in this case is proved by his being one of the purchasers, as was decided in—

Tunno v. Robert, 16 Fla. 746.

Mr. Benjamin S. Liddon, for appellees:

Civil capacities or incapacities by which a person is affected in his former domicile are regarded in other states as to acts done or rights acquired in the former domicile, but not as to contracts made or rights or property acquired in the new domicile.

Polydore v. Prince, 1 Ware, 402, Fed. Cas. No. 11,257; *Hyman v. Schlenker*, 44 La. Ann. 108, 10 So. 623.

The judgments meant by the act of Congress requiring full faith and credit are those establishing rights and liabilities under general principles of law, and not those establishing liabilities or status of parties upon a statute purely local and without any extraterritorial force or effect.

Marriage and the status of married women, their rights and liabilities, are, as a rule, fixed by the statutes of the different states. Such statutes are operative only in the states where made, and have no extraterritorial effect.

McLean v. Hardin, 56 N. C. (3 Jones, Eq.) 294, 69 Am. Dec. 740, note 743.

Statutes enabling married women to make contracts, to sue and to be sued, etc., are in pursuance of the police power of the state, and cannot be enforced beyond the jurisdiction of the state which enacts them.

2 Black, Judgm. § 871.

If there is any value in the Alabama decree at all, it is simply as a basis upon which a similar decree might be entered in this state. It is not executory in this state, without additional action in the courts here.

2 Black, Judgm. § 862; *Carter v. Bennett*, 6 Fla. 214; *McLure v. Benceni*, 37 N. C. (2 Ired. Eq.) 513, 40 Am. Dec. 437; 12 Am. & Eng. Enc. Law, p. 148, and note; *Cole v. Cun-*
47 L. R. A.

ningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

All of our own legislation upon the subject shows that it is not our policy to recognize the judgments of other states as being upon an equal footing with domestic judgments.

Gordon v. Simonton, 10 Fla. 179; *Sloan v. Sloan*, 21 Fla. 589; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

The court should not enforce the Alabama statute. It has no binding force here. It can be recognized only through interstate comity,—a kind of courtesy,—and cannot be enforced if in conflict with the law or public policy of this state.

Wahworth v. Harris, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; 3 Am. & Eng. Enc. Law, pp. 508-510; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Mahorner v. Hooe*, 9 Smedes & M. 247, 48 Am. Dec. 706.

Such a decree does not confer upon a married woman the general capacity to contract.

Cook v. Meyer Bros. 73 Ala. 580; *Holt v. Agnew*, 67 Ala. 360; *Ashford v. Watkins*, 70 Ala. 156; *Dreyfus v. Wolffe*, 65 Ala. 496.

The Alabama statute is a local statute, not intended to be enforced beyond the limits of the state of Alabama. It is not a general right of married women to become *femes sole* or free dealers whenever they desire; it is a special statutory privilege, and, like all such statutes, has no extraterritorial force.

McLean v. Hardin, 56 N. C. (3 Jones, Eq.) 294, 69 Am. Dec. 740; *Ash v. Baltimore & O. R. Co.* 72 Md. 144, 19 Atl. 643.

The policy of our law is that no married women, except those who have the requisite qualifications, shall become free dealers. The Alabama decree is upon a statute clearly in conflict with our statute and our policy, and cannot be invoked to avoid a liability incurred in this state by a married woman while domiciled here.

Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277; *Ex parte Dickinson*, 29 S. C. 453, 1 L. R. A. 685, 7 S. E. 593; *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156; *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 198; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212, note 231; *Besse v. Pellochoux*, 73 Ill. 285, 24 Am. Rep. 242; *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109; *Hicks v. Pope*, 8 La. 554, 28 Am. Dec. 142; *Pritchard v. Citizens' Bank*, 8 La. 130, 28 Am. Dec. 132, note 135.

A divorce may be binding in one state, and the courts of another state refuse to recognize it.

Williams v. Williams, 130 N. Y. 193, 14 L. R. A. 220, 29 N. E. 98; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299.

Mabry, J., delivered the opinion of the court:

The assignments of error question the correctness of the order granting a temporary injunction and overruling the plea. The theory of the defense interposed by the

plea which had been filed when the order was made is that Mrs. R. A. Walling had acquired, by the Alabama decree mentioned therein, the status of a free dealer, subject to be sued at law by complete and adequate remedies, and that this status accompanied her, as a personal qualification, to this jurisdiction. Some question was raised, it seems, as to the sufficiency of the certification or the transcript of the record in the Alabama court; but, waiving that, we consider as presented the question whether Mrs. Walling can claim in this jurisdiction the status of a *feme sole*, to the extent accorded to her under the Alabama statute by the decree of the chancery court in that state. It appears that the Alabama decree which Mrs. Walling invoked was made under § 2731 of the Alabama Code of 1876, and this did not authorize her to be made a free dealer, with general powers to contract as *feme sole*. This section has been declared by the Alabama court to be simply an enabling act,—narrowly enabling,—for the purpose of authorizing a married woman to become a *feme sole*, in reference to her statutory and other separate estate, to the extent mentioned in the statute, and no further. It seems that a strict construction has been placed on this statute, and it has been regarded as establishing an exception to the general law then in force in reference to the capacity of married women to deal with their separate property. *Dreyfus v. Wolfe*, 65 Ala. 496; *Ashford v. Watkins*, 70 Ala. 156; *Cohen v. Wollner*, 72 Ala. 233; *Cook v. Meyer Bros.* 73 Ala. 580; *Falk v. Hecht*, 75 Ala. 293; *Hatcher v. Diggs*, 76 Ala. 189; *Parker v. Roswald*, 78 Ala. 526. Conceding, as appears to be the ruling in the last case cited, that if Mrs. Walling had engaged in a mercantile business in Alabama after the rendition of the decree, and had bought goods, she could be sued at law for the value of the same, the question occurs whether this status obtained by her in Alabama can be insisted on in this state, after her permanent domicile here, and as to transactions had in this jurisdiction. In our opinion, a negative answer must be given to this question. To avoid any misconception as to the extent of our ruling, it is deemed proper to state that no question arises as to the validity or rights under any contract made by Mrs. Walling while she was a citizen of or in the state of Alabama, nor does it appear that she brought to this jurisdiction any property acquired by her under her Alabama status. It does appear that she acquired real property in this state after she moved here, and this property in part is the subject of the present litigation. So far as this character of property is concerned, it is the universal rule that the laws of the state where it is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same. *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12. If Mrs. Walling resided in Ala-

bama, and under the law of her domicile had the capacities of a *feme sole*, she would still have to comply with the laws of this state in reference to contracts and conveyances of real property situated here. Story says (Conf. Laws, § 101) that “the capacity, state, and condition of persons according to the law of their domicile will generally be regarded, as to acts done, rights acquired, and contracts made, in the place of their domicile, touching property situate therein. If these acts, rights, and contracts have validity there, they will be held equally valid everywhere.” If invalid there, they will be held invalid everywhere.” In recognition of this rule, marriages valid where celebrated or contracted are regarded as valid elsewhere, without reference to the domicile of the forum where the question of their validity may arise. Contracts by married women, valid under the laws where made, though void under the laws of another domicile, have been enforced in the courts of the latter. Thus, a married woman resident in Kentucky was made a free dealer under the laws of that state, and entered into a valid contract there. The courts of Tennessee enforced the contract against her, though by the laws of the latter state her contract would be invalid. *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 11 S. W. 38. See also *Milliken v. Pratt*, 125 Mass. 374; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Bell v. Packard*, 60 Me. 105, 31 Am. Rep. 251; *Bowles v. Field*, 78 Fed. Rep. 742. It was decided in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, that matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought. See also *Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 27 S. W. 412; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319. After a thorough examination of the authorities, Story concludes as follows (Conf. L. § 103): “Hence we may deduce, as a corollary, that in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*,—the law of the place where the contract is made or the act done. Therefore a person who is a minor until he is of the age of twenty-five years, by the law of his domicile, and incapable, as such, of making a valid contract there, may, nevertheless, in another country, where he would be of age at twenty-one years, generally make a valid contract at that age,—even a contract of marriage.” The reasoning of the court in the following cases sustains this view: *Polydore v. Prince*, 1 Ware, 402, Fed. Cas. No. 11,257; *Com. v. Green*, 17 Mass. 515; *Saul*

v. *His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *Thompson v. Ketchum*, 8 Johns. 190, 5 Am. Dec. 332; *Pearl v. Hansborough*, 9 Humph. 426. The Alabama statute (Code 1876, § 2731) was simply an enabling provision by which a married woman, in compliance with its provisions, could be made a *feme sole*, as to her separate statutory estate in that state, to the extent authorized by the statute. The chancellor, in ascertaining that she was entitled to the exceptional and enabling benefits of the statute, did not exercise any general powers belonging to a court of chancery, but was limited in his powers to the grant of the statute. The effect of his finding under the statute was simply to invest the married woman in that jurisdiction with the exceptional status, under the general laws of the state, of dealing with separate estate which she possessed as a *feme sole*, to the extent provided, and no further. We have no question before us as to the validity of any contract made or act done by the married woman under such status in Alabama, and our judgment is that Mrs. Walling cannot avail herself of the decree under the Alabama statute as to acquisition of property and transactions in this state after she became a citizen here. There are decisions on questions so analogous to the one we are considering as to make them apparently conflict with the conclusion we reach. We refer to the decisions holding that an illegitimate child, made legitimate by the subsequent marriage of its parents according to the laws of the country of the marriage and parental domicile, is thereafter legitimate elsewhere. *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669. On the legal adoption of a child with capacity to inherit in one jurisdiction, it can likewise inherit in another jurisdiction, where similar laws authorizing the adoption of children prevail. *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. But there is a distinction to be observed in dealing with the questions. It is pointed out in the case last cited. It is there said: "The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding, from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the state in which it is made."

We have considered the question as presented by counsel, but another view has suggested itself, which we mention without a determination of it. The organic law provides that a married woman's separate real and personal property may be charged in equity and sold, or the uses, rents, and profits thereof sequestered for certain designated purposes. Const. 1885, art. 11, § 2; 47 L. R. A.

Halle v. Einstein, 34 Fla. 589, 16 So. 554. Does the making of a married woman a free dealer, even in this jurisdiction, oust the court of chancery of the jurisdiction conferred by the Constitution?

The bill clearly authorized the chancellor to grant the temporary injunction, and as there was nothing at the time before the court to overcome it but the plea, which we decide presented no defense, there was no error in the orders granting the injunction and overruling the plea.

The remaining question presented relates to the ruling of the court denying the motion to dissolve the injunction. The answer of defendants had then been filed, and it is claimed that all the equities of the bill were met. From the conclusion already reached, it follows that all that part of the answer and defense relating to the status of a free dealer claimed for Mrs. Walling under the Alabama decree must be entirely disregarded. Mrs. Walling was a *feme covert* in this state, engaged in a mercantile business, at the time she bought goods from appellees, and when the bill was filed against her. It is charged that the husband did not join his wife, R. A. Walling, in the execution of the bills of sale and deed, and the answer admits that they were executed as alleged. Copies were attached to the bill, as parts thereof; and from these it appears that Mrs. Walling, designating herself as a free dealer, alone executed them. One bill of sale was executed to H. H. Ratliff & Co. for the entire stock of merchandise, and there is nothing connected with it showing the concurrence of the husband in the sale. In this state the husband and wife must join in all sales, transfers, and conveyances of the property of the wife. Rev. Stat. § 2072. In reference to personal property the statute should be liberally construed, in giving effect to the transfers of the wife. *Tunno v. Robert*, 16 Fla. 738; *Ballard v. Lippman Bros.* 32 Fla. 481, 14 So. 154.

The case is not here upon final hearing, and it is not necessary to determine the validity of the sale to Ratliff & Co., on account of the nonjoinder of the husband therein, though upon the pleadings it appears that the statute has not been complied with. It is stated in the answer that Ratliff bought the entire stock of goods from Mrs. Walling, and paid her in cash \$160 more than she owed him. She was at the time embarrassed with debts, and threatened with suits by her creditors. We have condensed the answer in the statement given, but, taken as an entirety, it is apparent that Ratliff knew when he purchased the stock of goods that Mrs. Walling was insolvent, and that she was then disposing of all her property in order that it might not be reached by pressing creditors. Under such circumstances, he should not have bought more than was necessary for his own protection. *Christian v. Greenwood*, 23 Ark. 258, 79 Am. Dec. 104; *Meyberg v. Jacobs*, 40 Mo. App. 128; *Montgomery v. Bayliss*, 96 Ala. 342, 11 So. 198; *Oppen-*

heimer v. Guokenheimer, 39 Fla. 617, 23 So. 9.

Under our statute, a married woman can sell her real property, provided her husband join in the sale and conveyance; but, in order to render such sale and conveyance effectual to pass title, she must acknowledge, before some officer authorized to take acknowledgments of deeds, separately and apart from her husband, that she executed the same freely and voluntarily, and without compulsion, constraint, apprehension, or fear of or from her husband, and the officer's certificate must set forth all such facts. Rev. Stat. §§ 1956, 1958. Mrs. Walling attempted to deed her property direct to her husband, claiming to act as a free dealer, when she was invested with no such capacity, and her deed was not acknowledged as

required by statute to make the deed effective. If it be conceded that she could deed property direct to her husband (which we do not decide), still her deed is ineffective, because not acknowledged as imperatively required by the statute. *Carn v. Haisley*, 22 Fla. 317.

Without considering the sufficiency of the answer in other respects to overcome the case made in the bill, we think the court did not err in refusing to dissolve the injunction.

Upon consideration of the questions presented, we are of the opinion that the orders made were correct, and affirm the action of the court.

Ordered accordingly.

Carter, J., being disqualified, took no part in the decision of this case.

MARYLAND COURT OF APPEALS.

Winfield S. CAHILL, Admr., etc., of Catherine Cahill, Deceased, Appt.,
v.

MARYLAND LIFE INSURANCE COMPANY of Baltimore.

(.....Md.)

1. The failure to attach the seal of the insurance company to a policy granting an annuity, or the omission of some other technical requirement, will not constitute a defense to a suit for annuity after the insurer has received the purchase money.
2. A contract for a life annuity not issuing out of or charged upon lands, but by which an insurance company, in consideration of a sum certain, agrees to pay the annuitant specified sums annually during life, is a mere chose in action for the payment of money, which need not be made in the form of a deed or under seal.
3. A charter authorizing an insurance company to "grant, purchase, or dispose of annuities" does not limit the company to the grant of annuities by deed or contract under seal.

(January 9, 1900.)

A PPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in favor of defendant in an action brought to recover back the consideration paid for an

annuity on the ground of the invalidity of the contract. *Affirmed*.

The facts are stated in the opinion.

Mr. Julian J. Alexander, for appellant:

An annuity by the law of Maryland is an incorporeal hereditament, and may be granted in fee or fee simple conditional, for life, or for years.

Co. Litt. 2a, 20a, 144b; 1 Wait, Act. & Def. title *Annuity*; *Turrentine v. Perkins*, 46 Ala. 631; 2 Bl. Com. Chitty's ed. 40, and notes; *Hays v. Richardson*, 1 Gill & J. 378; *Burton*, Real Prop. 21 Law Lib. 82; *Crabb*, Real Prop. 54 Law Lib. §§ 259-261; *Roscoe*, Real Prop. 27 Law Lib. 35, 68, 466; 2 Broom, Com. by Broom & Hadley, 55; 3 Kent, Com. 461; 1 Schouler, Pers. Prop. 542; *Townshend v. Duncan*, 2 Bland, Ch. 53; *William's Case*, 3 Bland, Ch. 251; *Robinson v. Townshend*, 3 Gill & J. 413; *Peyton v. Ayres*, 2 Md. Ch. 64.

An annuity must be granted by deed, and cannot be granted otherwise. The charter of appellee does not give power to grant annuities otherwise.

Veghte v. Raritan Water Power Co. 19 N. J. Eq. 142; *Baltimore & H. E. Co. v. Algire*, 63 Md. 320.

The word "grant" is everywhere used and necessary to charge the grantor.

Rolle, Abr. p. 226; *Co. Litt.* 144b; *Bacon*,

NOTE.—*What form of instrument required for the creation of an annuity.*

The principal case is apparently the first one in this country which raises and determines the question as to the necessity of a deed to the creation of an annuity.

Cox v. Maxwell, 151 Mass. 336, 24 N. E. 50, indeed, holds that the consent of the testator to a letter requesting an annuity from him for the lifetime of the writer in consideration of services rendered and to be rendered was binding upon his executors, but the question as to the necessity of a deed does not seem to have been raised in that case.

The statement made by the English law writ-
47 L. R. A.

ers, and supported by some of the adjudged cases, that a grant of an annuity must be by deed, should probably be restricted to annuities secured upon real property, as was the case in *Re Locke*, 2 Dowl. & R. 608, or to annuities which run to one and his heirs; in which case the annuity partakes of the nature of an incorporeal hereditament, so far, at least, as the manner of its creation and its descent upon the first annuitant's death are concerned.

When, as in the principal case, the annuity is a mere personal charge, and is limited to the life of the annuitant, there seems to be not even a technical reason why it may not be created by a contract not under seal. G. H. P

Abr. Grant, E; 2 *Chitty*, Bl. Com. 40, and notes; 3 *Kent*, Com. 460; 1 *Wait*, Act. & Def. title *Annuity*; 3 *Washb. Real Prop.* *605; 2 *Broom*, Com. by *Broom & Hadley*, 55; *Union Bank v. Ridgely*, 1 *Harr. & G.* 324; *Rayner v. Nugent*, 60 Md. 519; *Nield v. Smith*, 14 *Ves. Jr.* 491; *Re Locke*, 2 *Dowl. & R.* 603; 1 *Saunders*, Pl. & Kv. 84, *hoo tit.*; 1 *Chitty*, Pl. 16th ed. 124.

Mrs. Cahill was a married woman at the time and till her death, as the officers of the defendant knew, and certainly never acquiesced in accepting a void annuity, for acquiescence must have been with full knowledge of her rights.

Trader v. Lowe, 45 Md. 1; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 509; *Taliaferro v. First Nat. Bank*, 71 Md. 214; *Cockerell v. Cholmeley*, 1 *Russ. & M.* 425, Affirmed in 1 *Clark & F.* 60; *Lammot v. Bowly*, 6 *Harr. & J.* 521.

Her counsel had no right to ratify any insufficient document for her. He was employed to secure her a valid annuity, not to accept an imperfect instrument.

Louekamp v. Koechling, 64 Md. 95, 3 *Atl.* 35; *Duckett v. Jenkins*, 66 Md. 267, 7 *Atl.* 263; *Maulsby v. Byers*, 67 Md. 440, 10 *Atl.* 235; *Otero v. Bank of Baltimore*, 14 Md. 319; *Turton v. Turton*, 6 Md. 383; *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 417.

The appellee had no right to grant annuities otherwise than by deed, and therefore the paper marked "A" is void.

Mott v. Danville Seminary, 129 *Ill.* 403, 21 *N. E.* 927; *McSpedon v. New York*, 7 *Bos. v.* 601; *Baltimore F. Ins. Co. v. McGowan*, 16 Md. 53.

If this instrument was and is void as an annuity, the consideration has failed, and we may recover it back in this action.

Hall v. Swansea, 5 *Q. B.* 526; *Wilkinson v. Lloyd*, 7 *Q. B.* 27; *Young v. Cole*, 3 *Bing. N. C.* 724; *Scurfield v. Gouland*, 6 *East*, 241; *Waters v. Mansell*, 3 *Taunt.* 56.

The appellee is a corporation, and money paid to it as a consideration for an act *ultra vires* it undertakes to execute may be thus recovered back.

Maryland Hospital v. Foreman, 29 *Md.* 531; *Tracy v. Talmage*, 14 *N. Y.* 167, 8 *Am. Dec.* 132; *Curtis v. Leavitt*, 15 *N. Y.* 9.

Messrs. William A. Fisher and Clayton C. Hall, for appellee:

There was no money paid by, and no consideration moved from, the appellant's testatrix to the appellee.

She therefore could have no right of action based on failure of consideration, if there had been such failure.

Boyce v. Wilson, 32 *Md.* 129; *Small v. Schaefer*, 24 *Md.* 158; 1 *Chitty*, Pl. 365; *Thurston v. Mills*, 16 *East*, 274; *Owings v. Owings*, 1 *Harr. & G.* 488; *Second Nat. Bank v. Grand Lodge of F. & A. A. Masons*, 98 *U. S.* 123, 25 *L. ed.* 75; *Exchange Bank v. Rice*, 107 *Mass.* 37, 9 *Am. Rep.* 1; *Mars-ton v. Bigelow*, 150 *Mass.* 45, 5 *L. R. A.* 43, 92 *N. E.* 71; *Borden v. Boardman*, 157 *Mass.* 410, 32 *N. E.* 469; *Linneman v. Moross*, 98 *Mich.* 178, 57 *N. W.* 103; *Tweddle v. Atkin-* 47 *L. R. A.*

son, 1 *Best & S.* 393; *Price v. Easton*, 4 *Barn. & Ad.* 433.

Anciently, annuities were frequently granted by individuals in consideration of borrowed money, the annuities being payable during the lifetime of the borrower, who was in this case the grantor; he was the *cestui que vie*. The annuity was then commonly made payable to the grantee and his heirs (in case the grantor should survive the grantee), and hence came to be regarded as an incorporeal hereditament, in that the benefits passed to the heir, and not to the legal representatives or administrator of the grantee.

Co. Litt. Bk. II. 449, § 144b; 2 *Bl. Com.* p. 20.

An annuity, in order to be an hereditament, must be granted to the annuitant and his heirs.

2 *Co. Litt.* p. 219, § 6a; 3 *Kent*, Com. p. 660; *Bunyon*, *Life Assurance*, 3d ed. p. 363.

A policy of life insurance is a mere chose in action for the payment of money.

Rittler v. Smith, 70 *Md.* 265, 2 *L. R. A.* 844, 16 *Atl.* 890.

A grant of annuity need not be by deed under seal.

Anciently, all contracts were required to be under seal in order to give them validity at law.

Anson, *Contr.* p. 44; 1 *Bl. Com.* p. 475; *Bank of Columbia v. Patterson*, 7 *Cranch*, 299, 3 *L. ed.* 351; *Coa v. Maxwell*, 151 *Mass.* 336, 24 *N. E.* 50.

The word "grant" does not necessarily import grant by deed.

Pomeroy's Smith, *Mercantile Law*, § 15; *Underhill*, *Ev.* p. 317; *Farrar v. Staokpole*, 6 *Me.* 158, 19 *Am. Dec.* 201; *Meriam v. Har-sen*, 2 *Barb. Ch.* 270.

Annuities granted by corporations are to be distinguished from those for which a deed is required.

Townshend v. Duncan, 2 *Bland*, Ch. 45; *Jones v. Stockett*, 2 *Bland*, Ch. 409; *Robinson v. Townshend*, 3 *Gill & J.* 413; *Peyton v. Ayres*, 2 *Md. Ch.* 64; *Re Blake*, 4 *Md. Ch.* 64; *Mitchell v. Mitchell*, 21 *Md.* 244; *Perkins v. Emory*, 55 *Md.* 27; *Neild v. Smith*, 14 *Ves. Jr.* 491; *Re Locke*, 2 *Dowl. & R.* 603; *Ellis*, *Ins.* 4th *London ed.* 197, 202.

The annuity policy in question was duly accepted before payment of the consideration.

The money was paid with full knowledge of the facts.

Baltimore v. Lefferman, 4 *Gill*, 431, 45 *Am. Dec.* 145; *Poe*, Pl. chap. 3, § 119.

If a person has received all the consideration he has knowingly contracted for, he cannot be permitted to say there was none.

Baker v. Roberts, 14 *Ind.* 552; *Penniman v. Winner*, 54 *Md.* 127.

The doctrine of *ultra vires* is not, as a rule, available when it would operate a legal wrong or injustice.

Parish v. Wheeler, 22 *N. Y.* 494; *Whitney Arms Co. v. Barlow*, 63 *N. Y.* 62, 20 *Am. Rep.* 504; *Rider Life Raft Co. v. Roach*, 97 *N. Y.* 378; *Woodruff v. Erie R. Co.* 93 *N. Y.* 618; *Leslie v. Lorillard*, 110 *N. Y.* 519, 1 *L.*

R. A. 456, 18 N. E. 363; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

An innocent mistake in the method of carrying out the corporate power would never render the entire transaction subject to be vacated on the ground of *ultra vires*. When the principal matter is within the limits of the corporate power, and the act claimed to be *ultra vires* is an incident to it, the former will be upheld.

Philadelphia & S. R. Co. v. Lewis, 33 Pa. 33, 75 Am. Dec. 574.

Even if the question had arisen before performance by the defendant, inasmuch as the consideration had been received and the company had the power to do the act, it would have been liable to pay the annuity, even if no instrument of any kind had been executed.

Bunyon, Life Assurance, 310; *Kenney v. Weaham*, 6 Madd. & G. 357; *Davis v. Bryan*, 6 Barn. & C. 656; *Chitty*, Contr. 625.

Mrs. Kate Cahill received the benefit of full performance by the company of its contract, and neither she nor her administrator could assert the *ultra vires*.

2 Cook, Corp. § 681, p. 1373; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *United German Bank v. Katz*, 57 Md. 141; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 60, 35 L. ed. 68, 11 Sup. Ct. Rep. 478.

The corporation could not have availed itself of such plea after receiving the consideration.

Millard v. St. Francis Xavier Female Academy, 8 Ill. App. 341; *Memphis & L. R. R. Co. v. Dow*, 19 Fed. Rep. 388; *Hitchcock v. Galveston*, 96 U. S. 351, 24 L. ed. 662; *Zabriskie v. Cleveland, O. & C. R. Co.* 23 How. 381, 16 L. ed. 488; Bunyon, Life Assurance, 310.

Fowler, J., delivered the opinion of the court:

This case was most fully and ably argued, but it does not appear to us that there is any serious difficulty presented. There is little, if any, contention in regard to the controlling facts. Of course, if it be admitted, as contended on the part of the appellant, that the contract or policy by which the appellee bound itself to pay the annuity is *ultra vires*, and therefore void, or that the instrument itself was not properly executed, or that an annuity cannot be created or granted by parol, but must be by deed, there might be some room for controversy; but we not only do not admit any of these propositions, but we distinctly deny them all, as applicable to this case. What are the facts? On the 20th of April, 1895, the Maryland Life Insurance Company of Baltimore issued its policy of annuity to Mrs. Kate Cahill, agreeing thereby, in consideration of the sum of \$14,116.96 paid by her husband, John Cahill, to pay to her an annuity of \$1,040 during the continuance of her life. This sum was paid by the husband in accordance with an agreement set forth in a deed of separation executed by him and his wife;

she agreeing on her part, in consideration of the purchase of the annuity by him, to renounce her right of dower, and to do and perform certain other things not necessary now to mention. She lived but a short time to enjoy the annuity, for she died on the 20th of November, 1896; all the payments of the annuity having been promptly made during her life as provided by the policy. The contract or policy by which the insurance company agreed to pay the annuity was signed by its president and secretary, in accordance with its by-laws, and was in the usual form in which such assurances were made by the company. The administrator *d. b. n. c. t. a.* of Mrs. Cahill brought an action of assumpsit against the insurance company on the common counts, for money lent, money had and received, and money found to be due on accounts stated, etc. The theory upon which this suit was brought is that the policy is void, because an annuity can be created or granted only by deed, and that the charter of the insurance company does not give power to grant annuities otherwise. The contention is, therefore, that the policy in question being not under the seal of the company, and not its deed, but simply a written contract of the company, signed by its president and secretary, no action at law could have been maintained for arrears of the annuity, and consequently there was no valid contract between the parties. There are some other questions which were argued at great length, but the view we entertain of this case renders it unnecessary to consider them. The judgment of the court below being for the defendant, the plaintiff has appealed.

It will be observed that, if we leave out of consideration the mere form of the policy, Mrs. Cahill got all that the defendant agreed to give her (*Penniman v. Winner*, 54 Md. 135); for it is conceded that the annuity was promptly paid during her life, and, as was suggested at bar, if she had lived sixteen years to enjoy the annuity, instead of only sixteen months, it is not likely this suit would have been brought. Without considering whether the representative of Mrs. Cahill or her husband is the proper party plaintiff, we will briefly consider the question whether an action of any kind by any person can be brought against the insurance company under the circumstances presented by this appeal. The answer to this question depends upon the relation of the parties to each other, and, as contended by the plaintiff, upon the validity of the contract by which the defendant agreed to pay the annuity. Assuming, without deciding, as contended, that, if the contract was invalid and void, the plaintiff had a right to bring an action of assumpsit to recover the purchase money, which the court below, sitting as a jury, found was paid by, and was the money of, the husband, the first question presented, and indeed the only one, is whether that contract was or was not a binding and valid contract of the defendant. The answer to this question, it seems to us, is obvious. The defendant's charter (act 1864, chap. 362, §

3) authorizes it, among other things, "to grant, purchase, or dispose of annuities." Now, let us assume, *ex gratia*, that the proper construction of the language used in the charter is that the defendant may grant or dispose of an annuity only by deed, yet it can hardly be contended that the contract itself is *ultra vires*, and therefore void, because the officers of the defendant executed it in an irregular or imperfect manner. The power to grant or dispose of annuities is a charter power, and the most, therefore, that can be said, is that in this case the officers of the company have failed to attach the seal of the company, or have omitted some other technical requirement. Under such circumstances, the defendant, after receiving the purchase money, would not be allowed to defend itself in a suit to recover the annuity on the ground, not that the contract is void because it is *ultra vires*, but because, although the charter authorized it to make the contract, it had not been executed in a proper and legal manner. On the contrary, a court of equity would have compelled it to execute the contract in a legal and binding form; and in the meantime the annuitant could have sued for the instalments, because the law would have implied a promise to pay them, on which an action of assumpsit would lie. And, if the defendant would not be allowed to repudiate the contract, neither could the other party; for, in order to be equitable, the estoppel must be mutual. It may be conceded, as contended by appellant,—without, however, so deciding,—that, if this were a contract *ultra vires*, which, as we have seen, it is not, neither party would be estopped.

Thus far we have assumed that, while the charter authorizes the defendant to grant or dispose of annuities, the legal and proper construction of the grant requires the contract to be in the form of a deed. But, so far from this being the true construction, we think it abundantly clear, not only that the policy issued to the late Mrs. Cahill is, as testified by the president of the defendant, in the usual form in which such assurances were made by the defendant, but that both in form and substance it was in entire accordance with the charter. Indeed, we might almost take judicial notice of the fact that it is now usual, and has been for many years the general custom of insurance companies, to issue just such documents as the one issued to Mrs. Cahill, not under seal, but in the form of a written contract signed by officers designated by the by-laws. We do not place our conclusion on judicial notice of this alleged general custom, nor on the evidence of it offered by the defendant; for the court below excluded that evidence, and the propriety of that ruling is not before us. But it is settled law in this state that a policy of life insurance is a mere chose in action for the payment of money. *Rit-her v. Smith*, 70 Md. 265, 2 L. R. A. 844, 16 Atl. 890. And so is a contract for a life annuity, unless it be a life annuity issuing out of or charged upon lands. Of this latter class are most of the cases relied upon by 47 L. R. A.

the appellant. What is an annuity like the one in this case, but a contract on the part of the insurance company, in consideration of a sum certain, to pay the annuitant specified sums annually during life? There is certainly no feature of inheritance about such a contract as this, and we can conceive of no reason why such a chose in action may not, as any other chose in action, be the subject of a parol or written contract, unless there be some statute requiring such a contract to be by deed. But, so far from this being the case, as we have already said, we are of opinion that the charter of the defendant company authorizes just such a contract as the one we are considering. By that charter, the defendant may "grant, purchase, or dispose of annuities." Whatever may be said of the word "grant," it certainly cannot be contended that any conclusion can be drawn from the use of the word "dispose" that the contract by which the annuity is disposed of must be by deed. But we cannot adopt the view of the appellant, that the charter of the defendant does not confer power upon it to grant annuities otherwise than by deed. Undoubtedly, it may "grant" annuities by deed, if it will; but it may, also, by the very terms of the charter, "dispose" of them by contract in writing. That a chose in action like this annuity can be disposed of only by deed is a proposition which, we think, requires no argument to refute. It is sufficient to say that the mode of creating or transferring an annuity adopted in this case is authorized by the charter itself of the defendant. 2 Am. & Eng. Enc. Law, p. 388. We think it unnecessary to refer to the many authorities cited at bar, because most of them have application only to questions which were argued, but which, as we have said, we need not consider. Nor do the English statutes (17 Geo. III. chap. 26, and 53 Geo. III. chap. 141) appear to have any controlling effect in this case, even if we assume that they are in force here; for each of them provides that the provision of the act "shall not apply to annuities granted by any body corporate."

Our conclusion is that, the contract of annuity being valid, there is no right of action in the plaintiff or any other person to recover the purchase money paid by Mr. Cahill for the annuity.

Judgment affirmed.

William COLTON *et al.*, Receivers of South Baltimore Bank, *Appts.*,

v.

Lee MAYER.

(.....Md.....)

Receivers cannot maintain an action to

NOTE.—As to action by receiver to enforce stockholder's liability, see also *Republic L. Ins. Co. v. Swigert* (Ill.) 12 L. R. A. 328; *Cushing v. Perot* (Pa.) 34 L. R. A. 737; *Runner v. Dwiggins* (Ind.) 36 L. R. A. 645; *Minneapolis Baseball Co. v. City Bank* (Minn.) 38 L. R. A. 415; and *Hirschfeld v. Fitzgerald* (N. Y.) 46 L. R. A. 839.

enforce the liability of stockholders in a bank for its debts under Acts 1888, chap. 294, for the amount of their respective shares of stock, since the fund arising from such liability is in no sense an asset of the corporation, and the receivers have no interest in it.

(March 21, 1900.)

APPPEAL by plaintiffs from a judgment of the Baltimore City Court in favor of defendant in an action brought to enforce defendant's statutory liability as a stockholder in a bank which had become insolvent. *Affirmed.*

The facts are stated in the opinion.

Messrs. George R. Willis, William S. Bryan, Jr., Joseph W. Hasell, and Martin Lehmayr, for appellants:

When a stockholder subscribed for stock in the South Baltimore Bank, he made a contract that he would pay into the bank the amount of his capital stock. He also made a contract that, if necessary to pay the debts, he would pay into the bank an equal amount in addition. The contract, so far as the rights of creditors were concerned, was identically the same in the one case as in the other.

Richmond v. Irons, 121 U. S. 50, 30 L. ed. 871, 7 Sup. Ct. Rep. 788; *Hawthorne v. Calef*, 2 Wall. 22, *sub nom. Hathorn v. Calef*, 17 L. ed. 776; *Norris v. Johnson*, 34 Md. 485.

The most recent and satisfactory discussions of this general question are—

Sheafe v. Larimer, 79 Fed. Rep. 921; *Waterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041; *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *State ex rel. Stone v. Union Stock Yards State Bank*, 103 Iowa, 549, 70 N. W. 752, Rehearing in 72 N. W. 1076; *Ueland v. Hagan*, 70 Minn. 349, 73 N. W. 169; *Cuykendall v. Miles*, 10 Fed. Rep. 342; *Cushing v. Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 311.

The fact that a banking corporation is insolvent and in the hands of a receiver will not entitle creditors to proceed against the stockholders upon their secondary liability, but such liability constitutes a part of the receiver's trust fund for the benefit of creditors.

Wilson v. Book, 13 Wash. 676, 43 Pac. 939.

A receiver under circumstances similar to those here existing has a right to maintain an action at law for assessments on the stockholder ordered by the court which appointed him.

Cuykendall v. Miles, 10 Fed. Rep. 342; *Cushing v. Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Fames v. Doris*, 102 Ill. 350; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310.

The most practical way to have but one recovery against the numerous stockholders liable on their statutory liability is to have a receiver appointed in a suit on a general creditors' bill against the corporation, where all the creditors will be represented by the plaintiff, and the corporation being before the court will bind all the stockholders as to the necessity for the assessment and as to its 47 J. R. A.

amount; and then allow the receiver to bring separate actions at law against the individual stockholders for the amounts severally due by them, in case, after demand, they refuse to pay the receiver the amount ordered to be paid by the court.

Hall v. United States Ins. Co. 5 Gill, 484; *Glenn v. Williams*, 60 Md. 114; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Sheafe v. Larimer*, 79 Fed. Rep. 921; *Rankine v. Elliott*, 16 N. Y. 379; *Atwood v. Rhode Island Agri. Bank*, 1 R. L. 376.

Liability of the stockholders for the debts of the corporation when the stock has not been paid in full (Code, § 64, art. 23) has been held to make the stockholders "debtors under the statute to the creditors of the company."

Norris v. Wrenschall, 34 Md. 501; *Mattheus v. Albert*, 24 Md. 535.

The receivers represent all the creditors, all the stockholders, and the corporation itself.

Glenn v. Williams, 60 Md. 114; *Frank v. Morrison*, 58 Md. 432.

The trustee in insolvency represents the creditors, and it is his duty to claim in their behalf all property which ought to be subjected to the payment of the debts due to them.

Gardner v. Gambrill, 86 Md. 662, 39 Atl. 318.

These receivers have the powers, as regards the South Baltimore Bank and its creditors, of a trustee in insolvency.

Alexander v. Ghiselin, 5 Gill, 138; *Mackubin v. Boorman*, 54 Md. 384.

The proceeding against stockholders of corporations when the capital stock has not been fully paid up furnishes an instructive analogy as to the liability of the stockholders here.

Matthews v. Albert, 24 Md. 535; *Norris v. Johnson*, 34 Md. 485; *Norris v. Wrenschall*, 34 Md. 492.

Mr. Albert S. J. Owens, for appellee:

The unpaid subscriptions to the capital stock of a corporation constitute a trust fund to be held by the corporation for the benefit of creditors, and upon insolvency the right to recover the same passes to the receiver.

Rider v. Morrison, 54 Md. 446; *Crawford v. Rohrer*, 59 Md. 605; *Liberty Female College Asso. v. Watkins*, 70 Mo. 13.

When a receiver is appointed, his duty is to collect all corporate assets and divide them *pro rata* among the corporate creditors, and to divide the excess, if any, among the stockholders. The receiver succeeds to nothing but corporate rights, and, except in cases of fraud, has no rights not possessed by the corporation itself.

On principle the receiver should not be allowed to collect this statutory obligation.

This statutory liability creates a contract between the individual creditor and the individual stockholder, independent of the contract between the creditor and the company.

Bashor v. Forbes, 36 Md. 167.

Even though the plaintiff shows the debt was contracted when the defendant was a stockholder, the stockholder may, in defense in a proper case, plead release, set-off, limitation, and other defenses.

1 Cook, Corp. p. 435.

If the right to collect this statutory liability is a corporate asset, all these defenses avail not, for the receiver's right of action does not arise until the insolvency of the corporation, and all the receiver has to show is that, in order to pay all the debts of the company, the aggregate statutory liability of the stockholders is needed.

High, Receivers, § 315; 2 Beach, Priv. Corp. § 716, p. 1119; *Mason v. New York Silk Mfg. Co.* 27 Hun, 307; *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. Rep. 454; *Farnsworth v. Wood*, 91 N. Y. 308; 1 Cook, Stock & Stockholders & Corp. Law, § 218, p. 401; Morawetz, Priv. Corp. § 869; 3 Thomp. Corp. § 3560; Taylor, Priv. Corp. 721; *Runner v. Dwiggins*, 147 Ind. 238, 36 L. R. A. 645, 46 N. E. 580; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 417, 69 N. W. 331; *Cushing v. Porot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 402, 51 N. E. 207; *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 807, 52 N. E. 346; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105.

Boyd, J., delivered the opinion of the court:

The appellants, who are receivers of the South Baltimore Bank, sued the appellee, who was a stockholder in that bank, to recover a sum equal to the par value of the stock held by him, under a provision in the charter, as amended by chapter 294 of the Acts of 1888, which is as follows: "The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation, for all of its debts and liabilities upon note, bill, or otherwise." The declaration alleges that the appellants were appointed by the circuit court No 2 of Baltimore city under a general creditors' bill filed against the corporation which, after due proof, was adjudged to be insolvent, and was dissolved, and its property was, in accordance with the terms of the act of 1896, chap. 349, vested in the appellants. It recites the above provision in the charter, and alleges that the assets of the corporation are totally insufficient to pay its debts and liabilities in full, and it is necessary to call upon the stockholders and directors to pay to the receivers a sum equal in amount to the par value of the share or shares of stock held by them; that such payment will not enable all of said debts or liabilities to be discharged, and that the court had made a call upon each stockholder to pay such sum, and authorized the plaintiffs to sue therefor. The defendant demurred to the declaration, and the first six counts having been withdrawn, the court below sustained the demurrer to the seventh count, and a *pro forma* judgment was entered for 47 L. R. A.

the defendant. From that judgment this appeal was taken.

The principal question intended to be raised by the demurrer was, whether the receivers are authorized to sue a stockholder of the bank for the liability thus created by the charter. Although that provision is in the language of § 27, art. 11, of the Code, relating to banks organized under the laws of this state, this precise point has not heretofore been before this court.

We have had many cases before us involving the liability of stockholders for unpaid subscriptions to capital stock, and we have sustained the right of receivers to sue for them, but they are assets, and are such debts as the corporations themselves can recover, and hence when receivers are appointed to wind up their affairs the right to unpaid subscriptions is vested in them.

Our general corporation laws, in § 269, art. 23, of the Code [Md. Code Supp. 1898, art. 26, § 190], provides that "where receivers of the estate or effects of any corporation shall be appointed by a court, upon or before the dissolution of any corporation, they shall be vested with all the estate and assets of every kind belonging to such corporation," and they are required to proceed to "wind up the affairs of such corporation," under the direction of the court, and are given "all powers which shall be necessary for that purpose."

By § 264 A (Act 1896, chap. 349), under which these receivers are acting, it is provided that when a corporation is dissolved as therein mentioned "all of its property and assets of every description" shall be distributed to the creditors in the same manner as the property and assets of an insolvent debtor are distributed under our insolvent laws, and the receiver is authorized to maintain suits and proceedings, to set aside preferences and void or fraudulent transfers, payments, etc., as the permanent trustee of an insolvent debtor can do. There is therefore no difficulty in the way of a receiver suing for any part of the estate, property, or assets that belonged to the corporation, and he is authorized by the statute last mentioned to maintain suits and proceedings to set aside preferences and void or fraudulent transfers, payments, etc., even when the corporation itself could not have done it, if it had not gone into the hands of a receiver.

But our law does not authorize a receiver to recover any estate, property, or assets that never did belong to the corporation, but only such as it was entitled to when he was appointed, or such as had belonged to it, but had been disposed of contrary to law.

Inasmuch as this charter does not authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or in any manner made it an asset of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder.

When the charter says that the stockhold-

ers and directors of this corporation shall be liable to the amount of their respective shares of stock "for all of its debts and liabilities," to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors.

When the stockholders subscribed for stock they assumed a two-fold obligation—one to the corporation, for the amount of the stock so subscribed, and the other to the creditors, to be limited by that amount. When they paid the corporation for their stock their obligation to it was at an end, but not so with that to the creditors.

There was no liability of any kind to the corporation by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it.

It was in the nature of a guaranty to the creditors that, in the event of the failure of the corporation to pay its debts and liabilities, each stockholder would contribute towards their payment, to the extent of the par value of stock held by him, but the corporation itself had no authority, under that provision, to assess the stock or to call for more than its par value to meet its obligations.

There can therefore be no valid reason why a receiver of a corporation should be permitted to collect from the stockholders debts which they never owed the corporation, and which should go to the creditors, if due at all, without being charged with fees and expenses incident to the settlement of insolvent estates. Some liability similar to this is generally fixed by statute upon the owners of stock in banking and other corporations that earn their profits out of the money of others, and it sometimes is provided, as in the case of national banks, for example, that in the event of failure the receiver can collect what is due on the statutory liability but, in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us.

It is said that it would be more convenient and more equitable to permit the receivers to collect the fund thus due by stockholders, and distribute it equally amongst the creditors entitled to it. But courts would not be justified in taking the fund from those entitled to it (the creditors) simply for convenience of distribution, and, under the decisions of this court that reflect upon the question, it would greatly embarrass the distribution of an estate of an insolvent corporation to place the funds thus derived in the hands of a receiver for distribution. The only case in which this court has had a similar statute before it is that of *Hammond v. Straus*, 53 Md. 1. There a creditor was suing an alleged stockholder to recover for the personal liability of the defendant under a statute like this.

Judge Alvey, in delivering the opinion of the court, said: "To entitle the plaintiff to

recover in this action it was essential that three things should be made to appear: (1) That a corporation, such as that alleged, should have been created; (2) that the defendant was a stockholder therein; and (3) that the plaintiff was a creditor of the corporation, and that he became such while the defendant was stockholder."

The court below took the case from the jury, and this court, after discussing the question as to whether there was such a corporation as was alleged, proceeded with the next inquiry, which was thus stated, "Should the existence of the corporation be found? The next question is, whether the defendant was a stockholder therein at the time the debt was contracted with the plaintiff;" and, having found that there was evidence that he was, reversed the case and awarded a new trial.

In *Matthews v. Albert*, 24 Md. 535, where a stockholder was sued for his personal liability under the statute then in force, which made stockholders liable to the amount of stock held by them for debts of the corporation until the capital stock was fully paid up, our predecessors said that the stockholders "occupied the twofold relation of debtors to the company for the amount of their stock at par value, and as debtors, under the statute, to the creditors of the company to an amount equal to their stock for all debts and contracts created while they were stockholders."

It is true that case involved the construction of a statute different from the one now before us, but the character of the liability was the same, the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid. In *Basshor v. Forbes*, 36 Md. 154, which was also a suit under the last-mentioned statute, it was held that a creditor could waive the individual liability of the stockholder by agreeing, when the contract was made, to look to the company alone and exclusively.

Thus, we see that the liability of the stockholders is only to those who became creditors while the former held the stock, and those creditors can relieve them of all such responsibility when the debts are contracted. One stockholder might be liable to one creditor, another to some other creditor, and the creditors may have released others.

It would therefore be very difficult, if not impossible, in some cases, to properly determine, in the distribution of the estate, how the funds collected from the various stockholders should be distributed, and it might require many accounts to be stated. Those authorities, and others to the same effect, not only show how inconvenient and inequitable it would be to permit the receivers to recover, but go very far towards showing that they are not the proper parties to sue on the liability imposed by a statute, such as the one now under consideration.

Some stress was laid at the argument on the fact that these receivers are vested with the powers of a permanent trustee under our

insolvent laws, but could it be successfully contended that, if the debts of an insolvent individual were guaranteed, the trustee could recover from the guarantors the amount of such guaranty and distribute it as a part of the insolvent estate?

Unquestionably not, and why should the receivers, who are to distribute the property and assets of the corporation in the same manner as the property and assets of an individual debtor are distributed, be permitted to recover from those who stand somewhat in the position of guarantors, that which they never owed or guaranteed to the corporation or receivers?

Under this charter the liability is directly to the creditors, and not to the receivers for the benefit of creditors. It was said, in passing on the liability under the statute we have referred to above, in *Norris v. Wrenschall*, 34 Md. 492: "It is a debt under the statute, due from the stockholder to the creditor, springing out of, and coexistent with, the contract between the corporation and the creditor;" and all the cases that have been decided in this state affecting the statutory liability of stockholders have been to the same effect.

There are many authorities elsewhere in which the enforcement of such liability has been considered, and most of them hold that the receivers cannot sue under statutes such as this. The text writers, so far as we have seen, are practically unanimous in the conclusion that such statutory liability is not a corporate asset, and receivers cannot sue, unless so authorized by the terms of the statute.

In 1 Cook, Stock & Stockholders, § 218, the principle is thus announced: "The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a receiver of an insolvent corporation, invested with 'all the estate, property, and equitable interests' of the concern, has no power to enforce such a liability as this. The action to enforce can be maintained only by the creditors themselves, in their own right and for their own benefit."

The rule is stated to the same effect, and as positively in 2 Beach, Priv. Corp. § 716; 2 Morawetz, Priv. Corp. § 869; 3 Thomp. Corp. § 3580; Taylor, Priv. Corp. § 721; and Thompson, Liability of Stockholders, § 342. There are also many cases to the same effect, of which we will mention *Runner v. Dwiggins*, 147 Ind. 238, 36 L. R. A. 645, 46 N. E. 580; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331; *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. Rep. 454; *Wright v. McCormack*, 17 Ohio St. 86; *Liberty Female College Assn. v. Wat-*

kins, 70 Mo. 13; *Farnsworth v. Wood*, 91 N. Y. 308; *Arentz v. Weir*, 89 Ill. 25; *Hanson v. Donkersley*, 37 Mich. 184; *Wincock v. Turpin*, 96 Ill. 135.

There are some to the contrary. That of *Cushing v. Perot*, 175 Pa. 68, 34 L. R. A. 737, 34 Atl. 447, is one of those relied on by the appellants. The learned judge who delivered the opinion in that case, thought that the weight of authority was with that decision, but we do not so find it, nor can we agree with the reasoning of that case, especially when considered in connection with our own decisions.

The supreme court of Massachusetts, in *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396, 51 N. E. 207, expressly declined to follow it in construing the statute of Kansas before those courts. See also *Bell v. Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105,—in reference to that statute.

In *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, affirmed in *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041, the liability of the stockholders was passed on under a constitutional provision of that state, the court holding that it constituted "a part of the receiver's trust fund which the court is authorized to direct him to enforce for the benefit of all the creditors."

In *State ex rel. Stone v. Union Stock Yards State Bank*, 103 Iowa, 549, 70 N. W. 752, the court conceded that the general rule is that money due under the statutory liability is not an asset of the bank, and that a receiver has no authority to collect it, but held that a receiver appointed by a decree under the statute of Iowa could enforce it.

In *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310, the fund allowed to be recovered by the receiver was capital stock which had been unlawfully refunded to the stockholders as dividends, and, of course, that was an asset. The case of *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 38 L. R. A. 417, 69 N. W. 331, points out the distinction.

Without prolonging this opinion by the citation of other cases, it seems clear to us that the great weight of authority denies the right of the receiver to sue for a liability created by a statute such as the one before us, and when he has been permitted to enforce such a claim, it has, almost without exception, been by reason of the peculiar provisions of the laws before the courts.

The national bank act and statutes in some of the states expressly authorize suits to be so brought, but this one not only does not so provide, but, as we have seen, the liability is only to those creditors who became such while the party sought to be held was a stockholder.

The fund arising from such liability is in no sense an asset of the corporation, and the receivers have no interest in it.

The demurrer was therefore properly sustained, and the judgment must be affirmed.

As it appears that the appellants were authorized by the court to sue, we will direct the costs to be paid out of the estate.

Rehearing denied.

J. Harry COVINGTON, *Appt.*,
v.
Lewis BUFFETT *et al.*, Election Supervisors of Talbot County.

(.....Md.....)

A court has no jurisdiction to determine whether a vacancy exists in the office of senator for a certain county, so as to require the election of a new incumbent, when the senate, which is made the judge of the qualifications and elections of its members by Const. art. 3, § 19, has not decided the question.

(January 11, 1900.)

A PPEAL by plaintiff from an order of the Circuit Court for Talbot County overruling a demurrer to the answer in a mandamus proceeding to compel defendants to print plaintiff's name on a ticket to be used at a general election. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Prentiss Poe and William H. Adkins, for appellant:

The duty of the appellees is ministerial only. It is not for them to say whether a vacancy in the office of senator exists or does not exist.

It is sufficient to entitle the appellant to have his name printed upon the official ballot as the nominee of his party, that a bona fide claim is made that a vacancy now exists in the office of senator from Talbot county, that he has been regularly and duly nominated by his party for that office, that his nomination papers are in legal form and have been duly certified to the appellees as the board of supervisors of elections of Talbot county.

The senate is the only tribunal competent to pass upon the question as to whether Mr. Dodson's seat is vacant. The courts have no jurisdiction over this question.

The supervisors of elections have no discretion whatsoever upon the subject, but are bound to print upon the official ballot the names of all candidates nominated in the mode prescribed by the statute.

Wells v. Munroe, 86 Md. 443, 38 Atl. 987.

Messrs. Leon E. Greenbaum and R. Rastall Walker, for appellees:

The board of supervisors of elections has no power to pass upon the qualification of candidates.

Sterling v. Jones, 87 Md. 141, 39 Atl. 424.

A mere nomination by a political convention is not sufficient to entitle the nominee

by mandamus to compel the placing of his name upon a ticket which contains nominations for other offices than the one for which the nominee has been selected, and which are by law to be filled at the coming election, if there is to be no election for the office which the nominee seeks, at the time when the ticket for other offices is to be voted upon.

Worman v. Hagan, 78 Md. 163, 21 L. R. A. 716, 27 Atl. 616; *Wells v. Munroe*, 86 Md. 448, 38 Atl. 987.

The board of supervisors of election is not compelled to recognize a nomination, unless the term of the incumbent has expired or the seat has been vacated, and the vacancy must be of such character that a new election is necessary to fill it, and the new election must have been ordered in the manner by law provided.

The provisions for the ordering of a new election in case of disqualification of a member of the senate are found in § 13 of art. 3 of the state Constitution, and the matter is under the control of the senate.

Story, Const. 5th ed. § 833; *Peabody v. Boston School Committee*, 115 Mass. 383.

Briscoe, J., delivered the opinion of the court:

This appeal was heard on the 10th of October, 1899. The question involved being one of public importance, and relating to an election to be held on the 7th day of November, 1899, a *per curiam* opinion announcing our decision, as requested by the counsel on both sides, was filed on the 13th of October. We will now state the reasons for that decision. It appears that the appellant, on the 2d of October, filed a petition in the circuit court for Talbot county for a writ of mandamus to compel the appellees, the board of supervisors of election for that county, to print his name as the nominee of the Democratic party of Talbot county for the office of state senator on the official ballot to be voted for at the general election to be held on the 7th of November, 1899, and to deliver, as required by law, the official ballot, containing his name, to the proper election officers. It is alleged by the petition that the appellant has all the requisite qualifications for the office; that his nomination was duly made and certified as provided by law; that the Honorable Henry C. Dodson, who was elected as senator from that county at an election in November, 1897, for a term of four years, has accepted a Federal office, and has removed from the county, thereby creating a vacancy in the office; and that the appellees have refused to place his name on the official ballot, although requested so to do. The answer to this petition states the following reasons why the writ should not issue: Because there exists no power in the board of supervisors of election, nor in the con-

NOTE.—For the power of the court as to political questions, see *State ex rel. Adams v. Cunningham* (Wis.) 15 L. R. A. 561; *State ex rel. Lamb v. Cunningham* (Wis.) 17 L. R. A. 145; *Parker v. State ex rel. Powell* (Ind.) 18 L. R. A. 567; *Fletcher v. Tuttle* (Ill.) 25 L. R. A. 47.

A. 143; *Green v. Mills* (C. C. App. 4th C.) 30 L. R. A. 90; *Denny v. State ex rel. Basler* (Ind.) 31 L. R. A. 726; *Phelps v. Piper* (Neb.) 33 L. R. A. 53; and *Kearns v. Howley* (Pa.) 42 L. R. A. 235.

vention of any political party, nor in any judicial tribunal, to declare a vacancy in the office prior to the expiration of said term, but by express constitutional provisions elections for senator are held at regular intervals of four years, and that the term of each senator so elected lasts for four years; and that, further, each house is the judge of the qualification and election of its members, as prescribed by the Constitution and laws of the state, and that, in consequence, no other person or body than the senate of the state of Maryland is empowered to pass upon the question as to the qualifications of Henry Clay Dodson for holding the seat of senator of Talbot county; and that, further, the Constitution of the state of Maryland contains, in § 13 of art. 3, definite provisions in regard to the method of ordering and holding an election for senator in the event of disqualification, and neither of the methods so provided for has been adopted in the present case, a warrant for a new election not having been ordered by the president of the senate or the governor of the state of Maryland, and that, in consequence, there can be no election for senator from Talbot county, in the state of Maryland, on the 7th day of November next; and that a court of justice has no power to order such; and the petitioner is therefore not entitled to have his name placed upon the official ballot as candidate for senator at the general election of November 7, 1899; and that the court will not compel the performance of a nugatory act, nor destroy the separation of power between the judicial, legislative, and executive branches of the state government. To this answer a demurrer was interposed, and from the *pro forma* order overruling the demurrer and dismissing the petition this appeal is taken.

The controlling question, then, under the pleadings in the case, is whether this court has jurisdiction to determine whether a vacancy exists in the office of senator for Talbot county. It is quite clear that, unless a vacancy does exist, no election can be held for the purpose of electing a senator, and to issue the writ would have no beneficial effect. By the 8th section of article 3 of the Constitution of this state the term of senator is fixed at four years, and an election of one half of the senators, as nearly as practicable, shall be held in every second year. There can be no dispute that, if the Honorable Henry C. Dodson was duly elected senator in the year 1897 for a term of four years, as provided by the Constitution, there can be no election for senator for Talbot county until the expiration of his term, unless a vacancy exists in that office. By § 13, Id., the mode and method of ordering an election is provided in case of death, disqualification, or removal from the county of any person who has been chosen senator. The question, then, as stated, comes to this: Does a vacancy exist in the office of senator for Talbot county in the senate of Maryland, and has the court power to determine the question? It is too clear, we think, for serious

controversy, that § 19, art. 3, of the Constitution names the only tribunal which has the power to decide the question, and that is the senate of Maryland itself. It provides that "each house shall be judge of the qualifications and elections of its members," and we are all of the opinion that until that tribunal, which is intrusted with the exclusive authority, decides whether a vacancy exists, the courts are without jurisdiction to interfere. In the case of *Wells v. Munroe*, 86 Md. 449, 38 Atl. 988, cited by the appellant, the decision related to the office of clerk of the circuit court, and in that case, owing to its own peculiar circumstances, the court had full jurisdiction to decide the question of vacancy *vel non*. It was there said: "If there is no vacancy in the office of clerk of the circuit court for Anne Arundel county, and no such officer was legally to be elected, . . . the court will not direct the name of a nominee for that position to be placed on the ballot." *Worman v. Hagan*, 78 Md. 163, 21 L. R. A. 716, 27 Atl. 616; *Sterling v. Jones*, 87 Md. 141, 39 Atl. 424. In the case at bar the courts are without jurisdiction to entertain the proceedings, for the reason that each house of the general assembly has the sole power to judge of the qualifications of its members, to the exclusion of every other tribunal. In *Peabody v. Boston School Committee*, 115 Mass. 383, the supreme court of Massachusetts, in passing upon a similar provision of its Constitution, says: "It cannot be doubted that either branch of the legislature is thus made the final and exclusive judge of all questions, whether of law or of fact, respecting such elections, returns, or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof; and that while the Constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein cannot be disputed or revised by any court or authority whatever." The following cases are in harmony with the conclusion reached by us in this case, and we cite them as bearing on the question: *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *People ex rel. Sherwood v. State Bd. of Censors*, 129 N. Y. 360, 14 L. R. A. 646, 29 N. E. 345; *Re McNeill*, 111 Pa. 235, 2 Atl. 341; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Weeden v. Richmond*, 9 R. I. 128, 98 Am. Dec. 373; *People ex rel. Demarest v. Fairchild*, 67 N. Y. 334; *State ex rel. Ensworth v. Albin*, 44 Mo. 346. We find no warrant in the Constitution for the position taken by the appellant, and, if sustained, it would lead to an inevitable conflict between the legislative and judicial branches of the government. As was stated by this court in *Worman v. Hagan*, 78 Md. 165, 21 L. R. A. 716, 27 Atl. 616, having no jurisdiction to determine the vacancy *vel non*, we disclaim all intention to investigate the question.

The remaining questions raised on this appeal need not be considered by us. We hold that this court has no jurisdiction to deter-

mine whether a vacancy exists in the office of senator for Talbot county, and, unless a vacancy does exist, no election can be had for the purpose of electing a senator. The courts are without jurisdiction to compel the appellees to place the name of the appel-

lant on the official ballot until the tribunal having the exclusive authority under the Constitution to decide whether a vacancy exists passes upon that question.

Order affirmed, with costs.

ILLINOIS SUPREME COURT.

LAKE STREET ELEVATED RAILROAD
COMPANY, *Appt.*,
v.
City of CHICAGO.

(183 Ill. 75.)

1. The franchise and right of way of an elevated railroad company which operates its road upon a structure about 20 feet high, supported by pillars about 40 feet apart, and resting on the street at the curb lines, and having stations reached by stairs from the street, constitute property subject to assessment for benefits by paving the street.
2. An ordinance requiring an elevated railroad company to restore the pavements, gutters, sidewalks, water pipes, sewer pipes, or gas pipes, in case there is any disturbance of the same during the construction of the elevated road, does not constitute a contract limiting the liability of the company to such repairs, so as to preclude it from being assessed for benefits on account of a pavement.
3. A paving assessment may be levied on that part of the franchise or right of way of an elevated railroad company which extends along the street which is paved, without being levied on the franchise or right of way as an entirety.
4. A finding of the lower court as to the amount of benefits sustained by an elevated railroad company from a street pavement is not subject to review by the Illinois supreme court.

(December 18, 1899.)

A PPEAL by defendant from a judgment of the Cook County Court confirming a special assessment against its property for street improvement. *Affirmed.*

Statement by **Magruder, J.:**

This is an appeal from a judgment of the county court, entered on June 3, 1899, confirming a special assessment levied by the city of Chicago to pay the cost of an improvement for paving West Lake street from the east curb line of Ashland avenue to the east curb line of Western avenue with vitrified brick. The petition was filed on January 23, 1899; and on March 25, 1899, the assessment roll was filed, wherein the "right of way, right of occupancy, franchise, and interest of the Lake Street Elevated Railroad Company in and upon West Lake street from the east curb line of Ashland avenue

to the east curb line of Western avenue" were assessed. Objections were filed by appellant to the confirmation of the assessment. The court overruled all objections, except as to the proportionate share of the cost of the improvement to be borne by appellant, which was fixed at the sum of \$500. The objections of the appellant then came on to be heard upon the question of benefits, and a jury was waived, and the cause was submitted to the court. After hearing the testimony, the court took the matter under advisement, and afterwards entered a finding that the benefits to the "right of way, right of occupancy, franchise, and interest of the Lake Street Elevated Railroad Company," etc., would be the sum of \$150, and ordered that the assessment upon said right of way be reduced from \$500 to \$150, and that the assessment roll be confirmed as to said railroad company for \$150. Exception was taken to the finding, and motions for a new trial and in arrest of judgment were made and overruled. Exceptions were taken to these rulings of the court, and a judgment of confirmation was entered in accordance with the above finding. Exception was taken to the entry of the judgment.

Mr. Clarence Knight, for appellant:

The right of way, right of occupancy, franchise, and interest of the Lake Street Elevated Railroad Company in and upon West Lake street from the east curb line of Ashland avenue to the east curb line of Western avenue are not, nor is either of them, in whole or in part, assessable in this proceeding.

Hurd, Rev. Stat. chap. 24, § 546.

The cases deciding that the rights of way and franchises of a surface street railway may be assessed for a local improvement are not authority in this case.

West Chicago Street R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866; *Chicago v. Baer*, 41 Ill. 306; *Parmelee v. Chicago*, 60 Ill. 267; *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54; *Kuchner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372; *Lightner v. Peoria*, 150 Ill. 80, 37 N. E. 69.

By the ordinance granting authority to the Lake Street Elevated Railroad Company to maintain and operate its railroad in West Lake street, the city is precluded from levying this assessment against its right of way and franchise.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594.

NOTE.—As to the liability of a street railway to a paving assessment, see *Shreveport v. Prescott* (La.) 46 L. R. A. 193, and note. 47 L. R. A.

The finding and judgment of the county court confirm the assessment upon more property than is described in the assessment roll, and are erroneous.

Dempster v. People ex rel. Kern, 158 Ill. 36, 41 N. E. 1022.

There is no authority in the law for levying this special assessment upon a part only of the right of way and franchise of this railroad company, even if it can be assessed as an entirety.

State ex rel. St. Paul City R. Co. v. Ramsey County Dist. Ct. 31 Minn. 354, 17 N. W. 954; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. Rep. 15.

Speculative and imaginary benefits cannot be considered.

Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78; *Jones v. Chicago & I. R. Co.* 68 Ill. 380; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110; *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 56, 41 N. E. 640.

Benefits must be such as can be at least approximately measured.

Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110.

The only benefits which can be considered are those determined by the value of the property for railroad uses.

Illinois C. R. Co. v. Chicago, 141 Ill. 515, 30 N. E. 1036; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 590; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78.

Benefits to the corporation in a material sense, or to its business, are not to be considered.

Rich v. Chicago, 152 Ill. 18, 38 N. E. 255.

Section 40 of the act concerning local improvement provides as follows: "In levying any special assessment or special tax, each lot, block, tract, or parcel of land shall be assessed separately in the same manner as upon assessments for general taxation; provided that this requirement shall not apply to the property of railroad companies or the right of way and franchise of street-railway companies; but the same may be described in any manner sufficient to reasonably identify the property intended to be assessed."

Hurd, Rev. Stat. chap. 24, § 546.

The only authority found in the statute itself for levying this special assessment upon the right of way and franchise of this railroad company is found in the proviso.

If the proviso had been omitted from the statute it could not be contended that a special assessment could be levied on a franchise or right of way of a railroad company unless such a franchise consisted of, and was made up of, lots, blocks, tracts, or parcels of land. The proviso does not profess to confer any such power on the assessing municipality. The office of the proviso is to qualify, not enlarge, what is affirmed in the body of the section preceding it.

Boon v. Joliet, 2 Ill. 258; *Chicago v. Phoenix Ins. Co.* 126 Ill. 276, 18 N. E. 668. 47 L. R. A.

Messrs. Charles M. Walker, Armand F. Teefy, and Denis E. Sullivan, for appellee:

"The right of way, right of occupancy, franchise, and interest of railways in the streets" may be assessed for local improvements.

Chicago v. Baer, 41 Ill. 306; *Parmeles v. Chicago*, 60 Ill. 267; *Chicago City R. Co. v. Chicago*, 90 Ill. 573; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372; *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866.

Property in its appropriate sense is that dominion or indefinite right of use and disposition which one may lawfully exercise over particular things or subjects.

South Park Omrs. v. Chicago, B. & Q. R. Co. 107 Ill. 108.

The legislature may lawfully provide for taxation of property of this character.

Ibid.

There is no constitutional or statutory exemption against assessing railroad property if specially benefited.

Chicago & N. W. R. Co. v. People ex rel. Seip, 120 Ill. 104, 11 N. E. 418.

The right of way of a railway is subject to special taxation for a local improvement.

Chicago & A. R. Co. v. Joliet, 153 Ill. 649, 39 N. E. 1077; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 150, 46 N. E. 437.

The franchise, right of way, and of occupancy by a street-railway company in a given street may be sold upon an unpaid judgment against it for a special assessment.

Little v. Chicago & E. Ave. R. Co. 46 Ill. App. 534.

No good reason can be offered for making a distinction between elevated railways and surface railways.

Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520.

The doctrine of commutation cannot apply in this case.

West Chicago Street R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594.

Magruder, J., delivered the opinion of the court:

1. The first objection made is that "the right of way, right of occupancy, franchise, and interest of the Lake Street Elevated Railroad Company in and upon West Lake street from the east curb line of Ashland avenue to the east curb line of Western avenue" are not assessable in this proceeding. The question raised by this objection is not now an open one in this court. In *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866, the commissioners assessed a certain sum upon "the right of way, right of occupancy, franchise, and interest of the Cicero & Proviso Street Railway Company in West Lake street from South Forty-Eighth avenue to South Fifty-Second avenue;" and it was there claimed that "the right of way, right of occupancy, franchise, and interest" of the railway company were not assessable for a local improvement, upon the alleged ground that the same were not such proper

ty as fell within the provisions of the Constitution, or of article 9 of the city and village act; but it was there held that the franchise and right of user constituted property of a fixed and immovable character, like real estate, and might be assessed for the local improvement of the street, the same as any real estate contiguous to the improvement. It was also there held that property of this nature was of a character to be substantially and directly benefited by the proposed pavement of the street, and that, in proportion as it was thus benefited, it should contribute its share to the cost of the improvement in common with the other property upon the street. Substantially the same question arose in *West Chicago Street R. Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112. In the latter case the same language here used was made use of in describing the interest of a street-railway company in and upon West Twelfth street from the east line of South Canal street to the east line of the street-railway right of way in South Halsted street; and the claim was again made that the railway property, as thus described, was not of such a character that a special assessment could be levied upon it. But the case of *Cicero & P. Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866, was referred to with approval, and it was there held that a special assessment might be levied upon property of the character in question. We see nothing in the proviso of § 40 of the act of June 14, 1897, "concerning local improvements," which militates against the conclusions announced in the cases above referred to. It may be admitted that the office of a proviso generally is to except something from the enacting clause, or to qualify or restrain its generality. If the enacting clause in said § 40 provides for the assessment of real estate, the proviso thereby confers no additional power to assess real estate, in view of the holding that the franchise and right of user of the railway company constitute property of a fixed and immovable character, like real estate. The proviso merely qualifies the enacting clause so far as to hold that the property of the railroad companies intended to be assessed might be described in any manner sufficient to reasonably identify the same.

It is said, however, by counsel for appellant, that the franchise and right of way of the Lake Street Elevated Railroad Company, assessed in this proceeding, is not the right of way of a street-railroad company occupying a portion of the street, and running its cars on the street surface, but that the appellant is a railroad company incorporated under the general railroad act, and operates its cars upon a structure about 20 feet from the surface of the street, supported on iron columns about 40 feet apart, resting on the curb lines. It not only appears that the iron columns in question rest upon the curb lines of the street, but that the stations by which the trains of the company are boarded are located above the surface of the street, with stairs leading thereto from the street. These elevated railroad companies

certainly do not appropriate to their own use and benefit as much of the surface of the street as do the surface street-railways. But it cannot be denied that they appropriate a part of the street and sidewalk, by means of the iron columns which support their structures, and by means of the stairs which lead up to their stations. There is no reason, therefore, why the doctrine of the cases above referred to should not be extended so as to include the franchise and right of way of elevated railroad companies. It is not true that the surface of the street is left as free from obstruction as though the elevated railroad company was not operating its road. Although the elevated railroad company does not occupy exclusively a portion of the street surface itself with its tracks, roadbed, and ties, yet it does occupy a portion of the street surface in the manner above indicated. There is no injustice, therefore, in holding it liable to assessment for the improvement of the street over which its structure is placed, and the use of which is to some extent obstructed thereby. In *Louisville & N. R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962, it was held that, under the powers conferred upon a city council by the city and village act, a viaduct over railroad tracks could be constructed on a public street, and paid for by special assessment as a local improvement. In *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520, the surface roads of street railways were placed substantially upon the same footing as the elevated structures of elevated street railroads, and it was there said that there was no good reason for making a distinction between the two classes of roads. We are therefore of the opinion that the court below committed no error in overruling the first objection thus presented to our notice by counsel.

2. It is contended on behalf of the appellant that the ordinance granting authority to appellant to maintain and operate its railroad in West Lake street constituted a contract between the city and appellant, by reason of which the city is precluded from levying a special assessment for this improvement against appellant's property. This objection has no force. The ordinance in question merely requires the appellant company to restore the pavements, gutters, sidewalks, water pipes, sewer pipes, or gas pipes, in case there is any disturbance of the same during the construction of the elevated road, and requires appellant to replace the same in as good condition as they were in before such disturbance. The ordinance in question contains nothing more than a simple safety clause, designed to prevent the destruction of improvements already existing in the highways over which an elevated structure is to be built. The ordinance in question in no sense embodies such a contract as is mentioned and discussed in *West Chicago Street R. Co. v. Chicago*, 178 Ill. 339, 53 N. E. 112, where the object of the ordinance there involved was to fix the share of the paving to be done by

the railway company; and it was there held that the doing of such work by the company acted as a commutation against being included in an assessment for the whole work, the burden being imposed as an equivalent for the assessment. No such construction can be given to any language employed in the ordinance which grants authority to appellant to maintain and operate its road.

3. It is furthermore contended in behalf of the appellant that the finding and judgment of the county court confirm the assessment upon more property than is described in the assessment roll, and for this reason are erroneous. If we understand the meaning of counsel in the objection thus made, it is that the judgment confirms an assessment upon the whole of the right of way of appellant, throughout its whole extent, while the assessment roll describes, and the evidence has reference to, that portion of the right of way which extends from the east curb line of Ashland avenue to the east curb line of Western avenue. When, however, we recur to the language of the judgment itself, we find that it is thereby ordered by the court "that said assessment [as modified by the court], as to the property of said objector, and all proceedings therein, be, and the same are hereby, confirmed." The judgment thus refers to "said assessment," and a reference to the assessment roll shows that the portion of the right of way, etc., sought to be assessed, is that portion which lies between the avenues above named. This objection, therefore, is untenable.

4. It is claimed that there is no authority in law for levying a special assessment up-

on a part only of the right of way or franchise of this railroad company, even if it cannot be assessed as an entirety; and it is therefore argued that the assessment is invalid, because it is upon that portion of the right of way, etc., which extends along Lake street from Ashland avenue to Western avenue, a distance of 1 mile, and not upon the whole right of way, which is 5 miles long. This precise question arose in *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437, where it was expressly held to the contrary of the contention here made by counsel. This objection is therefore overruled.

5. It is claimed that the finding of the court that the property of the appellant is benefited by the assessment to the extent of \$150 is not sustained by the evidence. The court below, to which the cause was submitted for hearing after a jury had been waived, heard the testimony upon this subject of three witnesses for appellant and four witnesses for the appellee, and thereupon decided that the benefits received by the appellant from this improvement amounted to the sum above specified. We are unable to say that the court was not justified in its finding upon this question of fact, inasmuch as it heard the witnesses, and was better able to judge of their credibility, and of the weight to be attached to their testimony, than this court can be, with nothing before it but the written record. Accordingly the finding made as to the benefits and the amount thereof will not be disturbed.

The judgment of the County Court of Cook County is affirmed.

INDIANA SUPREME COURT.

STATE of Indiana, Appt.,
v.
OHIO OIL COMPANY.

(150 Ind. 21.)

1. The state has a right to maintain a suit in its courts, both in its sovereign capacity and by virtue of its corporate rights.
2. The title to natural gas does not vest in any private owner until it is reduced to actual possession.
3. A statute making it unlawful to permit the escape of natural gas into the open air from a well for longer than two days after it is constructed is not unconstitutional.
4. The recital of a particular mischief

NOTE.—For waste of gas or oil by allowing its escape when there is no statute governing the matter, see *Hague v. Wheeler* (Pa.) 22 L. R. A. 141.

For statute prohibiting waste of gas by flambeau lights, see *Townsend v. State* (Ind.) 37 L. R. A. 294.

The constitutionality of the statute involved in the above case is sustained by the Supreme Court of the United States in another case of the same name, — *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. —, 20 Sup. Ct. Rep. 576.
47 L. R. A.

in the preamble of a statute does not limit the broader scope of the language of the act, which is neither ambiguous nor doubtful in meaning.

5. Wells producing both oil and gas are within the prohibition of the Indiana act of 1893 prohibiting the escape of gas from a well more than two days after it is constructed.
6. The right of the state to maintain an action for injunction against the unlawful escape of natural gas from a well into the open air is not precluded by statutory remedies for penalties and for the closing of the well at the owner's expense.
7. The continuous and persistent waste of natural gas to the detriment of the community at large and in violation of statute is a nuisance which may be abated by injunction.

(March 10, 1898.)

A PPEAL by the state from a judgment of the Circuit Court for Madison county in favor of defendant in a suit to enjoin defendant for wasting natural gas. *Reversed.*

The facts are stated in the opinion.

Messrs. Ferdinand Winter, C. C. Shirley, and M. A. Chipman, with Messrs. William A. Ketcham, Attorney General, Daniel W. Scanlan, and Merrill Moores, for appellant:

The injunction is sought by the state both in its sovereign capacity and by virtue of its corporate rights. The courts of the state and of the United States are open to it for any kind of relief which it may seek in either capacity.

Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Indiana v. Woram*, 6 Hill, 33, 40 Am. Dec. 378; *State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379; *State v. Adams Exp. Co.* 144 Ind. 549, 42 N. E. 483; *Adams Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; *State v. Chicago & E. I. R. Co.* 145 Ind. 229, 43 N. E. 226; *State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585; *Western U. Teleg. Co. v. State*, 146 Ind. 54, 44 N. E. 793.

It has been the recognized practice of other states to seek relief in equity in actions brought in the form in which this one has been.

People v. Canal Board, 55 N. Y. 390; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

The state is the real party in interest, and the matter of a relator is simply a matter of form.

State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 472, 15 L. R. A. 561, 51 N. W. 724; *State ex rel. McCain v. Metschan*, 32 Or. 372, 41 L. R. A. 692, 46 Pac. 791, 53 Pac. 1071; *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361; *Brower v. O'Brien*, 2 Ind. 423; *State ex rel. Sigler v. Madison County Comrs.* 92 Ind. 133.

Actions of this nature have always been brought by the United States in precisely the way that this suit was instituted, and in the name of the United States simply against the defendant or defendants.

United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15,998; *United States v. World's Columbian Exposition*, 56 Fed. Rep. 630; *United States v. Flournoy Live-Stock & Real-Estate Co.* 69 Fed. Rep. 886; *United States v. North Bloomfield Gravel-Min. Co.* 81 Fed. Rep. 243; *United States v. Debs*, 64 Fed. Rep. 724; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The state has already, as sovereign, in the proper exercise of its police power, declared unlawful the acts sought to be enjoined here.

Ind. Rev. Stat. §§ 7510 *et seq.*; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19.

Possession of the land is not necessarily possession of the gas.

Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *People's Gas Co. v. Tynor*, 131 Ind. 281, 16 L. R. A. 443, 31 N. E. 59; *Townsend v.* 47 L. R. A.

State, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 21.

The state has the right to go into its own courts for the purpose of seeking to enforce a proper respect for its own laws.

Ex parte Stebbel, 100 U. S. 395, 25 L. ed. 725; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374; *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159; *Hague v. Wheeler*, 157 Pa. 340, 22 L. R. A. 141, 27 Atl. 714; *State ex rel. McCain v. Metschan*, 32 Or. 372, 41 L. R. A. 692, 46 Pac. 791, 53 Pac. 1071; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 556, 36 L. ed. 543, 12 Sup. Ct. Rep. 689; *United States v. Flournoy Live-Stock & Real-Estate Co.* 69 Fed. Rep. 886; *United States v. North Bloomfield Gravel-Min. Co.* 81 Fed. Rep. 243; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. Rep. 70; *Columbian Athletic Club v. State ex rel. McMahon*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914.

It has always been the law, both in England and the United States, even in the absence of such a statute as exists in Indiana, that the state may enjoin a public nuisance in an action brought by the attorney general.

High, *Inf.* § 1554; Wood, *Nuisances*, § 77. Notwithstanding the remedy by prosecution of a nuisance by indictment, its continuance may be prevented by an injunction.

Reichert v. Geers, 98 Ind. 73, 49 Am. Rep. 736; *Smith v. Fitzgerald*, 24 Ind. 316; *Owen v. Phillips*, 73 Ind. 288; *Bowen v. Maury*, 117 Ind. 261, 19 N. E. 526; *First Nat. Bank v. Sarile*, 129 Ind. 201, 13 L. R. A. 481, 28 N. E. 434; *McLaughlin v. State*, 45 Ind. 341.

Trespass, which may be prosecuted criminally, may nevertheless be enjoined.

Thatcher v. Humble, 67 Ind. 444; *Ross v. Thompson*, 78 Ind. 96; *Kyle v. Kosciusko County Comrs.* 94 Ind. 115; *Erwin v. Fulk*, 94 Ind. 238; *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Champ v. Kendrick*, 130 Ind. 549; *McCaslin v. State*, 44 Ind. 174; *Richmond v. Smith*, 148 Ind. 294, 47 N. E. 630.

This is by no means the first time in the history of the state that the state has undertaken to regulate lawful occupations or the use of property.

Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *People ex rel. Nechamus v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. Rep. 564; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Health Department v. Trinity Church*, 145 N. Y. 43, 27 L. R. A. 710, 39 N. E. 833; *Fry v. State*, 63 Ind. 552; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253.

In the face of a great and irreparable wrong the state is no more bound to await the slow processes of the criminal or common-law courts to enforce its laws, and to protect itself and its rights and those of its

citizens, than is the citizen himself remanded to common-law courts and common-law remedies.

Emperor of Austria v. Day, 3 De G. F. & J. 217; *People v. Gold Run Ditch & Min. Co.* 60 Cal. 138, 4 Pac. 1152; *People ex rel. Roberts v. Beaudry*, 91 Cal. 220, 27 Pac. 610; *People v. Oakland Water Front Co.* 118 Cal. 234, 50 Pac. 305; *State ex rel. Circuit Court Attorney v. Saline County Ct.* 51 Mo. 350; *State v. Curators State University*, 57 Mo. 178; *People v. Vanderbilt*, 28 N. Y. 399; *State ex rel. Crosby v. Dayton & S. E. R. Co.* 30 Ohio St. 439; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631; *Atty. Gen. v. Blount*, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *Atty. Gen. v. Hunter*, 16 N. C. (1 Dev. Eq.) 12; *Atty. Gen. v. Richards*, 2 Anstr. 603; *Atty. Gen. v. Parmeter*, 10 Price, 378; *State v. Bowen*, 38 W. Va. 91, 18 S. E. 376; *State v. Pacific Guano Co.* 22 S. C. 50; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029; *Holmes v. State*, 100 Ala. 291, 14 So. 51; *Cunningham v. Dublin*, 1 Bligh, N. R. 312.

Messrs. R. R. Stephenson, George Shirts, and W. R. Fertig, for appellee:

In virtue of its corporate rights the state has no interest whatever in any mineral found beneath the surface of the earth. Neither the state nor the government made any reservation of such minerals, and its corporate rights are therefore gone, and this is the clear distinction between the case in hand and the cases cited for appellant.

Where there is a statutory remedy, injunction will be denied, and this must apply to the state as a suitor just as much as to another who brings a civil action.

1 Spelling, Extraordinary Relief, § 13; *Brown's Appeal*, 66 Pa. 155; High, Extr. Legal Rem. §§ 18, 179.

Mr. M. F. Elliott, also for appellee:

Every court in the United States which has passed upon this question has held that oil and gas in place is the property of the owner of the land in which they are contained.

Oil in place is a part of the realty.

Houghton's Appeal, 88 Pa. 198; *Gill v. Weston*, 110 Pa. 312; *Wettengel v. Gormley*, 160 Pa. 559; *Brown v. Beecher*, 120 Pa. 590; *Kelley v. Ohio Oil Co.* 57 Ohio St. 317, 39 L. R. A. 765, 49 N. E. 399; *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222, 19 S. E. 436.

A person owning an oil well from which large quantities of gas may be escaping is utilizing his gas as far as he is able to do. He is utilizing the pressure to force the oil to the surface. His more fortunate neighbor is able to use both the oil and gas.

They are both entitled to the reasonable use of their own property in the manner best calculated to promote their own individual interests.

Re Furman Street, 17 Wend. 658; *Re Wall Street*, 17 Barb. 639; *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 28 N. E. 1040; *Home Ins. Co. v. New York*, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.
47 L. R. A.

Legislative declaration as to what is a proper exercise of police powers is not conclusive or binding upon the courts.

Laulton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Coe v. Schultz*, 47 Barb. 64; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Hey Sing Ieok v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115.

McCabe, J., delivered the opinion of the court:

The state of Indiana, by her attorney general and the prosecuting attorney in the Madison circuit court, brought suit against the appellee, the Ohio Oil Company, seeking to enjoin it from wasting natural gas. The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and the plaintiff electing to abide said demurrer, and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint, and that defendant recover costs. Upon this ruling alone the state assigns error.

The substance of the complaint is that: For many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana a large deposit of natural gas utilized for fuel and light by the people of those counties, and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette, and others of the most populous cities of the state, to which cities the gas is conducted, after being brought through wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named, and other portions of Indiana, is contained in and percolates freely through a stratum of rock known as "Trenton Rock," comprising a vast reservoir, in which the gas is confined under great pressure, and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas thus obtained is the cheapest and best known to civilization, and the value of the natural gas deposit to the state and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886, vast sums of money have come into the state, and have been invested in building up large manufacturing interests, and vast sums of money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have be-

come and are greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation, and for the permanent value of their property, upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit; and, in the event that the supply of gas is exhausted in the territory, many of such manufacturing enterprises, in which thousands of citizens of Indiana find employment at remunerative wages, will be compelled to suspend operations. Their employees will be thrown out of employment, and many of them, being wholly dependent upon their labor for support, may and will become charges upon the state and its municipal subdivisions. The property of the manufacturing enterprises, and the vast investments depending on them and related to them, will become worthless, and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now invested in these enterprises. In the cities named, and in all the territory known as the "Gas Belt," the inhabitants have for years used practically no other fuel than natural gas. Their houses, in many instances, are constructed with a view to the use of natural gas, and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands, is very much less than that of any other fuel that has ever been or can be procured by them, and to the other inhabitants of the state using natural gas it has become and is a source of great convenience, comfort, and increased happiness, because of its cheapness, convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities. The state's wealth, and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas, have been greatly increased, and will, in the event gas is exhausted, be correspondingly curtailed. The state of Indiana relying upon the permanent supply of gas, has, at great expense, equipped many of its public institutions, including the State House, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the institutions for the care of the orphans of American soldiers and sailors, and other public institutions, owned and maintained by the state of Indiana and its various subdivisions, together with the courthouses in many counties and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened, and the comfort and happiness of their inmates and occupants immensely increased. Natural gas

47 L. R. A.

exists in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected, it will last for many years, and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the state will continue to be benefited and enhanced, and the comfort, enjoyment, and happiness of the people of the state greatly increased. It is charged that about May 25, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells, drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them, within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the state's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory, dependent upon the continued supply of natural gas for fuel as aforesaid, has been greatly damaged and decreased in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefinitely hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that, if the gas continues to flow from the wells, the supply of natural gas upon which the citizens of the state dependent will be greatly diminished; that the pressure of gas, as found in said Trenton rock, will be greatly diminished, and that by the diminution of such pressure, water will accumulate in the rock stratum, and ultimately and entirely displace and overcome the gas supply: that because of the wrongful acts of the defendant above described, heretofore committed and now continuing, its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted. And plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue; that the plaintiff's injuries on ac-

count thereof are and will be great and irreparable, and increase as said gas is permitted to flow and the number of wells wherein the same is unconfined continues to increase; and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant." It is charged that the penalties provided by law for the unlawful acts above described are wholly inadequate, and that the defendant has openly defied, and continues to defy, the lawfully constituted authorities of the state in their efforts to enforce and recover, in the name of the state, the penalties provided by law for such wrongful acts committed by the defendant, and that injunctive relief is necessary in order to restrain the continued wrongful acts of the defendant, and that, unless the same is given, one of the greatest natural resources of the state will be ultimately destroyed; that, in order to obtain even a partial and inadequate remedy for the wrong done, a multiplicity of suits must be resorted to, entailing great expense, and affording no considerable relief, unless the defendant is restrained and prohibited by injunction from doing the things complained of. It is therefore prayed that upon final hearing the defendant, and its agents, servants, and employees, be perpetually enjoined and prohibited from further suffering or permitting the natural gas produced in said wells, or any of them, to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells, or by confining the gas in tanks, pipes, or other proper receptacles, and that, failing to do so, the sheriff of Madison county be ordered to anchor, secure, and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the costs of suit.

It is intimated by appellee's learned counsel that the state has no right to maintain such a suit; but, whether it be on account of lack of capacity to sue, or simply because the complaint does not state facts sufficient, is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the state to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely, "that the plaintiff has not legal capacity to sue." Burns's Rev. Stat. 1894, § 342; Rev. Stat. 1881, § 339; Horner's Rev. Stat. 1807, § 339. But the courts of the state and United States are open to the state, both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here. *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *Indiana v. Woram*, 6 Hill, 33, 40 Am. Dec. 378; *State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379; *State v. Adams Exp. Co.* 144 Ind. 549, 42 N. E. 483; *Adams Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; *State v. Chicago & E. I. R. Co.* 145 Ind. 220, 43 N. E. 226; *State v. Union Nat. Bank*, 145 47 L. R. A.

Ind. 537, 44 N. E. 585; *Western U. Teleg. Co. v. State*, 146 Ind. 54, 44 N. E. 793; 23 Am. & Eng. Enc. Law, p. 80.

The appellee contends that "the question of the exhaustion of the gas is certain, according to the averments in both the injunction cases; and the question therefore is, Who shall be permitted to exhaust it?" "The state contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company, which is also using gas for the purpose of a legitimate business. In such matters of private concern the state has no interest, and should not have any." It is true the production of oil is a legitimate business, but the waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this state. Burns's Rev. Stat. 1894, §§ 2316-2318, 7510-7512; Acts 1891, p. 55; Acts 1893, p. 300. Section 1 of the latter act provides: "That it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles." The constitutionality of the latter act is assailed by the appellee. But the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19, for every conceivable constitutional objection, and for every objection urged to the act now under consideration, and this court, in that case, upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air, and that a statute prohibiting such a reasonable use is unconstitutional. And several Pennsylvania and Ohio cases are cited, together with one from New York, and one in West Virginia, to the effect that petroleum is a mineral, and while it is in the earth it is a part of the realty, and that when it reaches a well, and is produced on the surface, it becomes personal property, and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that

the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land, to the center of the earth, and for an unlimited distance upward from the surface. The force of these authorities depends entirely upon the analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two substances in their nature. This court has likened natural gas, as to its property characteristics, to fish in the waters and wild game in the forest, before taken and reduced to possession. *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 21, and cases there cited. But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court, and which had in a gas case been previously quoted by this court. *People's Gas Co. v. Tyner*, 131 Ind. 281, 16 L. R. A. 443, 31 N. E. 60. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." The part of this quotation that seems favorable to appellee's contention is this: "They [the water, gas, and oil] belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone." This much of the quotation was not adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the *Tyner Case*, 131 Ind. 281, 282, 16 L. R. A. 443, 31 N. E. 60, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota, in *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098, having under consideration the constitutionality of a certain game law of that state, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity as the representative, and for the benefit of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a

matter of public interest; and it is within the police power of the state, as the representative of the people, in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizens; and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also imposing limitations upon the right of property in such game after it has been reduced to possession.'" And this court, in the same case, also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found, or in the waters of which the fish are found. And there is no such thing in such laws to the effect that, after title has once vested by actual reduction to possession, the same may wander off and vest in someone else. To say that the title to natural gas vests in the owner of the land in or under which it exists to-day, and that to-morrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd, and contrary to all the analogies of the law, than to say that wild animals or fowls, in "their fugitive and wandering existence," in passing over the land, become the property of the owner of such land, or that fish, in their passage up or down a stream of water, become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land, and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and, therefore, that the act from which we have quoted is not violative of the Constitution, as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit,—the prevention of the waste of gas; that it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe, and negligent sinking, maintenance, use, and operation of natural gas and oil wells: Therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be

extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble. 23 Am. & Eng. Enc. Law, pp. 331, 332, and authorities there cited; *Holbrook v. Holbrook*, 1 Pick. 251; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 288; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Hughes v. Done*, 1 Q. B. 301. In *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one 'of great public importance,' and 'to be encouraged by legislative sanction and liberality,' and that 'the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins, or other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands, and connecting them with the railroad systems of the country.' But, as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature, is, in itself, fatal to the claim set up." We have no doubt, from the language of the act and the circumstances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas. 23 Am. & Eng. Enc. Law, pp. 335, 336; *Edger v. Randolph County Comrs.* 70 Ind. 331; *Stout v. Grant County Comrs.* 107 Ind. 343, 8 N. E. 222; *May v. Hoover*, 112 Ind. 455, 14 N. E. 472; *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69, 13 N. E. 263.

It is next contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone and to wells producing gas alone, and not to what counsel call "combination wells," producing both oil and gas, as is the case with appellee's wells, as disclosed in the complaint. At the time of the passage of the act, the chief waste of natural gas which was going on, and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889-90, and the current history of the times, resulted from what counsel term "combination wells," producing both oil and gas. The waste from wells producing gas alone was small, in comparison with that from such combination wells. In the light of these historical facts, it would be extremely absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open. But even the language of the statute forbids such construction. The act made

unlawful by the express words of the section quoted is "to allow or permit the flow of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well; and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas to escape from such well would not be good? Certainly not.

It is next contended that there is no authority or right of action in the state at common law, and especially that the state cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the Civil Code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint. The reason assigned in argument why the state cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of \$200 for each violation of the act, and a further penalty of \$200 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the state, for the use of the county in which such well is located, with attorney's fees and costs of suit. And another remedy, provided in another section of the act, is that certain persons in the vicinity are authorized to go upon the land where any well is situate from which gas or oil is allowed to escape in violation of the act, and shut up the same, and pack and tube said well so as to prevent the escape of gas or oil, and maintain a civil suit against the owner for the costs of such closing of said well, with attorney's fees and costs of suit. But this court has gone much further than to hold that the fact of the civil remedy given to recover penalties and the other remedies for violations of the act does not bar the right to an injunction. In the case of *People's Gas Co. v. Tyner*, 131 Ind. 281, 16 L. R. A. 443, 31 N. E. 60, it was said: "No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerin within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong, if he suffers an injury peculiar to himself and not sustained by the public in general." In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute. And the same rule was applied in *Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914, where

this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. . . . The rule to be observed in such cases is quoted, at page 386 [*Taylor v. Salmon*, 4 Myl. & C. 142], from Lord Chancellor Cottenham, 'that it is the duty of the courts of equity (and the same is true of all courts and of all institutions) to "adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.'" This rule the author [Judge Redfield] concludes is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America." Our Code provides that "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. . . . The nuisance may be enjoined or abated and damages recovered therefor." Burns's Rev. Stat. 1894, §§ 290, 292; Rev. Stat. 1881, §§ 289, 291; Horner's Rev. Stat. 1897, §§ 289, 291. The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with the comfortable enjoyment of life and the property of the citizens of the state.

The supreme court of Kansas, in *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this category. The supreme court of California, in a suit by the attorney general, to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee river with the effect of destroying the fish therein, in sustaining the action, which is closely analogous to this action, the court used the following language, which we adopt: "It is alleged that the acts of the defendant have the effect of poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance. . . . The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (*Ex parte Maier*, 103 Cal. 476, 37 Pac. 402), as in England it was in the King; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and 47 L. R. A.

preserved and expressly provided for by the statutes of this and every other state in the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.* 107 Cal. 219, 40 Pac. 486. . . .

The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habituated or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. . . . While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. . . .

The fact that acts of the character alleged are by the Penal Code made a misdemeanor, and punishable as such, does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. Nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information, without the intervention of a private relator." *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374. The same doctrine is laid down in *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339, *Com. v. Pittsburgh & C. R. Co.* 24 Pa. 159; *State ex rel. McCain v. Metschan*, 32 Or. 372, 41 L. R. A. 692, 46 Pac. 791, 53 Pac. 1071. In the 24 Pa. case, *supra*, it was said: "The matter complained of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned, for no neglect is chargeable against the state. Its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the state, which thought fit to make it, and against the public officers, who are intrusted with its custody. . . . It is therefore ordered that an injunction issue."

The state of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining, or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the mining company, the case was removed into the circuit court of the United States. From the decree of that court the mining

company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court, awarding an injunction, said: "An instructive case upon this subject is *Atty. Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361, 363, 364. That was an information in equity, in the name of the attorney general, to restrain a corporation from doing certain illegal acts, the necessary effects of which would be, not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance, by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation, detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that, where the nuisance is a public one, an information by the attorney general was the appropriate remedy. After observing that the preventive force of a decree in equity restraining the illegal acts before any mischief was done would give a more efficacious and complete remedy than an indictment or proceedings under a statute for the abatement of the nuisance, the court said: "There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. . . . If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief.' So, in *Eden on Injunctions*: 'The usual, and perhaps the more correct, mode of proceeding in equity in cases of public nuisance is by information at the suit of the attorney general.' Page 267. Mr. Justice Story said that an information in equity at the suit of the attorney general would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.' Story, *Eq. Jur.* §§ 922-924; *People v. Vanderbilt*, 26 N. Y. 287; *District Attorney v. Lynn & B. R. Co.* 16 Gray, 242, 245; Kerr, *Inj.* 262, 263; 1 Joyce, *Inj.* 120. These principles are applicable to the present case. The remedy at law for the protection of the state in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such roots and deposits without its consent. The *Cooasaw* 47 L. R. A.

Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the state. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the state of the digging, mining, and removing of phosphate rock and phosphatic deposits in the bed of the Cooasaw river. Such security was properly given by the decree below. Decree affirmed." *Cooasaw Min. Co. v. South Carolina*, 144 U. S. 566, 36 L. ed. 543, 12 Sup. Ct. Rep. 689.

Accordingly, in *Cranford v. Tyrrell*, 128 N. Y. 344, 28 N. E. 515, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." And in *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 126, 4 So. 106, it was held that "the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States in its sovereign capacity may enjoin hydraulic mining to the detriment of navigable streams. *United States v. North Bloomfield Gravel-Min. Co.* 81 Fed. Rep. 243. In a case where the state officers failed to enforce the law against brokerage in railroad tickets, the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted the injunction, and, in answering the objection that such a proceeding was novel and unprecedented, said: "I return, now, to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject.

Of course, this contention has been over-ruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion, regulated by analogy,—by what would be manifestly just in view of all the existing conditions,—and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy, and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization. A similar objection that novel use was being made of the writ of injunction was pressed in the case of *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 54 Fed. Rep. 751, and was answered by the court as follows: "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording relief to the one party without imposing illegal burdens on the others, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the supreme court in *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, said: 'It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic, by new methods of intercourse and transportation.'" *Nashville, C. & St. L. R. Co. v. McConnell*, 32 Fed. Rep. 76. To the same effect is our own case of *Columbian Athletic Club v. State ex rel. McMahon*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914.

47 L. R. A.

It is true that, as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession by the landowner, when drawn into his well, pipes, tanks, or other receptacles, thereby becomes his personal property, subject to his dominion. But, as said by this court in *People's Gas Co. v. Tyner*, 131 Ind. 281, 16 L. R. A. 443, 31 N. E. 60: "The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others." Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this state has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But the appellee tries to excuse its conduct on the score that it cannot mine and utilize the oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there were, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the store house of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it cannot draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the state, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the state and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands, and perhaps millions, of the people of Indiana, and the injury—the exhaustion of natural gas—is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence, as compared with that calamity which it mercilessly and cruelly holds over

the heads of the people of Indiana, and, in effect, says: "It is my property, to do as I please with, even to the destruction of one of the greatest interests the state has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this state, imported from other states, and we could continue to do so if the production of oil should cease in this state. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this state are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the

complaint states facts sufficient to constitute a cause of action. Hence, the circuit court erred in sustaining appellee's demurrer to the complaint.

The judgment is reversed, and the cause remanded, with instructions to overrule said demurrer, and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

After this case was returned to the lower court a final judgment was entered, a second appeal taken, which was affirmed *pro forma* on the authority of the above opinion, and the case was then taken to the Supreme Court of the United States, where it was affirmed April 19, 1900.

NORTH DAKOTA SUPREME COURT.

Jay F. RUSSELL, *Respt.*,

v.

Christopher MEYER *et al.*, *Appts.*

(7 N. D. 335.)

- *1. Complaint examined, and held to state a cause of action for trespass on realty, and not for the conversion of personalty.
2. The owner of unoccupied land may sue for trespass.
3. Where a tenant is in possession, the owner may sue in trespass on the case for the damage to his reversionary interest.
4. One who has the equitable title and full right to call for the legal title may, as against a trespasser, maintain the same action as one who has the entire ownership of land, legal and equitable.

*Headnotes by CORLISS, Ch. J.

NOTE.—*Sufficiency of equitable title to sustain action for trespass to land.*

- I. Action against owner of legal title.
- II. Action against mere wrongdoer, generally.
- III. Action for permanent injury.
- IV. Statutory action.

Since it is now almost uniformly held that possession alone, without title, is sufficient to support the common-law action of trespass *quare clausum fregit* against a mere wrongdoer for an injury to the possession as distinguished from one to the freehold, the question suggested by the title of the note becomes important only when the holder of the equitable title, or one claiming under him, seeks to maintain the action against the holder of the legal title, or one acting under the latter's authority; or when, not being in actual possession, he seeks to draw the constructive possession to his equitable title, and thus maintain his action against a mere intruder; or when, being in possession, actual or constructive, he seeks to recover for an injury to the freehold as distinguished from one to the possession; or, finally, when he attempts to bring an action under a statute giving the right of action to the "owner" of the premises.

- I. Action against owner of legal title.

Safford v. Hynds, 39 Barb. 625, holds that one 47 L. R. A.

5. A special verdict is one which determines specifically the ultimate facts which are in issue, and not one which determines evidential facts on which such ultimate facts rest.

6. Where the grantee in an unrecorded deed sells the land to another, and for the purpose of putting the title in the purchaser without the expense of having the old deed recorded destroys such deed, and procures to be executed to the purchaser a deed directly from the original grantor to the purchaser, no legal title vests in such purchaser, but only an equitable interest, the grantor in such deed having no legal title to convey. A court of equity, however, will compel the holder of the legal title to convey it to such purchaser.

(April 28, 1898.)

A PPEAL by defendants from an order of the District Court for Richland County

in possession of property under authority of the *cestui que trust* in a resulting trust may maintain trespass against the holder of the legal title for an injury to his possession.

On the other hand, Chicago & W. I. R. Co. v. Snee, 33 Ill. App. 416, holds that the equity of redemption in a grantor under a deed of trust, whatever its force in equity, will not support an action of trespass against a grantee from the trustee.

In Watts v. Loomis, 81 Mo. 236, the plaintiff claimed under a deed which was sufficient to convey the equitable, but not the legal, title. The defendant claimed under a subsequent deed from plaintiff's grantor. Both had been in actual possession—the plaintiff in possession of the surface, and the defendant of the mines below the surface. The plaintiff's possession antedated the defendant's. The court held that plaintiff could maintain his action.

When the equitable title rests upon an executory contract of purchase which has not been completely performed by the purchaser, his right to maintain the action against the owner of the legal title depends upon his right to possession under the contract.

Thus, it is held in Smith v. Price, 42 Ill. 390, that a party in lawful possession under such a contract may maintain trespass for injuries thereto, even against the owner of the legal title.

denying a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for the entry upon certain real estate and tearing down and carrying away a barn. *Reversed.*

The facts are stated in the opinion.

Meers, McCumber & Bogart for appellants.

Mr. W. E. Purcell for respondent.

Corliss, Ch. J., delivered the opinion of the court:

Defendants have appealed from a judgment based upon the verdict of a jury. One of the errors assigned is that the district court should have compelled the plaintiff to elect whether he would treat the action as an action for trespass to real estate or for the conversion of personal property. The averments of the complaint were that plain-

tiff was the owner of certain real estate, and that defendants forcibly entered the same, and tore down and removed a barn erected thereon. While it is possible that the pleading was vulnerable to attack by motion to render it more definite, we are clear that it states only one cause of action, i. e., an action for trespass to real property. It is true that the plaintiff does not allege that he was in the actual possession of the premises, but actual possession is not necessary. Constructive possession, resting upon title, is sufficient where there is no adverse possession. 26 Am. & Eng. Enc. Law, p. 585, and cases cited. When a part of the realty is severed therefrom by a wrongdoer, the owner may sue for the trespass, or he may elect to treat the act of severance as unlawful, and sue for the conversion of the property as a chattel, it having been rendered personalty by the act

Connally v. Hall, 84 Ga. 198, 10 S. E. 738, is to the same effect.

Inderlied v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 188, upheld an action by a purchaser under such a contract, entitled to immediate possession, for the removal of timber after the time specified in a provision of the contract reserving to the vendor the right to cut and remove the timber.

In *White v. Livingston*, 10 Cush. 259, plaintiff was in possession under a bond to convey, which gave him the right to possession. The court upheld his right to maintain an action of trespass against the grantee in a quitclaim from the vendor. The decision was, however, put upon the ground that the bond was in effect a demise of the premises so long as the purchaser was not in default, and that his tenancy could not be terminated by the vendor's conveyance.

On the other hand, the right of one claiming under an executory contract which confers no right to possession, to maintain the action against the owner of the legal title, or one acting under his authority, before payment of the purchase price, has been denied in *Greve v. Wood-Harmon Co.* 173 Mass. 45, 52 N. E. 1070; *Fagan v. Scott*, 14 Ill. 162; and *McGrew v. Foster*, 113 Pa. 642, 6 Atl. 346.

Halligan v. Chicago & R. I. R. Co. 15 Ill. 560, held that the grantee from a vendee in an executory contract, who at one time held possession through his tenant, could not maintain trespass against the owner of the fee who entered after the tenant had abandoned the premises, although as against a stranger without color of title he might prevail.

II. Action against mere wrongdoer, generally.

Rogers v. White, 1 Sneed, 68, holds that a trustee may maintain the action against a third person, even if the *cestui que trust* be in actual possession, since in legal contemplation such possession is the trustee's. *Cox v. Walker*, 26 Me. 504, on the contrary, holds that if the *cestui que trust* be in possession, he, and not the trustee, should bring the action. If the former case is to be followed, the ownership of the equitable title, instead of supporting an action by one in possession under it, deprives him of a right of action which his mere possession would otherwise confer upon him.

Considered as an aid to a common-law action by its holder for an injury to the possession against a mere wrongdoer, the only function of the equitable title is to draw to itself the constructive possession, which, in the absence of actual possession by the plaintiff, is essential to the maintenance of the action. That it per-

forms that function when the premises are not actually occupied by anyone is held in *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350, and *Phillips v. De Groat*, 2 Lans. 192.

So, also, *McPeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076, upholds the right of the locator of a mining claim on public land before patent issued, to maintain trespass against an intruder for cutting timber, although the only acts of possession on plaintiff's part were those done in compliance with the statute relative to the acquisition of mineral land.

In *Bechtel v. Rhoads*, 3 Serg. & R. 333, the plaintiff was permitted to recover for a trespass committed upon property, not in the actual possession of anyone, in the interval between the issuance of a warrant and patent to him; but in that case the patent had been granted before the commencement of the action, and was held to relate back to the time of the issuance of the warrant.

Hunt v. Taylor, 22 Vt. 556, holds that a contract to purchase a lot operates to extend the purchaser's actual possession of a part of the lot to the entire lot, and thus enables him to maintain an action against a stranger to the title for a trespass on any part of the lot.

McMillan v. Hadley, 4 N. C. (2 Car. Law Repos.) 89, however, denied the right of a purchaser at an execution sale, who was not in actual possession, to recover for a trespass committed after the sale but before the execution of the deed. The court says that plaintiff in such an action must have either actual or constructive possession, and that title at law is essential to constructive possession.

It is apparent, from the foregoing citations, under this division, that the latter case has not been followed, and that it is generally held that the equitable title will draw to it the constructive possession essential to this form of action when the premises are vacant.

However, the efficacy of an executory contract, before the purchaser has become absolutely entitled to a conveyance, to create a constructive possession, is dependent upon the question whether or not it gives him the right to possession. The court, in *Moyer v. Scott*, 30 Mich. 345, says that, whatever the rights of a contract purchaser when he has fulfilled all the conditions and become absolutely entitled to a conveyance, he cannot before that time maintain trover or trespass for an injury to the freehold unless he has acquired possessory rights.

The equitable title may not only operate to create a constructive possession in its holder when the premises are unoccupied, but also in some cases when they are actually occupied by another. Thus, *Abbott v. Sturtevant*, 30 Me.

or the tortfeasor. But if he decides to sue in conversion, all the legal consequence of his election must follow. When he insists that his interest in a chattel has been destroyed, it is as a wrong to such chattel that he must prosecute his action; and he can only recover the value of such chattel after it became such, and not the damage which the severance and removal thereof from the realty have caused. It is obvious, from the allegations of the complaint herein and the prayer for relief, that plaintiff has not elected to sue in conversion, but for damages to the realty resulting from a trespass. He avers that the barn was worth \$230, and this is the sum which he seeks to recover. Assuming that there was no damage to the premises aside from the demolition and carrying away of this structure, it is clear that the damage to plaintiff's realty would be the exact amount of the value of such structure. But such value would not form the proper measure of damages, on the theory of an action in conversion; for, after this erection had become a chattel property by severing it from the land, it would no longer possess value as a barn, but only as so much lumber, much less valuable, because an important element of value, i. e., the cost of construction, would then have disappeared.

It is claimed that the court erred in refusing a request of defendants' counsel to direct the jury to render a special verdict. But in our opinion what counsel for the defendants asked was not that the jury be requested to return a special verdict, but to answer certain questions framed by counsel, which went more into details on the issues in the case than a jury are required to go, even when they are directed to render a spe-

cial verdict. The court was requested to propound to them the following questions, among others: "How many loads of lumber were taken down and carried away by the defendants?" "About how many feet of lumber in all did the defendants take away from the lot?" "What was the value of the lumber taken by said defendants?" "What was that building that was taken by the defendants worth on the day it was taken, but before it was taken down by the defendants?" "What was the lot on which the building was situated, with the building thereon, worth on the day, but just before the building was torn down?" "What was the lot worth, exclusive of the building, on the day the building was torn down?" "What was the building in question worth, as it stood on the lot just prior to the time it was taken down?" By a special verdict, a jury set forth their findings on each point in issue, but they are not to find anything except the ultimate facts in controversy. If there are, for instance, three questions of fact in a case which should be submitted to the jury, either party may ask that the jury be required to answer categorically each one of these questions in the form of a special verdict. But the jury cannot be further requested to answer in addition any number of special interrogatories which the ingenuity of counsel may frame. What the court is commanded by the statute to do, when so requested by either party, is to direct the jury to find a special verdict. Rev. Codes, § 5445. Section 5444 clearly shows what a special verdict shall embrace. It must contain only the conclusions of fact, and not the evidence to prove them. One of the issues of fact in this case was concerning the

40, holds that the purchaser of an equity of redemption at an attachment sale takes the right to immediate possession (except as against the mortgagee), and may maintain trespass *quare clausum fregit* against one exercising ownership under a conveyance made by the debtor after attachment.

Fernald v. Linscott, 6 Me. 234, holds that a purchaser of the equity of redemption may, before entry by the mortgagee (who holds the legal title), maintain trespass against the mortgagor in possession who cuts and takes off growing grass.

But Buck v. Gilson, 87 Vt. 653, decides that a purchaser at a judicial sale of a husband's interest in real property, the legal title to which is held by the wife, cannot maintain an action of trespass against the husband who remains in possession, even if at the time of sale he owned the entire equitable estate, and the legal title was vested in his wife merely as trustee, holding that the proper course for the purchaser is to obtain the legal title.

III. Action for permanent injury.

Since a permanent injury affects the freehold, and not merely the possession, it is apparent that mere possession, whether actual or constructive, will not support the action, or at least will not permit recovery for the full damages; and thus it may become necessary for the equitable owner, even if in actual possession, to rely upon his equitable title.

Carney v. Reed, 11 Ind. 417, holds that posses-

sion under an equitable title will support an action for a permanent injury, and Gulf, C. & S. F. R. Co. v. Clark (Ind. Terr.) 51 S. W. 962, made a similar decision in favor of a plaintiff in possession of land by virtue of the homestead laws, who had not acquired a complete legal title.

In Jones v. Taylor, 12 N. C. (1 Dev. L.) 435, however, an action for a trespass *quare clausum fregit* for a permanent injury was brought by a vendor against third persons. His right to maintain the action was disputed upon the ground that it lay in the owner of the equitable title who was in possession. The court held that the purchaser's possession did not interfere with the vendor's possession, and that while the purchaser might maintain an action for an injury more immediately affecting his possession, the vendor was the proper party to bring the action when the injury affected the freehold.

IV. Statutory action.

Gravlee v. Williams, 112 Ala. 539, 20 So. 952, holds that the word "owner" in a statute giving a right of action to the "owner" to recover a penalty from one who cuts trees on the land, means the owner of the legal estate, and does not include the owner of an equitable estate under an executory contract; but the contrary is distinctly held in Walton v. Pollock, 12 Pa. Co. Ct. 216, and Kulp v. Bird (Pa.) 7 Cent. Rep. 576, 8 Atl. 618.

G. H. P.

damage to plaintiff's realty caused by this trespass. Three of the questions framed by counsel for defendants related to the evidence bearing on such issues, and not to the ultimate fact. The court was requested to ask the jury to say how many loads of lumber were carried away by defendants, how many feet of lumber were removed by them, and what the value of such lumber was. What the jury were to determine in the case was not the evidential facts, but, in the light of them, the ultimate fact as to the damage to the land which the trespass of the defendants had caused the plaintiff. The true rule is stated by Mr. Thompson in his work on Trials: "Another leading rule in regard to special verdicts is, that they should find the ultimate or constitutive facts which are necessary to support the judgment of the court, and should not find those matters which are merely evidentiary in their nature, and which merely tend to show the existence of the ultimate facts." § 2652.

It is urged that, inasmuch as the plaintiff was not in actual possession of the land at the time of the trespass, he cannot recover because he has failed to show that he was at such time the owner of the legal title thereto. It appears that at a time anterior to the trespass the premises were owned by Jay Russell, the plaintiff, and W. H. Davenport, under a deed to them which was duly recorded, each owning one half. They conveyed through different grantees their respective interests, and finally the fee was vested in A. G. Divet. Divet sold the property to the plaintiff. However, instead of executing a deed to the plaintiff, he destroyed all the intermediate deeds, which had not been recorded, and caused a deed to be executed by Davenport to the plaintiff. Thus, upon the public records, when the latter deed should be recorded, it would appear that plaintiff was the owner of the entire lot, the deed to himself and Davenport vesting a one-half interest in him, and the deed from Davenport to himself transferring to him the other half. It is obvious, however, that Divet did not by the destruction of such deeds divest himself of his legal title to the premises. 2 Jones, Real Prop. § 1259, and cases cited; Rev. Codes, § 3519. There is, however, authority for the proposition that the effect of a voluntary destruction of a deed is to revest the legal title in the grantor if that is the purpose of the party, the ground of such holding being an equitable estoppel. He who has deliberately put it out of his power to prove his title by the best evidence shall not be permitted to produce secondary evidence to sustain it, and therefore he can never establish such title in a court of justice. It follows that he has in law no title, because he is powerless to assert it. So runs the reasoning of these cases: *Holbrook v. Tirrell*, 9 Pick. 105; *Barrett v. Thorndike*, 1 Me. 73; *Com. v. Dudley*, 10 Mass. 403; *Trull v. Skinner*, 17 Pick. 213; *Tolson v. Ward*, 1 N. H. 9; *Stanley v. Epperson*, 45 Tex. 645; *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 410. We do not 47 L. R. A.

deem these decisions sound, and our statute is decisive. Rev. Codes, § 3519. See 2 Jones, Real Prop. § 1259. But, although no legal title passed from Divet to plaintiff, still he has an equitable title to the land in question. Divet, the owner of the legal title, has sold the land to him, and has presumably received his pay; for he testified on the trial that he destroyed these deeds, and had Davenport convey to plaintiff for the purpose of carrying out his agreement to sell the premises to plaintiff. A court of equity would treat him as a mere trustee, and require him to convey the land to the plaintiff should the latter seek such relief. As against the defendants who are wrongdoers, —who failed to establish any interest in the land,—the plaintiff's equitable title is sufficient to sustain this action for trespass. *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436; *Inderslied v. Whaley*, 65 Hun, 407, 20 N. Y. Supp. 183; *Miller v. Zufall*, 113 Pa. 317-325, 6 Atl. 350; *McFeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076; 2 Jaggard, Torts, 673. Even as against Divet, who held the valid legal title, the plaintiff was entitled to possession. While the right to sue in trespass rests upon possession, yet ownership draws after it constructive possession when no one else is in the adverse possession of the land. In such a case the owner may sue. 26 Am. & Eng. Enc. Law, p. 585, and cases in note 2. Nor does it clearly appear that plaintiff was not in possession at the time of the trespass. But assuming the view most favorable to defendants, that a tenant was in possession, still the plaintiff could maintain the action of trespass on the case for the injury, which was clearly an injury to the reversion. *Bailey v. A. Siegel Gas Fixture Co.* 54 Mo. App. 50; *Starr v. Jackson*, 11 Mass. 519; *Hastings v. Livermore*, 7 Gray, 194; *French v. Fuller*, 23 Pick. 106; *Ridge v. Railroad Transfer Co.* 56 Mo. App. 133; *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Parker v. Shackelford*, 61 Mo. 68; *Austin v. Huntville Coal & Min. Co.* 72 Mo. 535, 37 Am. Rep. 446; 2 Jaggard, Torts, 666. As all forms of action are abolished in this state, the only inquiry is whether, under such circumstances, the owner can sue the wrongdoer for the damages he has caused him, the owner. Whether the action was at common law known as an action of trespass or as an action of trespass on the case is unimportant, when once it is ascertained that the law gives the owner a remedy in some form of action.

On one point, however, we think the learned trial judge erred. He charged the jury that, as a matter of law, the plaintiff was entitled to recover damages on the theory that plaintiff was the owner of the building, and that the only question for them to determine was the amount of plaintiff's damages. So far as this instruction rested upon plaintiff's title to the land, we think the court was correct. But there is some evidence in the case tending to show that the ownership of the barn had been transferred to one who was not the owner

of the land, and that at the time that Divet sold to plaintiff he (Divet) was not the owner of such structure. Of course, it was competent for the owner of the land to sever the building therefrom (considering the mode of its annexation thereto) by a sale thereof separate from the land. Such a sale would pass the title to the building as personal property. *Shaw v. Carbrej*, 13 Allen, 462; *Long v. White*, 42 Ohio St. 59. True it is that an innocent purchaser of the land would have a right to assume that the building was a part of the realty, and would, on putting his deed on record, be in a position to defeat the prior sale of the building by his grantor, he having no notice thereof. 2 Jones, Real Prop. § 1736. But no claim is made here under the recording act. Counsel for plaintiff merely argues that the alleged oral transfer of the building was void under the statute of frauds. And it is obvious from the record that the case was not litigated in the court below on the theory that plaintiff was entitled to protection on the ground that he was a bona fide purchaser under our recording law.

We think that there was a question of fact as to the ownership of the building which should have been submitted to the jury. It is true that the trespass upon the land was not justified, because the defendants failed to show that they had any interest in either the land or the building. But, while a technical trespass was made out, plaintiff established no claim to more than nominal damages, except on the theory that he was the owner of the barn at the time of the trespass. If he was not such owner, the verdict is excessive, and it was for the jury to say whether he was such owner.

Because this question was not submitted to the jury, the order denying the motion for a new trial is reversed, and a new trial is ordered.

All concur.

James McCABE et al., Respts.,
v.

ÆTNA INSURANCE COMPANY, Appt.

(.....N. D.....)

- *1. A parol agreement to renew a policy of insurance, entered into by an agent having authority to renew policies, held to be the agreement of the principal, and not of the agent.
2. An insurance agent having authority to solicit insurance, to accept risks, to agree upon and settle the terms of insurance, and to issue and renew policies, has authority to make a preliminary parol contract binding upon his principal, to renew a policy about to expire. Certain provisions of the

*Headnotes by FISK, J.

NOTE.—As to contract by agent to keep property insured, see *Ramspeck v. Patillo* (Ga.) 42 L. R. A. 197.

On the question when an insurance agent is the agent of the assured, see *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* (Mich.) 20 L. R. A. 47.

policy respecting renewal, waivers, etc., held not to apply to such preliminary contract.

3. Prepayment of premium for renewal term is not essential to the validity of such preliminary agreement to renew.
4. Where an amendment of the complaint at the trial is allowed on condition that defendant be given sufficient time to prepare to meet issues as amended, and thereafter defendant announces himself ready, and proceeds to trial on the amended pleadings, he will not be heard to urge that he was prejudiced by reason of the allowance of such amendment.
5. Evidence of custom on the part of the agent to extend credit for premiums, held admissible.
6. Evidence that plaintiffs relied upon the preliminary agreement to renew the policy, and that, had they not believed that the policy was renewed, they would have procured other insurance, also held competent.
7. The court's charge to the jury examined, and held to state the law correctly.

(October 31, 1899.)

APPEAL by defendant from an order of the District Court for Pembina County overruling a motion for new trial after judgment in favor of plaintiffs in an action brought to compel payment of the amount alleged to be due on a contract for fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Kitchel, Cohen, & Shaw and W. J. Burke, for appellant:

If the conversation of December 5 made an agreement, the agreement was between the McCabes and McBride personally.

Shank v. Glens Falls Ins. Co. 4 App. Div. 516, 40 N. Y. Supp. 14.

McBride's authority as agent for the defendant did not include the making of executory contracts by parol to renew policies in futuro.

McBride's power as defendant's agent was measured primarily by his commission and by the policy, unless the authority specifically given was enlarged by implication or by appearances.

Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; *O'Reilly v. London Assur. Corp.* 101 N. Y. 575, 5 N. E. 568; *Taylor v. Phoenix Ins. Co.* 47 Wis. 365, 2 N. W. 559, 3 N. W. 584; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.* 8 Utah, 41, 17 L. R. A. 586, 29 Pac. 826; *Stewart v. Helvetia Swiss F. Ins. Co.* 102 Cal. 218, 36 Pac. 410; *Shank v. Glens Falls Ins. Co.* 4 App. Div. 516, 40 N. Y. Supp. 14.

The policy declares that "in any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company." Every holder of an insurance policy is presumed to know its contents.

A. 277, and note; also *John B. Davis Lumber Co. v. Hartford F. Ins. Co.* (Wis.) 37 L. R. A. 131.

As to power of agent to bind an insurance company, see *Cole v. Union Cent. L. Ins. Co.* (Wash.) 47 L. R. A. 201, and footnote thereto.

Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799.

The only stipulation concerning renewals is the following: "This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term; provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void. This is a privilege or permission under the policy itself. It does not look to the abandonment of the old contract and the substitution of a new contract for it. The renewal is a continuation.

Pitney v. Glen's Falls Ins. Co. 65 N. Y. 6; *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368.

To make a renewal effective the first step is to deliver the policy to the agent in order that the waiver or privilege may be properly indorsed on it.

The policy provisions as to waiver, being clear and precise, ought to be given a fair interpretation.

Imperial F. Ins. Co. v. Ooos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Baumgartel v. Providence Washington Ins. Co.* 136 N. Y. 547, 32 N. E. 990; *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219, 36 N. E. 191; *Gray v. Germania F. Ins. Co.* 155 N. Y. 180, 49 N. E. 675.

The standard policy must be interpreted "generally by the same rules as though the form of policy were voluntarily adopted by the parties."

Anderson v. Manchester F. Assur. Co. 59 Minn. 182, 28 L. R. A. 609, 60 N. W. 1095, 63 N. W. 241; *Clevenger v. Mutual L. Ins. Co.* 2 Dak. 114, 3 N. W. 313; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Enos v. Sun Ins. Co.* 67 Cal. 621, 8 Pac. 379; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Egan v. Westchester Ins. Co.* 28 Or. 289, 42 Pac. 611.

On petition for rehearing.

In this policy the restriction and limitation are both stated in unmistakable language. No oral privilege or permission affecting the insurance can "exist" and no such oral privilege or permission can be "claimed" by the insured.

Messrs. Templeton & Rex and J. D. Stack for respondents.

Flak, J., delivered the opinion of the court:

This litigation arose out of a transaction wherein plaintiffs allege that defendant, through its authorized agent, orally agreed to renew a certain policy of insurance on certain property belonging to the plaintiffs. It is conceded that on November 13, 1896, the defendant, through its agent, William McBride, at St. Thomas, duly issued and delivered to plaintiffs its certain policy of insurance, whereby it insured against loss by fire certain grain contained in plaintiff's elevator at Glasston, in the sum of \$2,000, 47 L. R. A.

for the period of one month. It is also conceded that after the expiration of said period of one month, and on December 24, 1896, said grain was totally destroyed by fire, and that plaintiffs' loss thereby exceeded said sum of \$2,000. Plaintiffs contend that on or about December 5, 1896, they entered into a parol agreement with defendant, through its said agent, whereby the defendant promised and agreed to renew said policy, at its expiration, for the further period of one month, and that defendant, through its said agent's neglect, failed to renew said policy, and this action was brought to recover damages for the breach of said parol agreement. The defendant flatly denied the existence of such agreement, and there is considerable evidence in the record tending to corroborate defendant's contention; but the jury having found for the plaintiffs on this issue, and there being a substantial conflict in the testimony, this court must assume that such agreement was made. Counsel for appellant urge numerous assignments of error, which we will consider in the order in which they are presented.

1. They contend, first, that the alleged parol agreement, if made, was the agreement of McBride, the agent, and not the defendant, and in support of such contention they cite *Shank v. Glens Falls Ins. Co.* 4 App. Div. 516, 40 N. Y. Supp. 14. This case seems to be an authority in defendant's favor. The facts in that case were very similar to the facts in the case at bar. We have carefully considered the reasoning of the court in the case cited, and, with all due respect to that court, we are forced to the conclusion that the reasoning is unsound, and that it is opposed to the great weight of authority. The defendant is a foreign corporation, and can, of course, only act through an agent. The defendant concedes that the policy which was to be renewed under the terms of the parol agreement was the policy of the defendant, and that the same was issued by McBride as agent, with full authority to do so, and it seems unreasonable to suppose that the parties in making this parol agreement believed that they were dealing with McBride personally, instead of in his capacity as such agent. If the parol contract to renew had been fulfilled by McBride, it would have been done as agent. Plaintiffs having dealt with McBride as agent in the issuance of the policy in the first instance, which policy expressly provided for renewals thereof from time to time, it is but natural to suppose that in subsequent dealings, relating to the renewal of this identical policy, the parties contemplated that they were dealing with him in the same capacity. McBride was not engaged in the issuance of insurance policies or the renewal thereof on his own account, but simply as agent. This all parties knew. McBride was authorized by the company to issue renewals of its policies, and we must hold, under the evidence in this case, that in entering into the preliminary contract to issue such renewal he acted in his representative capacity as agent. Upon this point,

see *Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518, and cases cited.

2. Appellant's second contention is that even if McBride, in making such parol agreement, acted in his capacity as such agent, still his authority as such agent for the defendant did not include the making of executory contracts by parol to renew policies *in futuro*. This, to our minds, is the most difficult question in the case, and, in order to intelligently dispose of the same, it is necessary to examine into the authority conferred upon Mr. McBride by this insurance company. The authority of an agent is such as is expressly given him by his principal, and, in addition thereto, such as his appointment and duties necessarily imply. The commission appointing McBride as agent gave him "full power to receive proposals for insurance against loss or damage by fire; to act as surveyor, or to appoint surveyors, of buildings to be insured, or containing property to be insured, in St. Thomas and vicinity; and insurance thereon to make, by policies signed by the president, and attested by the secretary, of said Aetna Insurance Company, and countersigned by the said William McBride, agent." The only other authority conferred upon McBride is such as is contained in the policy (Exhibit A), as follows: "In any matter relating to this insurance, no person, unless authorized in writing, shall be deemed the agent of this company. This policy may, by a renewal, be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy is made and accepted subject to the foregoing stipulation and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached." It appears from the agent's commission that he possessed express authority to receive proposals for insurance; to act as surveyor, and to appoint surveyors, for buildings to be insured; and insurance thereon to make, by policies signed by the president, and attested by the secretary, of said company, countersigned by said McBride, as agent; and, by the terms of the policy, the agent might renew the same in the manner therein provided. There is nothing in the commission or in the policy expressly authorizing McBride, as agent, to make a preliminary oral agree-

ment to issue or renew policies; neither is there anything restricting the authority of the agent in this regard; and, if such authority was conferred upon him, it must have been so conferred by operation of law, from the express authority given him. It is well settled in this country that the agent of a foreign insurance company, invested with such authority as was conferred upon McBride by this defendant, is a general agent. *Post v. Aetna Ins. Co.* 43 Barb. 361; *Lightbody v. North American Ins. Co.* 23 Wend. 22; *McEwen v. Montgomery County Mut. Ins. Co.* 5 Hill, 106; *King v. Cow*, 63 Ark. 204, 37 S. W. 877. It is also, we think, well settled that such agent, with similar authority, may enter into a binding executory contract by parol to issue or to renew a policy in the future. A leading authority involving this question is *Post v. Aetna Ins. Co.* 43 Barb. 361. It was contended by the plaintiff in that case that the defendant, either itself or through its agent, made a verbal agreement to renew the policy in question for a period of sixty days, which included the time when the loss occurred; defendant's contention being that the evidence was too indefinite to establish an agreement to renew the policy, and that it could only be renewed by an instrument in writing, and that the agreement, if made, was not binding on the defendant; and the court, in disposing of the question here involved, said: "When this agreement was made, however, the policy had expired, and, as the agreement was unwritten, the defendant claims that it was not binding upon it. The court ruled otherwise, and the defendant excepted. No evidence other than the form of the policy, and of the certificates used in making renewals, was given showing that the exercise of the agent's authority depended upon the manner in which he made contracts of insurance. The policy and certificates declared that they should not be valid until countersigned by the agent. But that does not exclude his power to bind the defendant by the agreement in question. . . . The possession and use of the defendant's certificates of renewal, together with the exercise of that authority in other instances, indicate that the power of renewing and continuing insurances had been conferred upon this agent. There is nothing in the case showing him to be confined or restricted in the use of it to the cases where the policy renewed was still valid as an insurance. . . . He was authorized to accept risks, to agree upon and settle the terms of their insurance, and to carry them into effect by issuing and renewing policies on behalf of the defendant. . . . The agreement which, upon the evidence, the jury must have found existed in this case, did not, of itself, renew the insurance. But it imposed upon the defendant's agent the duty of doing whatever was necessary to effect a renewal of it. An agreement of that nature, either expressed or implied, must necessarily precede the renewal of any insurance, and a similar one is made to ascertain and determine the subject, term, and rate of in-

insurance in all cases where policies are issued. They are directly and necessarily within the employment and authority of the agent, whose business could not be carried on without the power to enter into them, and the law does not require them to be in writing in order to become obligatory on the parties. They have often been the subject of judicial controversies, and always held binding on the principal, when fairly established by proof." In *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.* 19 How. 321, 15 L. ed. 636, it was held by the Supreme Court of the United States that, under the common law, a promise for a valuable consideration, to make a policy of insurance, is no more required to be in writing than a promise to execute and deliver a bond, a bill of exchange, or a negotiable note. The same doctrine was announced by the court of appeals of New York in *First Baptist Church v. Brooklyn F. Ins. Co.* 19 N. Y. 305. In that case the court sustained the validity of the unwritten agreement to continue a policy of insurance from year to year until notice of the contrary should be given, notwithstanding the policy declared that it might be continued provided the premium therefor was paid and indorsed on the policy, or a receipt given for it, and that no insurance whatever, original or continued, should be considered binding until the actual payment of the premium. In *Ellis v. Albany City F. Ins. Co.* 50 N. Y. 402, 10 Am. Rep. 495, a similar question was involved, and the court said: "Whatever doubts may formerly have been entertained as to the validity of parol contracts of insurance made by insurance corporations, authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. . . . It is equally well settled that parol contracts of such companies to effect an insurance by issuing policies are valid, and will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement; in either of which, a recovery for a loss of the property agreed to be insured will be awarded to the plaintiff." Again, in *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322, the court of appeals of New York said: "The counsel for the appellant is mistaken in supposing that the action was based upon a parol contract of insurance for three years. There was not sufficient evidence to show that Carpenter was authorized to make such a contract by the defendant. It was alleged in the complaint, and the testimony tended to prove, that a preliminary contract was made by which it was agreed that the defendant should insure the plaintiff upon the property against damage by fire, for a sum and at a rate agreed upon, for the term of three years from the time of making the contract, and that a policy of insurance should shortly thereafter be made out to take effect from that time, and delivered to the plaintiff by Carpenter, at which time it was agreed the premium should be paid. It was proved that Carpenter was the agent of the defendant, with authority to

negotiate contracts of insurance in its behalf, agree upon the rate of premium, the term of insurance, and, in short, to agree upon all the terms of the contract. That he was furnished with policies executed in blank by the president and secretary of the defendant, with authority to fill up and deliver the same to any party with whom he made a contract. This authorized him to make a preliminary contract, binding upon the defendant, to be consummated by filling up and delivering a policy pursuant thereto." See also *Van Loan v. Farmers' Mut. F. Ins. Asso.* 90 N. Y. 280, where the same doctrine is reaffirmed by that court. That an insurance company can, by a preliminary parol contract, bind itself to issue or to renew a policy in the future, seems too well settled to admit of doubt. In addition to the foregoing, the following are a few of the many authorities sustaining this doctrine: *Stickleley v. Mobile Ins. Co.* 37 S. C. 56, 16 S. E. 280, 838; *Bauble v. Aetna Ins. Co.* 2 Dill. 156, Fed. Cas. No. 1,111; *Cohen v. Continental F. Ins. Co.* 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296; *Taylor v. Germania Ins. Co.* 2 Dill. 282, Fed. Cas. No. 13,793; *King v. Coz*, 63 Ark. 204, 37 S. W. 877; *Newark Mach. Co. v. Kenton Ins. Co.* 50 Ohio St. 549, 22 L. R. A. 708, 35 N. E. 1060; *Croft v. Hanover F. Ins. Co.* 40 W. Va. 508, 21 S. E. 864; *Hardwick v. State Ins. Co.* 20 Or. 541, 26 Pac. 840; *More v. New York Bowery F. Ins. Co.* 130 N. Y. 537, 29 N. E. 757.

The learned counsel for appellant, in support of his position, cites numerous cases, which we will briefly notice. The first case upon which he relies is *O'Reilly v. London Assur. Corp.* 101 N. Y. 575, 5 N. E. 568. That case is distinguishable from the case at bar. Under the particular facts in that case, it was held, as a matter of law, that the parties did not contemplate that they were entering into a renewal agreement. Furthermore, under the express terms of the policy a renewal could not be had without actual payment of the premium for the renewal term, and an indorsement thereof made upon the policy or a receipt given therefor, and it was expressly stipulated in the policy that the company should not be liable unless the premium for the renewal term was actually paid. In *Taylor v. Phoenix Ins. Co.* 47 Wis. 365, 2 N. W. 559, and 3 N. W. 584, cited by appellant, the action was based upon an alleged completed contract of insurance, and not upon the breach of an oral agreement to insure; and the court held that the parol negotiations did not amount to a complete contract of insurance *in presenti*, and therefore that the action, which was based on the policy of insurance, could not be maintained. See *King v. Hekla F. Ins. Co.* 58 Wis. 508, 17 N. W. 297; *Campbell v. American F. Ins. Co.* 73 Wis. 100, 40 N. W. 661. To the same effect was the case of *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.* 8 Utah, 41, 17 L. R. A. 586, 29 Pac. 826, cited by appellant. In the latter case the court said: "The plaintiff relies upon a contract *in presenti*, not a contract to thereafter insure." In *Stew-*

art v. Helvetia Suisse F. Ins. Co. 102 Cal. 218, 36 Pac. 410, also relied upon by the appellant, the agent had no authority, either actual or ostensible, to enter into a contract of insurance, and therefore this case cannot be considered in point. The last case relied upon is *Shank v. Glens Falls Ins. Co.* 4 App. Div. 516, 40 N. Y. Supp. 14. This case we have already referred to, and we are constrained to hold that the language used in the opinion in this case, respecting the power of a general agent to enter into a valid parol contract to insure, is unsound, and opposed to the great weight of authority. It is contrary to the doctrine established in *Manchester v. Guardian Assur. Co.* 151 N. Y. 88, 45 N. E. 381, as well as the other New York cases cited in this opinion.

But the learned counsel for the appellant contends that, under the provisions of the policy respecting renewals, waivers, etc., and under § 4608 of the Revised Codes, the agent was not authorized to bind the company by a parol contract to renew this policy. We are unable to agree with counsel on this point. We are of opinion that these provisions clearly have reference only to the contract of insurance and of renewal, and not to a preliminary agreement to insure or to renew. We are supported in this view by numerous authorities. *Baile v. St. Joseph F. & M. Ins. Co.* 73 Mo. 371; *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448, 77 Am. Dec. 419; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.* 19 How. 318, 15 L. ed. 636; *Davenport v. Peoria Marine & F. Ins. Co.* 17 Iowa, 276; *Security F. Ins. Co. v. Kentucky Marine & F. Ins. Co.* 7 Bush, 81, 3 Am. Rep. 301; *Franklin Ins. Co. v. Colt*, 20 Wall. 560, 22 L. ed. 423; *Phœnix Ins. Co. v. Ryland*, 60 Md. 437, 1 L. R. A. 548, 16 Atl. 109; *Emery v. Boston Marine Ins. Co.* 138 Mass. 398, 412; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 365, 15 Am. Rep. 612; *Scranton Steel Co. v. Ward's Detroit & L. S. Line*, 40 Fed. Rep. 866. Wood on Insurance, 2d ed. vol. 1, § 11, announces the doctrine, as we think, correctly. He says: "Parol contracts to insure will be enforced in equity, even though the charter of the company requires all of its contracts to be in writing; the courts holding in such cases that there is a broad distinction between an executory contract and an executed contract, and that the charter provisions can only be held to apply to the latter; that is, that a contract of insurance must be in writing, but that a contract to insure may be by parol." It is also urged that prepayment of the premium for the renewal term was necessary to effect a valid renewal, but we are of the opinion that this was not essential. By the terms of the policy, prepayment of the premium is not required. By the language of the policy, it may be renewed "in consideration of premium for the renewal term." This language cannot be construed so as to require prepayment of such premium. Moreover, this language in the policy has reference only to the completed contract of renewal, and not to a preliminary contract to renew.

3. Appellant next urges that the trial

court erred in permitting plaintiffs to amend the complaint at the trial. The original complaint alleged, in substance, that in the month of November, 1896, for a consideration, the defendant agreed with the plaintiffs to renew and keep in force all expiring policies of insurance, etc. The amendment which was allowed at the trial further alleged a specific agreement entered into on December 5, 1896, to renew this policy. As to whether or not it was error to allow said amendment, it is unnecessary to decide, for the reason that the record discloses that the trial court, at the time of the allowance of such amendment, distinctly stated that, if the defendant was prejudiced thereby and was not prepared to proceed with the trial at that time, sufficient time would be given it to prepare for the trial, and that two days afterwards, when the case was called for trial, counsel for defendant announced his readiness to proceed to trial upon the pleadings as amended. Surely, the defendant cannot now be heard to object to such ruling. But, upon the question of the amendment being permissible, see *Croft v. Hanover F. Ins. Co.* 40 W. Va. 508, 517, 21 S. E. 854, 857.

4. Certain errors are assigned on the admission of evidence. We have examined the rulings complained of, and we do not find any prejudicial error. That evidence of custom on the part of McBride, the agent, to extend credit for premiums, was admissible, see *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 418, 21 N. E. 1000; *Church v. Lafayette F. Ins. Co.* 66 N. Y. 222, 225; *Potter v. Phenix Ins. Co.* 63 Fed. Rep. 384; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34; *Newark Mach. Co. v. Kenton Ins. Co.* 50 Ohio St. 549, 558, 22 L. R. A. 768, 35 N. E. 1060, 1064; *Cohen v. Continental F. Ins. Co.* 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296. The testimony of James McCabe, to the effect that he relied upon the contract to renew, and that they would have procured other insurance had they not believed that the policy was renewed, was not, we think, prejudicial under the circumstances, and could not have misled the jury.

5. The remaining assignments of error relate to the court's instructions to the jury. The court charged the jury that the action was "to recover damages for the breach of the contract to insure," and the learned counsel for appellant contend that, inasmuch as the action is to recover damages for the breach of a contract to renew the old policy, the instruction was misleading and prejudicial. We must overrule this contention. We cannot believe that the jury were misled by this instruction, especially in view of the fact that they were later in the charge distinctly instructed that, before they could find for the plaintiffs, they must find that an agreement to renew the old policy was made as alleged.

It is next urged that, in charging the jury as to the powers of an insurance agent, the trial court committed error. The instruction complained of was as follows: "An insurance agent, with power to make and ef-

fect insurance, and to issue and deliver policies, and to receive and collect premiums, has the power, if no restriction on it is shown and brought home to the knowledge of the person dealing with him, to bind his company by a verbal contract with the assured, at or prior to the expiration of the policy, to renew the insurance, and to waive the payment of the premiums for the time being, and to give the assured time for such payment." We think the above instruction stated the law correctly. That McBride was authorized to solicit insurance, to issue, countersign, and deliver policies of insurance, to renew the same, and to collect premiums therefor, the undisputed evidence shows; and it follows therefrom, as a matter of law, that he possessed authority to make preliminary oral agreements to issue or to renew such policies. Upon this point, see authorities cited under the second proposition in this opinion; also *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 3 S. D. 205, 52 N. W. 866.

Appellant also complains of the following instruction: "The tender of the premium by plaintiffs after the fire was sufficient, if you find that there was an agreement to renew the policy." We think this instruction stated the law correctly. The evidence of a tender was undisputed, and it is well settled that prepayment of premium is not a condition precedent to the validity of a parol agreement to insure or to renew. See authorities above cited.

Lastly, the instruction of the court as to the burden of proof is challenged as erroneous. The instruction told the jury that the plaintiffs must establish their case "by a fair preponderance of the evidence." Counsel for appellant insists that the jury should have been told that the plaintiffs must establish their case by clear and satisfactory evidence. The rule contended for by appellant is not applicable to this case. We think the instruction given was correct. We are unable to see why a different rule should apply to a case of this kind than is applied to actions for damages for the breach of other parol contracts. This question was involved in the case of *Johnson v. Connecticut F. Ins. Co.* 84 Ky. 470, 2 S. W. 151, and the court used the following language: "The latter kind of contract, usually existing in parol, must be established by the same class of proof required to establish any other contract. It must be shown that a complete contract was made, that an agreement to insure was in fact entered into, and that nothing essential to a complete agreement was left open for future determination. The burden is on the party attempting to establish such a contract to establish it by a preponderance of evidence." See also *Dodd v. Home Mut. Ins. Co.* 22 Or. 3, 11, 28 Pac. 881, 884, 29 Pac. 3; *Dinning v. Phoenix Ins. Co.* 68 Ill. 414; *Ostrander, Ins.* § 10; 4 Joyce, *Ins.* § 3760.

Having decided each of appellant's assignments of error adversely to it, it follows that the order of the District Court denying a new trial should be affirmed.

47 L. R. A.

Young, J., having been of counsel in the case, took no part in the hearing; Judge Fisk, of the First Judicial District, sitting by request.

Rehearing denied December 5, 1899.

Eugene S. OWEN, Admr., etc., of Eleazer Shoemaker, Deceased, Resp't.,

v.

E. C. COOK et al., Appts.

(.....N. D.....)

- *1. Ordinarily in an action to recover damages for negligence the question whether the acts complained of constitute negligence is for the jury. This is not the case, however, when it is apparent that fair-minded men would not infer negligence from the facts proved.
2. A person whose property is threatened with imminent destruction by fire may take such steps for its protection as are reasonable and proper, and, if his acts aid or contribute to the destruction of another's property, he will not be liable as for its negligent destruction. The fire from which, without negligence, he seeks to protect himself, will be considered as the direct and proximate cause of the loss, and also the cause of his acts.
3. The defendants, when on a hunting expedition, encamped in a vacant house which was situated in an open prairie. A prairie fire originated near the house, and threatened its destruction and the destruction of defendants' property. A back fire was set by them near the house, and allowed to run until it joined the main fire, which destroyed the property of plaintiffs' intestate. Held, under the facts stated in the opinion, that the original fire was the proximate cause of the loss, and that the acts of the defendants in back-firing were not negligent, and are wholly insufficient to sustain a verdict for the plaintiff for the negligent destruction of the property.

(December 1, 1899.)

APPEAL by defendants from a judgment of the District Court for Kidder County in favor of plaintiff in an action brought to hold defendants liable for the burning of property of plaintiffs' intestate by fire negligently set out by defendants. *Reversed.*

The facts are stated in the opinion.

Mr. John E. Greene for appellants.

*Headnotes by YOUNG, J.

NOTE.—As to liability for setting fire which spreads to the property of others, see *Brown v. Brooks* (Wis.) 21 L. R. A. 255, and note; *Day v. H. C. Akeley Lumber Co.* (Minn.) 23 L. R. A. 518; *Lillibridge v. McCann* (Mich.) 41 L. R. A. 881; and *Hoffman v. King* (N. Y.) 46 L. R. A. 672.

As to the liability of a wrongdoer or negligent person who starts a fire, for damage done by the fire after it has united with another fire the origin of which is unknown, see *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* (Wis.) 40 L. R. A. 457.

Messrs. Newton & Smith and Alexander Hughes, for respondent:

The contention of contributory negligence as a question for the jury is answered by the fact, undisputed, that the plaintiff had the property destroyed protected by a fire break.

Gram v. Northern P. R. Co. 1 N. D. 252, 46 N. W. 972.

If the plaintiff had not established a fire break around his premises, such omission would not constitute negligence *per se*; but in such case the question of whether or not such omission would constitute contributory negligence would be a question for the jury to decide under proper direction from the court.

Karson v. Milwaukee & St. P. R. Co. 29 Minn. 12, 11 N. W. 122; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Erd v. Chicago & N. W. R. Co.* 41 Wis. 65.

The joining, without objection, in the argument to the jury upon all the issues, was a waiver by the defendants of their right to complain on account of the denial of the motion to withdraw the evidence relating to one issue.

Brown v. Morrill, 45 Minn. 483, 48 N. W. 328.

The presumption must be that the trial judge gave the proper instructions in regard to the nonconsideration by the jury of the evidence withdrawn from their consideration, or any argument relating thereto.

Garr v. Spaulding, 2 N. D. 414, 51 N. W. 867; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935; *Huff v. Aultman*, 69 Iowa, 71, 58 Am. Rep. 213, 28 N. W. 440; *Fernbach v. Waterloo*, 76 Iowa, 598, 41 N. W. 370; *Malcom v. Hanson*, 32 Neb. 50, 48 N. W. 883; *Conger v. Dodd*, 45 Neb. 36, 63 N. W. 125; *Foutch v. State*, 100 Tenn. 334, 45 S. W. 678.

The questions arising in regard to the back fire were properly submitted to the jury, and, if so, then there was evidence to justify the verdict.

Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; *Powers v. Craig*, 22 Neb. 621, 35 N. W. 888; *Krippner v. Biehl*, 28 Minn. 139, 9 N. W. 671; Ray, Negligence of Imposed Duties, Personal, p. 642; *Richard v. Schleusener*, 41 Minn. 49, 42 N. W. 599; *Jespersion v. Phillips*, 46 Minn. 147, 48 N. W. 770.

No care was taken to prevent the fire set out by the defendants from spreading and destroying property.

Thoburn v. Campbell, 80 Iowa, 338, 45 N. W. 769.

Even though there was no direct evidence except the testimony of the defendants, yet the jury would not be bound to find in their favor, as they are interested parties.

Canajoharie Nat. Bank v. Diefendorff, 123 N. Y. 191, 10 L. R. A. 676, 25 N. E. 402; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Honegger v. Wettstein*, 94 N. Y. 252; *Stikwell v. Carpenter*, 2 Abb. N. C. 238; *Moody v. Pell*, 2 Abb. N. C. 275; *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609. 47 L. R. A.

Young, J., delivered the opinion of the court:

The plaintiff prosecutes this action as the administrator of Eleazer Shoemaker, deceased, to recover damages suffered by the latter during his lifetime in the destruction of certain buildings and other property in a prairie fire which occurred on October 6, 1897, in Kidder county, about 11 miles from Dawson. The complaint charges the defendants with negligently starting the fire which caused the destruction of the property in question, and also with negligence in permitting it to escape from the place where it was started. The answer denies that the defendants started, or caused to be started, the fire described in the complaint, and denies that plaintiff's intestate sustained any damage by reason of any act or omission on the part of the defendants. The case was tried in the district court to a jury, and a verdict was returned against the defendants in the sum of \$900. A motion for a new trial was made in the district court, based upon the alleged insufficiency of the evidence to sustain the verdict. No question was raised as to the pleadings, and no errors were specified on the admission of evidence. It was conceded in the motion that the property of plaintiff's intestate was destroyed by prairie fire at the time and place alleged in the complaint, and that the property so destroyed was of the value of \$900, as found by the jury. Defendants' entire contention was and is that the evidence is insufficient to charge them with responsibility for the fire which occasioned the loss in question. The motion for a new trial was denied, and judgment was entered against the defendants upon the verdict. This appeal is from the judgment and the order overruling the motion for a new trial, and presents for review the same questions that were before the trial court in the motion for new trial.

The record shows that the five defendants were residents of the state of Illinois, and that they came as a party to Kidder county for the purpose of hunting, and that they arrived in Dawson, in said county, on October 6, 1897, and there secured the services of one Chris Wisner and his brother, with their teams, to convey them and their hunting and camping outfit to their hunting grounds. It appears that they went immediately to a small lake, called "Kilby lake," about 14 miles distant from Dawson. Wisner had secured permission for the party to occupy a vacant house which was located at the south end and on the east shore of the lake, and about 20 rods from the southeast shore. The party arrived at the house at 11 o'clock in the forenoon, or a few minutes later, and at once proceeded to unpack their outfit and settle themselves in the house which was to be used as their camp and headquarters. Kilby lake is a small body of water, perhaps 50 rods wide and $\frac{1}{2}$ mile long, extending almost due north and south. All of the country surrounding the lake for varying distances was then unbroken prairie, covered with dead and dry grass. The buildings and

property of plaintiff's intestate, which were destroyed by fire on that day, were situated $2\frac{3}{4}$ miles almost due south of the south end of Kilby lake, where the defendants were camped. From Kilby lake to where the property in question was burned, and beyond, it was open prairie. There was a stiff wind on that day, coming from the north, a little west of north; traveling, as estimated by one of the witnesses for plaintiff, at 20 miles an hour. During the time when defendants were settling their belongings in the Kilby house, and about 11:30 A. M., a smoke was seen to arise on the prairie about a quarter of a mile northeast of the house, in a depression between two small hills or knolls which concealed the fire itself from view for a time. All of the eyewitnesses agree that the fire originated at this point. Within a few minutes the fire was seen advancing over the knoll to the south, from whence it swept southward with increasing swiftness. The line of fire went between 30 and 40 rods east of the house where defendants were camped. E. C. Nafus, a witness for plaintiff, came towards the fire from the east as soon as he saw the first smoke. He testified that the front or head fire was about 20 rods wide when it was $\frac{1}{2}$ mile south from its place of starting, and that he went south from that point in front of the advancing flames a mile and a quarter for the purpose of back-firing, to protect his property, and that he had fired but about 3 rods when the head fire reached him. This was at 12:30 P. M., as near as he could fix the time. At this point the head fire, which was here but a few rods wide, was stopped by a fire break and a weed patch. This witness followed the east side fire, and back-fired in that direction outside of his fire break, and in advance of the flames spreading eastward towards his premises. But little attention was paid by this witness to the side fire on the west, but he testified that the fire passed west of his fire break, and went south about $1\frac{1}{2}$ miles. This carried the line of fire $\frac{1}{2}$ mile south of the property which was destroyed, and $\frac{1}{2}$ mile east of it. This witness says: "At three o'clock I was about $\frac{3}{4}$ of a mile from Shoemaker's buildings. I could see his house. There was fire west of that, but I could not see how far. It was burned as far west as I could see." The fire on the west side burned westward all along the line from Kilby lake to its terminus in the south, a distance of more than 3 miles. John W. Goodman, another of plaintiff's witnesses, and one who was nearest the west side of the fire, testified that it was "side-firing and back-firing all the way along,—all the way along the full length of the first head fire." Another witness, E. C. Stinchcomb, was 1 mile west of the fire line. He testified to the stopping of the head fire at 12:30 P. M., at the point indicated by the witness Nafus, and says: "The side fire was still burning as far as I could see at that time in a westerly direction. The head fire was entirely stopped at that point. All the fire left was the side fire burning west." The 47 L. R. A.

defendants and one of the Wisner brothers were at the Kilby house, engaged in protecting themselves, their property, and the house from the fire which was advancing towards them from the north and from the east. What they did will be considered later. We have stated sufficient facts to give an intelligent understanding of the questions presented on the motion for new trial, and before us upon this appeal.

At the close of the case the defendants moved the court to instruct the jury to return a verdict in their favor on the grounds "(1) that the undisputed evidence in this case shows that the main fire which originated on October 6, 1897, in a northerly direction from what has been known in this case as the 'Kilby house,' where the defendants were encamped, was not, and could not have been, set by the defendants, or either of them; (2) that the undisputed evidence in the case shows that no fire set by the defendants, or under their direction, or with their knowledge or consent, for the purpose of protecting their own property or otherwise, was allowed to spread beyond their control, or through their neglect to pass from under their control, or that any such fire in any way contributed to, or resulted in, the destruction or injury to the plaintiff's property, or any portion thereof." This motion was denied and an exception taken to the ruling. Thereupon the defendants presented a separate request for a direction that they could not be held liable for the origin of the main fire. This was refused at the time, and an exception taken, and the case was argued to the jury upon both issues. At the close of the argument, however, with the consent of plaintiff's counsel, the court instructed the jury that the defendants could not be held responsible for the starting of the main fire northeast of the Kilby house. Counsel for appellants insists that the error in not granting his motion relative to defendants' responsibility for the main fire, at the time it was made, was not, and could not be, cured by granting it after the case had been argued to the jury upon that as one of the main issues, under the exceptional circumstances of this case. This presents an interesting question of practice, which we need not decide or discuss, inasmuch as we have reached the conclusion, after a careful study of the evidence, that the verdict returned cannot be sustained. By consent of counsel, all responsibility of the defendants for the origin of the main fire was eliminated, and is the law of this case. It is apparent, then, that, if the verdict can be sustained at all, there must be some evidence in the record tending to show that the defendants negligently started a new and independent fire, and that such fire either caused, or directly contributed, in a degree worthy of the law's notice, to, the destruction of the property in question. Counsel for plaintiff contend that such is the case, and that the defendants were negligent in starting a certain back fire at the Kilby house, and allowing it to

escape to the south. In this connection the evidence shows that the defendants, who were without previous experience in fighting prairie fires, placed themselves under the direction of their teamster, Wisner, for the purpose of protecting their camp from the approaching flames. An old fire break, partially surrounding the house, was freshened up with shovels. Back fires were set on the north, where the danger was greatest; also, on the west side of the house. These fires were entirely extinguished by means of water and wet sacks. The fire was also whipped out as it approached on the east side. On the south side a back fire was carried along to the west in advance of the main side fire. This was extinguished on the side towards the house, but on the south side was permitted to run its course with the wind. It is contended that the acts of defendants in starting this fire on the south and permitting it to run were negligent, or at least that it was a question for the jury to say whether they were or not. An examination of the undisputed evidence upon this point leads us to a different conclusion. It is shown that at the time the back fire was set on the south side of the house the original fire had gone 2 or 3 miles to the south, and was burning westward all along the line. Under such conditions the defendants had a right to believe that this back fire, which they carried a few rods to the west in advance of the main fire, would join and burn out in the main fire, and that is just what did occur, as the evidence shows that the back fires united with the main fire within 60 rods of the house. All of the facts relative to the defendants' acts in starting the back fire are undisputed, and we are of the opinion that fair-minded men could not draw an inference from them that the defendants were negligent and imprudent in starting them in the manner and under the circumstances narrated. The question of negligence was not, then, for the jury. *Thomp. Trials*, § 1667.

It is not negligence to start a back fire to protect one's property, providing the care and diligence of an honest and prudent man are exercised in guarding it. *Jesperson v. Phillips*, 46 Minn. 147, 48 N. W. 770. In *McKenna v. Baessler*, 86 Iowa, 197, 17 L. R. A. 310, 53 N. W. 103, it was held that one whose property had been destroyed by a back fire set by himself might recover from the person negligently setting out the fire from which he sought to protect himself, when it appeared that it would have been destroyed had the back fire not been set at all. The court said: "In determining this case, it is a most important fact to be kept in mind that the plaintiff's property would surely have been destroyed by the fire set out by the defendants, if plaintiff had remained idle. He would have been a mere spectator looking on at the destruction of his own property. It was not only his lawful right, but his duty, to use all reasonable and proper means to arrest the disaster. Every person is bound to use diligence to save himself from

the negligent act of another. . . . When plaintiff kindled the back fire, and thereby sought to save his buildings, he was in the strict line of duty, not only in attempting to save his property, but to save the defendants from an absolute liability for damages. It was his duty to fight the fire with fire or water, or in any way, so that his efforts in that direction were reasonable and proper."

In the case at bar it must be conceded that the property of plaintiff's intestate would have been destroyed by the main fire, had no back fire been set by the defendants; and it also seems clear that the acts of defendants in protecting their property were reasonable and proper, within the meaning of the Iowa case from which we have quoted. So, also, we must conclude that the original fire, for which defendants are not responsible, was the direct, efficient, and proximate cause of the damage suffered by plaintiff's intestate. The original fire was not only the responsible cause of the loss of the property involved, but it was the operative cause resulting in the back fires set by the defendants to protect their property and that under their charge, as well as various other back fires which were set out by other parties at other points on the same day to protect themselves against this same fire. In *Etna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395, the court said: "The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim, *Causa proxima non remota, spectatur*. The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. . . . The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss." We think the case at bar comes within the principle of *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, which has been universally approved by both courts and text writers whenever referred to. We quote from Bishop, *Non-Cont. Law*, § 45: "The defendant threw a squib into an open market house, where there were many people. It fell upon the standing of Yates, and another there, instantly to prevent injury to himself and Yates, threw it across the market house, and it fell upon the standing of Ryal, who instantly, for the same reason as before, sent it to another part of the market house, and it there took effect upon the plaintiff. The intermediate throwings, it is perceived, were from an impulse natural and to be expected, so that the disastrous result, though 'remote,' was deemed a product of the original cause. That the thrower of the squib was properly

held liable to the person finally injured was never doubted, and the doctrine of this case is accepted as law in all our states."

To what extent the back fire set by defendants accelerated the spread of the main fire to the property destroyed, if at all, is wholly conjectural, and, furthermore, is not an element tending to establish any liability, in view of our conclusion that the acts of the defendants in back-firing to protect their property in the manner already described were reasonable and proper precautions under the conditions which confronted

them. Ordinarily, in an action to recover damages for negligence, the question of whether the acts complained of were negligent is for the jury. This is not true, however, where the evidence is undisputed, and it is apparent that fair-minded men would not infer negligence from the facts proved.

The judgment of the District Court is reversed, and a new trial granted.

All concur.

Rehearing denied December 30, 1899.

KANSAS SUPREME COURT.

WILDEY CASUALTY COMPANY, Plff. in Err.,
v.

David A. SHEPPARD.

(.....Kan.....)

- *1. One insured against accident as a barber and restaurant keeper was accidentally shot and injured while hunting rabbits, but it appeared that hunting was only an incident to his daily life. Held, that the matter of hunting is not to be regarded as an occupation, and is not to be used as a basis of classification in determining the amount of indemnity payable to the insured.
2. An offer by the insurance company of a sum smaller than that claimed by the insured, and an averment of the same in the answer of the insurance company, waive the defense that the insured was not entitled to anything because the injury resulted from exposure to unnecessary danger.
3. In the matter of the reception of incomplete proofs of injury, and the request for further information from the insured by the insurance company, the decision of the case of *Standard Life & Acci. Ins. Co. v. Darts*, 59 Kan. 521, 58 Pac. 856, is followed.
4. A slight misstatement as to the cause of the injury, mistakenly made to the insurance company in behalf of the insured by the physician who attended him, will not prevent the insured from showing the actual facts.

(January 6, 1900.)

ERROR to the District Court for Sedgwick County to review a judgment in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bentley & Hatfield, for plaintiff in error:

Claimant cannot recover, because he misstated his business.

*Headnotes by JOHNSTON, J.

NOTE.—For restrictions in insurance policies as to occupation and employment, see notes to *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685; also *Union Mut. Acci. Asso. v. Frohard* (Ill.) 10 L. R. A. 883, and note; *Johnson v. London Guarantee & Acci. Co.* (Mich.) 40 L. R. A. 440; *Hess v. Preferred Masonic Mut. Acci. Asso.* (Mich.) 40 L. R. A. 444; *Standard Life* 47 L. R. A.

Standard Life & Acci. Ins. Co. v. Ward, 65 Ark. 295, 45 S. W. 1065; *Kettenring v. Northwestern Masonic Aid Asso.* 96 Fed. Rep. 177.

No act of the casualty company, as disclosed by the record, can be construed as a waiver of the rights under the certificate.

Georgia Home Ins. Co. v. Rosenfield, 95 Fed. Rep. 358, 37 C. C. A. 96; *Adkins v. Globe F. Ins. Co.* 45 W. Va. 384, 32 S. E. 194; *Johnson v. London Guarantee & Acci. Co.* 115 Mich. 86, 40 L. R. A. 440, 72 N. W. 1115; *Modern Woodmen of America v. Von Wald*, 6 Kan. App. 231, 49 Pac. 782; *Hess v. Mutual Relief Asso.* 118 Cal. 6, 49 Pac. 1056; *Standard Life & Acci. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105; *Aldrich v. Mercantile Mut. Acci. Asso.* 149 Mass. 457, 21 N. E. 873; *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567.

In an action for damages under an accident policy where the defendant claims that the injury was not accidental, the burden is upon the plaintiff to establish that it was accidental.

Etina L. Ins. Co. v. Vandecor, 57 U. S. App. 446, 86 Fed. Rep. 282, 30 C. C. A. 48; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 95 Fed. Rep. 111, 36 C. C. A. 671; *Ashenfelter v. Employer's Liability Assur. Corp.* 59 U. S. App. 479, 87 Fed. Rep. 682, 31 C. C. A. 193; *California Sav. Bank v. American Surety Co.* 87 Fed. Rep. 118; *Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015; *Yancoy v. Etina L. Ins. Co.* (Ga.) 33 S. E. 979.

Where plaintiff fails to furnish proof of loss to the insurance company he cannot recover unless the requirement is waived.

Burnham v. Royal Ins. Co. 75 Mo. App. 394; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; *Modern Woodmen of America v. Von Wald*, 6 Kan. App. 231, 49 Pac. 782; *Supreme Lodge O. of S. F. v. Raymond*, 57 Kan. 647, 47 Pac. 533; *Home Forum Benefit Order v. Jones*, 5 Okla. 598, 50 Pac. 165.

& Acci. Ins. Co. v. Carroll (C. C. A. 3d C.) 41 L. R. A. 194; and *Berliner v. Travelers' Ins. Co.* (Cal.) 41 L. R. A. 467.

For voluntary exposure to unnecessary danger within the meaning of an insurance policy, see note to *Fidelity & Casualty Co. v. Chambers* (Va.) 40 L. R. A. 432, and cases following on pages 437, 440, 453.

An accident, within the meaning of contracts of insurance against accidents, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.

Railway Officials & Employes Assn. v. Drummond, 56 Neb. 235, 78 N. W. 562.

A change of vocation increased the risk. The applicant was insured as a barber and restaurant keeper; when he was injured he had become a hunter, thereby increasing the risk.

The claimant is bound by the rules, regulations, and by-laws of the association which he joins. That being the case, the person injured is only entitled to recover under the classification of the occupation in which he was injured, at the time he was injured; and of that there can be no dispute.

Taylor v. Metropolitan Acci. Assn. 172 Ill. 511, 50 N. E. 115; *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 25, 47 Pac. 331; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Alston v. Northwestern Live Stock Ins. Co.* 7 Kan. App. 179, 53 Pac. 784; *Western Home Ins. Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *Standard Life & Acci. Ins. Co. v. Ward*, 65 Ark. 295, 45 S. W. 1065; *Etna L. Ins. Co. v. Vandear*, 57 U. S. App. 446, 86 Fed. Rep. 282, 30 C. C. A. 48; *Fred. J. Kiesel & Co. v. Sun Ins. Office*, 60 U. S. App. 10, 88 Fed. Rep. 243, 31 C. C. A. 518; *Gillett v. Burlington Ins. Co.* 53 Kan. 108, 36 Pac. 52; *Missouri P. R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 574; *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240, 40 L. R. A. 750, 45 S. W. 539; *Johnson v. London Guarantee & Acci. Co.* 115 Mich. 86, 40 L. R. A. 440, 72 N. W. 1115.

Messrs. Stanley, Vermillion, & Evans for defendant in error.

Johnston, J., delivered the opinion of the court:

This was an action by David A. Sheppard to recover from the Wildey Casualty Company upon a contract of insurance which, among other things, provided that the company would pay Sheppard weekly indemnity in case of a disabling accident, and would also pay him \$2,500 for the loss of a hand above the wrist as the result of an accident during the life of the policy. His left hand was torn off by the accidental discharge of a gun on May 27, 1897, while he was hunting rabbits in his orchard; and, the company having refused payment of his claim, the present proceeding was begun. The trial resulted in a verdict in favor of Sheppard for \$2,618.75. The company complains, and states that Sheppard misstated his business, failed to comply with the conditions of the insurance contract with respect to the giving of notice and furnishing proof of the injury, and that he voluntarily exposed himself to unnecessary danger; but counsel do not satisfactorily point us to any particular part of the record where error may be seen, nor do they sufficiently indicate particular rulings as a basis for the assigned errors. 47 L. R. A.

In respect to the claim that the insured misstated his business, it may be said, first, that no such averment is contained in the answer of the company, but it did allege that he was engaged in a business—hunting rabbits—more hazardous than that in which he was insured, and that in no event was he entitled to more than \$375. Sheppard was insured as a barber and restaurant keeper, and it is contended that he was injured while following the occupation of a hunter, which is classed as more hazardous than the occupation in which he was insured. He was not engaged in hunting for hire or profit, but it was an individual act, only an incident to his daily life, and is not to be regarded as an occupation, nor as furnishing a basis of classification. In *Holiday v. American Mut. Acci. Assn.* 103 Iowa, 178, 72 N. W. 448, one insured as a bookkeeper against accident by a policy classing as more hazardous the occupation of hunting, and providing that if injury occurred while performing an act pertaining to another occupation, classed as more hazardous than the one under which the policy was issued, or while engaged in a more hazardous occupation, he should be entitled to only such indemnity as the premiums paid would purchase in the class in which such occupation was classed, was shot by the discharge of a gun while he was hunting for recreation; and it was held that within the meaning of the policy he was not engaged in the occupation of hunting when the injury occurred, so that the liability of the defendant could be lessened for that cause. In *Union Mut. Acci. Assn. v. Frohard*, 134 Ill. 228, 10 L. R. A. 383, 25 N. E. 642, which involved a like question, it was said, "The word 'occupation,' as found in these by-laws, must be held to have referred to the vocation, profession, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, or recreation." See also *Kentucky Life & Acci. Ins. Co. v. Franklin*, 19 Ky. L. Rep. 1573, 43 S. W. 709; *Miller v. Travelers' Ins. Co.* 39 Minn. 550, 40 N. W. 839.

There is the further contention that the notice and proofs of loss were not made and forwarded in good time, nor in compliance with the terms of the contract. Notice and proofs of injury which were not formal or complete were forwarded in sufficient time, and these were received and retained by the company; but further and formal notice, upon blanks furnished, were requested. The additional proofs were furnished in accordance with the request, and the company appears to have treated the contract as being in force, and is therefore deemed to have waived the defense as to the defects in the notice. *Standard Life & Acci. Ins. Co. v. Davis*, 59 Kan. 523, 53 Pac. 856, and cases cited. In respect to the proofs there is this further consideration that one of the conditions of the policy is that "failure to fur-

nish the company proof of disability within thirty days after the termination of the same will invalidate all claim under this contract." This provision requires the proofs to be furnished within thirty days after the termination of the disability, and not within thirty days of the injury. The disability in this case had not terminated when final and formal proofs were made, to which no exception could be taken.

The contention that Sheppard voluntarily exposed himself to unnecessary danger, and is therefore not entitled to recover, as well as some claims of a general nature which go to the right to recover anything, are not available to the company. In its answer it alleges that, after investigation by an agent and adjuster of the company, an offer was made to the plaintiff as a payment of his claim. The offer, and the averment of the same in the pleading, practically acknowledge a right of recovery in Sheppard, and leave open for consideration only the question of the amount for which the company is liable. The ordinary use of a gun while hunting can hardly be regarded as a voluntary exposure to unnecessary danger, and as to whether there was such exposure in this particular instance was submitted to the

jury, and has been determined against the claim of the company.

The claim that there was a misstatement in the proofs of the injury is based on the fact that the doctor who attended Sheppard made the claim for him stated as the cause of the injury that Sheppard placed the gun upon the ground, butt down, and that it was discharged, taking effect in his left wrist, while it appeared on the trial that the cause of the accident was that Sheppard stepped into a hollow place in the ground, causing the gun to slip through his hands so that it struck the ground and was discharged. There is testimony to the effect that he called the attention of the doctor to the fact that the proof made out was incorrect in that particular, and that the doctor agreed to correct it, but by some oversight failed to do so. The inaccuracy seems to us to be rather immaterial, but, in any event, it having been made by mistake, the insured is not prevented from showing the actual facts.

We find nothing substantial in the objections to the rulings on the reception of evidence or in charging the jury.

The judgment will be affirmed.

All the Justices concur.

LOUISIANA SUPREME COURT.

Town of CROWLEY
v.

James L. WEST, Appt.

(52 La. Ann. 526.)

- *1. A municipality which has voluntarily passed under the dominion of act No. 136 of 1898 cannot, under any general or implied authority, "suppress" or "locate" at pleasure a lawful business which is not a nuisance *per se*, where the act confers authority, in specific terms, merely to prescribe regulations whereby the establishment in which such business is conducted shall be kept clean and in good order.
- *2. A fortiori is it incompetent for such municipality to enforce an ordinance, whether adopted before or after its acceptance of the act of 1898, the effect of which is to permit four livery stables to be maintained in its business center, while the fifth stable, and all others which may be hereafter established, are to be relegated and confined to a designated locality remote from such center.

(January 9, 1900.)

A PPEAL by defendant from a judgment of the Mayor's Court for the Town of Crowley convicting him of violation of an

*Headnotes by MONROE, J.

NOTE.—For municipal regulation of livery stables as nuisance, see note to *Ex parte Lacey* (Cal.) 88 L. R. A. on page 653.

As to restricting location of livery stable, see *Chicago v. Stratton* (Ill.) 85 L. R. A. 84. 47 L. R. A.

ordinance regulating the establishment of livery stables. *Reversed.*

The facts are stated in the opinion.

Messrs. Hampden Story and Philip S. Pugh, for appellant:

Livery stables are not nuisances *per se*.

2 Wood, Nuisances, §§ 594 *et seq.*; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *State ex rel. Violet v. King*, 46 La. Ann. 78, 14 So. 423; *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277; *Ex parte Lacey*, 108 Cal. 328, 38 L. R. A. 640, 41 Pac. 411.

No council vested with the power to declare nuisances has authority, by ordinance, to declare an existing livery stable a nuisance.

State ex rel. Russell v. Beattie, 16 Mo. App. 131; 13 Am. & Eng. Enc. Law, p. 935; *Grossman v. Oakland*, 36 L. R. A. 593, and notes, 30 Or. 478, 41 Pac. 5.

The existence of a nuisance is one of fact to be determined by the court, on evidence adduced.

Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 17 So. 343; Wood, Nuisances, § 744, pp. 976, 977; *Tissot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 1000, 3 So. 261; 1 High, Inj. 586; *Tiedeman*, Pol. Power, § 16, pp. 32-34, § 85, p. 197, §§ 102, 122c, p. 433.

The power to prevent the following of a lawful occupation, save in certain localities, is not inherent to municipal corporations. Ordinances which violate any recognized

principles of legal and equal rights are necessarily void as far as they do so.

State v. Mahner, 43 La. Ann. 496, 9 So. 480; *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277; 1 Dill. Mun. Corp. § 322; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

All ordinances must be general and equal in their operation, and not oppressive, arbitrary, unreasonable, and discriminatory.

Chicago v. Rumpff, 45 Ill. 95, 92 Am. Dec. 196; *Tugman v. Chicago*, 78 Ill. 405; *Hudson v. Thorne*, 7 Paige, 261; Dill. Mun. Corp. § 256; *Cooley*, Const. Lim. pp. 200-203.

It must appear that the purpose of the ordinance is a beneficial one within the meaning of the law.

Hayes v. Appleton, 24 Wis. 542; *Bloomington v. Wahl*, 46 Ill. 489.

The court must judge in each case whether the exercise of power is reasonable.

Com. v. Worcester, 3 Pick. 462; *St. Louis v. Weber*, 44 Mo. 550.

The ordinance prevents the respondent from pursuing his occupation in the same locality where others, his competitors, are permitted to ply their vocation, in violation of § 1, 14th Amend. U. S. Const., in this,—that he is denied the equal protection of the law.

Re Hong Wah, 82 Fed. Rep. 623; *Re Sam Kee*, 31 Fed. Rep. 681; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Stockton Laundry Case*, 26 Fed. Rep. 611; *Barthet v. New Orleans*, 24 Fed. Rep. 563; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Pac. 245.

Messrs. Philip J. Chappuis and Saunders & Gurley, for appellee:

The powers most usually delegated by the legislature to municipal bodies are such as fall within the police power of the state so that they may be exercised within the territorial limits of the municipality.

1 Dill. Mun. Corp. 4th ed. p. 215.

Change in form of government does not *ipso facto* abrogate pre-existing law, even when the change is by conquest. A change in the organic law for the future leaves unaffected the existing ordinance, precisely as change of a state Constitution leaves undisturbed all prior acts of the assembly.

1 Dill. Mun. Corp. 4th ed. p. 141, notes.

Existing laws are disturbed only when the Constitution contains provisions inconsistent with them.

6 Am. & Eng. Enc. Law, p. 920.

Certain trades may be confined to designated limits in a city.

Tiedeman, Pol. Power, § 104, p. 311, § 122c, p. 433, § 85, p. 194.

The town's power to regulate livery stables confers the right to designate the localities in which they shall not be established.

St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470.

Town authorities have discretion to regulate trades in proper cases, and to determine the character of regulations. It is a judicial question whether the nature of the

calling is such as to justify police regulation.

Tiedeman, Pol. Power, § 85, p. 194.

An ordinance cannot be held unreasonable when passed by express authority.

A Coal-Float v. Jeffersonville, 112 Ind. 19, 13 N. E. 115; 17 Am. & Eng. Enc. Law, p. 247.

An ordinance may be partly good and partly bad.

17 Am. & Eng. Enc. Law, p. 265, and notes.

Motives of members of a council in passing a valid ordinance are immaterial.

17 Am. & Eng. Enc. Law, p. 259.

Memroe, J., delivered the opinion of the court:

Defendant was fined for violating an ordinance of the town of Crowley which prohibited the establishment of livery stables, except within certain limits; and he has appealed to this court, on the ground that said ordinance is in contravention of statutory and constitutional law. The ordinance in question was adopted in 1898, and while it declares: "Section 1. . . . That hereafter, it shall be unlawful to establish, maintain, locate, or operate a livery, feed, sale, and boarding stable within any portion of the corporate limits of the town of Crowley, except as hereinafter prescribed,"—and then proceeds to establish the limits, remote from the business center of the town, in which such stables may be conducted, and to provide penalties for violation of the ordinance, the concluding section reads as follows, to wit: "Sec. 3. That the provisions of this ordinance should not be applied to livery, sale, boarding, and feed stables, already in existence and under operation: provided, that the effects of the ordinance shall not be governed by this section, which is hereby declared to be a distinct and independent part of the ordinance." The admissions and the evidence show that when the case was tried there were five livery stables within the prohibited section of the town; one of them being conducted by the firm of which the defendant is a member, and another being a stable which had been sold, before the adoption of the ordinance, by defendant's present partner to the person who is now conducting it. After this sale was made, and before the adoption of said ordinance, C. R. West, defendant's partner, purchased a lot, for which he paid \$1,000, also within the prohibited district, and ordered lumber and material for the erection thereon of a new stable, which, as we understand, has been since built, at a cost of \$1,300; and said firm have in the meanwhile, and after the adoption of said ordinance, carried on business in the stable for the maintenance of which the arrest was made. The ordinance, as it stands, will affect no other existing stable than that conducted by the defendant's firm; and said firm, if the ordinance is enforced, will be compelled to move within the limits designated, with the result that it will be unable to compete with the other stables, which are in the business portion of the town. The points

relied on by the defendant are that the corporate powers of the town of Crowley are derived from act No. 136 of 1898, and that said act confers no authority for the adoption of the ordinance in question; that said ordinance is invalid because it was not "entered in a well-bound book," as required by said act; that said ordinance is unconstitutional and illegal for the further reason that it is "discriminatory, unreasonable, arbitrary, and unequal in its operation and effect," and would "operate a hardship on defendant, by compelling him to remove his stable from a limit where livery stables are now prohibited, to a locality designated and set aside for that purpose, remote and distant from the central portion of business, where others, his competitors, are permitted to carry on a similar and like occupation, unmolested, and free from municipal interference and objection;" that said ordinance abridges defendant's liberty with respect to the selection of a means of livelihood, and denies him the enjoyment of his rights and privileges and of his property as guaranteed by the Constitution of the United States.

The town of Crowley was originally incorporated in 1894, agreeably to the provisions of act No. 49 of 1882. The act of 1882, however, purports merely to regulate the "manner" of incorporation, and contains no specific grants of power. Whatever authority was exercised by the corporation thus established must therefore have been implied from the fact of its authorized existence as a municipal corporation. In 1899 said corporation, by the vote of its electors and the proclamation of the governor, as required by the act, accepted the offer made by the state by means of act No. 136 of 1898, and became a "town," under said act. The act of 1898 is of much broader scope than that of 1882, since the latter provided only for the "manner" of effecting incorporation, while the latter provides, not only for the creation of corporations where none previously existed, and for the conversion of corporations already established under previously adopted statutes into corporations acknowledging it (said act) as the authority within which alone they exist, but it also specifies, in terms of great exactness, the powers which are to be exercised by the corporations so created or converted, and it concludes with a clause which repeals all laws contrary to it or "on the same subject-matter," except as otherwise provided in the act itself. The acceptance of this act by the town of Crowley, as the Jordan through which it was born again, if it does not cut off inquiry into any previous existence, at least reduces that inquiry within very definite bounds. It may be conceded that existing ordinances adopted during such previous existence were not necessarily annulled by the regeneration of the town thus affected. But it must also be conceded that no such ordinance can be enforced, if found to conflict with the law within which the town now lives and moves and has its being, since the creature, in matters of this kind, is not more powerful than the

creator. The charter of 1894 assumed for the town the power, among other things, to regulate the "location" as well as the inspection and cleaning of "stables, cattle yards, slaughter houses, soap, glue, tallow, and leather factories, depositories for hides, and all such places of business, likely to be, or to become, detrimental to health," etc.; and it was under this charter that the ordinance in question, which undertakes "to regulate the location of stables," was adopted. But since the acceptance of the act of 1898 there is no room for the assumption or exercise of any power not expressly or impliedly conferred by the act.

It is not pretended that the act of 1898 in express terms confers upon corporations established under it any authority to regulate the location of stables. The remaining question then is, Can such authority be implied? The act provides, in substance:

"Sec. 13. That each city, town, or village, which is incorporated, shall be governed by the provisions of this act, and shall be a municipal corporation, with power: First, to sue and be sued," etc.; "second, to purchase and hold real estate," etc.; "third, to make all contracts," etc.; "fourth, to exercise such other or further powers as are herein conferred."

"Sec. 14. That the powers herein granted shall be exercised by the mayor and board of aldermen," etc.

"Sec. 15. That the mayor and board of aldermen shall have power to enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state, and they shall have power: First, to levy and collect taxes for general purposes," etc.; "second, to levy and collect taxes to pay interest," etc.; "third, to make regulations to secure the general health of the municipality; to prevent, to remove, and to abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools and to regulate or suppress those already constructed; to compel and regulate the connection of all property with sewers and drains; to suppress hogpens, slaughter-houses and stock yards and to locate the same with the concurrent approval of the board of health, or to regulate the same and to prescribe and enforce regulations for cleaning and keeping the same in order, and the cleaning and keeping in order of warehouses, stables, alleys, yards, private ways, outhouses, and other places where offensive matter is kept or allowed to accumulate; and to compel and regulate the removal of garbage and filth, beyond the corporate limits."

And there are twenty-nine more paragraphs in § 15, each conferring separate and specific powers on cities and towns and villages falling under the dominion of the act. In § 16 there are eleven distinct paragraphs, conferring specific powers on cities and towns, but not on villages; and in § 17 there are five paragraphs, which confer still further specific authority on cities and towns having more than 2,000 inhabitants. But

nowhere else in the act are stables mentioned, save in the paragraph above quoted, where the corporations affected by said act are authorized to prescribe and enforce regulations for cleaning them and keeping them in order, in common with warehouses, alleys, private ways, outhouses, etc., while, in the same connection, and as part of the same sentence, the power is conferred to suppress hogpens, slaughterhouses and stock yards, or to locate the same. It will be observed, however, that the power to "suppress" and to "locate," thus conferred, is granted with the qualification that it is to be exercised "with the concurrent approval of the board of health." The question, then, very naturally suggests itself: If the legislature had intended that the municipal corporations affected by the act of 1898 should be authorized at pleasure to "suppress" or to "locate" warehouses and stables, what was to prevent the use of the language granting that authority, and why was language used which authorizes other action, and falls short of authorizing such suppression or location? And, again, is there any reason to suppose, taking the whole paragraph quoted together, or taking the various provisions which have been referred to together, that the lawmakers, in specifically authorizing the suppression or location of hogpens and slaughterhouses, would require such action to be taken "with the concurrent approval of the board of health," and yet that they intended that warehouses and stables should be suppressed, or located upon the outskirts of the town, without the concurrence of the board of health, although the authority, as granted, with respect to them, extends only to the prescribing and enforcing of regulations for keeping them clean and in order? The law applicable to the conditions as presented is, as we think, fully stated in the following language: ". . . The extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority to declare what is a nuisance is somewhat broader, but neither this nor the general authority mentioned in this last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or property to be nuisances. . . . It is not unusual to invest the municipal council with special authority in respect of particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety. . . . The terms in which such authority is conferred measure its scope, but, in view of the end for which it is given, it is not subjected to a hostile, or even a narrow, construction." 1 Dill. Mun. Corp. § 379. "It is a doctrine not to be tolerated in this country, that a municipal

corporation, without any general laws, either of the city or state, within which a given structure can be shown to be a nuisance, can, by mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities." *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

It has frequently been held that a livery stable is not a nuisance *per se*. *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138; *Pickard v. Collins*, 23 Barb. 444; *Harrison v. Brooks*, 20 Ga. 537; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Wood Nuisances*, §§ 528, 529. And in the case at bar the mayor, before whom it was tried, declined to permit the defendant's counsel to ask a witness who was upon the stand, "In what manner and in what condition is the stable in controversy kept?" on the ground that the question before him was not how the stable was kept, or whether it was a nuisance, but whether or not the town had the right to enforce the ordinance which prohibited the keeping of the stable where it then was. There is nothing in the record, therefore, to indicate that the defendant's stable was objectionable in any way whatever, or to anybody, except (1) the preamble to the ordinance under which he was prosecuted, which reads, "Whereas, the indiscriminate establishment of livery, feed, boarding, and sale stables endangers the public health and the public safety, prejudices the comfort and well-being of the community, depreciates the value of property, and greatly increases the danger of fire, therefore," etc.; and (2) the following statement, embodied in the mayor's reasons for judgment, to wit: "It is even more than an ordinary stable, being large, and being used for the penning and accommodation of a large number of animals for sale, and which make considerable litter, noise, and disturbance by their constant tramping upon the floor, thus affecting the health and comfort of the surrounding residents." This declaration in the ordinance cannot fasten upon a business, which is not in itself a nuisance, the pernicious, destructive, and altogether alarming qualities which the language used attributes to it, any more than these qualities can be fastened upon a "warehouse" or an "outhouse" by the mere use of language. Nor can we accept the statement in the opinion of the mayor as being conclusive upon the point to which he refers, since we find absolutely no testimony to that effect in the record,—not even that of the prosecuting witness; and the mayor, as has been stated, had ruled out all evidence upon the subject offered in behalf of the defendant. We have, then, a case in which it appears that a person engaged in a business which is conceded to be lawful, in which four other persons or firms are engaged, in the same town, and which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a

municipal ordinance, arrested and fined because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous; and it further appears that the other four persons or firms engaged in the same business are not to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly in perpetuity of the livery stable business in Crowley, cannot be seriously entertained. *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *State v. Dulaney*, 43 La. Ann. 500, 9 So. 481; *State v. Garibaldi*, 44 La. Ann. 814, 11 So. 36; *State v. Sarrahat*, 46 La. Ann. 703, 24 L. R. A. 548, 15 So. 87; *State v. Kuntz*, 47 La. Ann. 107, 16 So. 651; *Tugman v. Chicago*, 78 Ill. 409; Dill. Mun. Corp. 4th ed. ¶ 322.

It is said, however, that, by the terms of the ordinance itself, the section by which it was made inapplicable to those keepers of livery stables who were in business before its adoption is to be regarded as in the nature of an independent enactment, which may be declared null without affecting the other sections, and that the ordinance may be held to apply to all livery stables in Crowley, and to require the proprietors of such stables either to close them up and to go out of business, or else to move them within the territory prescribed by the ordinance. Pretermittting the consideration of the question whether such a method of dealing with the ordinance would be competent, and conceding, *arguendo*, that the section in question could be eliminated as suggested, we have remaining what may be called the main question; i. e., assuming that the ordinance is to apply to all livery-stable keepers in Crowley, and that under its provisions they will be compelled to move their establishments from the center of the town to the district designated therein, is the said ordinance a competent exercise of the authority vested in the corporation? We find nothing in the record which would justify us in answering this question in the affirmative. Ordinances of municipal corporations purporting to have been adopted in the exercise of implied or general authority must be "lawful," "reasonable," "impartial," "fair," "general," "consistent with public policy," and "not in contravention of common right." Dill. Mun. Corp. 4th ed. §§ 319-323, 325, 326, 329. It is doubtful whether the ordinance in question meets any of these requirements. The business to be affected is a legitimate business, and there is not a syllable of testimony in the record before us going to show that it is conducted otherwise than in a proper manner, and inoffensively to others. The declarations of the preamble to the ordinance are met by the admitted fact that four out of 47 L. R. A.

the five stables in Crowley which are said to endanger public health and safety, prejudice the comfort and well being of the community, depreciate the value of property, and increase the danger of fire, were to be left untouched, while the penalty for all this capacity for calamity breeding was to be visited on the defendant, as the proprietor of the fifth stable, which is not shown to differ in any respect from the others. Under these circumstances, even if the act of 1898 had not granted the corporate authority with respect to stables in specific terms, the general or implied authority to adopt ordinances in the interest of the general welfare of the community would not authorize such an oppressive discrimination between the defendant and other keepers of livery stables. But the specific character of the grant of authority to prescribe regulations for the "cleaning" and "keeping in order" of stables, warehouses, etc., taken in connection with the authority granted in the same section, and in equally specific terms, to "suppress" or "locate" hogpens, slaughterhouses, etc., and taken in connection with the general tenor of the act, leaves no room for doubt that it was the intention of the lawmakers to distinguish between establishments of different kinds, and that it was not intended that any greater authority should be exercised with respect to stables and warehouses than that which is conferred in terms. And this limitation applies equally to ordinances in existence when the town passed under the dominion of the act of 1898, and to those subsequently adopted. *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the ordinance (No. 88) under which defendant was convicted and sentenced be decreed null and of no effect; and that the defendant be discharged from further prosecution thereunder.

Adelina PRIETO, *Appt.*,
v.

ST. ALPHONSUS CONVENT OF MERCY.

(52 La. Ann. 631.)

*1. A child remains under the authority of his father and mother until his majority or emancipation, and is bound to obey them in everything which is not contrary to good morals and the laws; and during his minority, unless sooner emancipated, he is without legal capacity to leave the parental domicile permanently and select for himself another domicile or residence, without the consent of his parents. This is a fundamental principle that lies at the very foundation of society, and is intended to support and maintain the exercise of parental authority in the family and in the home, and to guard and protect the children of the family until

*Headnotes by WATKINS, J.

NOTE.—For habeas corpus to review custody of child, see *State ex rel. Bethell v. Kilvington* (Tenn.) 41 L. R. A. 284.

their minds shall be sufficiently cultivated and their judgments sufficiently matured to enable them to make judicious and proper selections of places of abode for themselves.

2. The precise limit of time is fixed by law, and it cannot in any case be either enlarged or diminished by evidence, however cogent, or by argument, however persuasive.

3. A girl of seventeen years of age has not the legal right to leave her mother's home and enter a convent, with the expressed purpose of becoming a nun, without previously obtaining her consent; and should she enter a convent under such circumstances, and be received therein upon the supposition that she had obtained such consent, it is the province of the writ of habeas corpus to release her from such restraint, and restore her to the rightful custody of her mother, in due course of law.

(Brocas, J., dissents.)

(January 9, 1900.)

A PPEAL by the petitioner from a decree of the Civil District Court, Division C. for the Parish of Orleans denying a writ of habeas corpus to obtain the release of petitioner's daughter from the defendant convent. *Reversed.*

The facts are stated in the opinion.

Messrs. Lazarus & Luce, for appellant:

The parents have, and can enforce, authority over their minor children until majority or emancipation. To exercise their authority, to discharge their obligations to support, direct their education, and control and regulate their morals, habits, and associations, the parents are entitled to the custody of their children.

Civil Code, 216, 217, 219-224, 227, 235, 236; Civil Code, 26, 34, 35, 36, 37, 39, 253.

They can bind their children as apprentices.

Civil Code, 164 (§ 3), 166, 170, 171, 173, 220.

Our legislation but recognizes and confirms the natural relations and rights of parent and child, and enacts that, until the dissolution of the marriage, the father, and in case of his death the mother, is the natural tutor or guardian of the minor child.

Civil Code, 246, 248, 250, 253, 254, 256-258, 260, 261.

Even when the parents are dead and have not appointed a tutor by last will, or where the tutor so appointed is not confirmed, the minor has no voice in the selection of a tutor, and the law fixes and directs who shall be appointed, not leaving it to the discretion of the court.

Civil Code, 263-268.

Even a minor over eighteen years of age, no matter how intelligent and capable the court may consider him, cannot, except for cause against the parents, be emancipated without their consent.

Civil Code, 385-387.

Under the English law there were three kinds of guardians: guardians by nature, guardians by nurture, and guardians by socage. Guardianship by nature was of the heir apparent, and was vested in the father, 47 L. R. A.

continuing until the minor was twenty-one years old, the child having no voice. Guardianship by nurture and socage continued until the minor was fourteen years old, when, under the law, it had the right to select its own guardian. During the period of the guardianship by nurture, formerly, in cases of separation of the parents, the authority of the father was paramount, and the court could not award to the mother helpless infants of tender years. Subsequently, the law was changed so as to authorize the court, in its discretion, to commit the children to the care and nurture of the mother.

2 Story, Eq. Jur. p. 588, note 1; 1 Chitty, Bl. p. 379, § 460, p. 380, § 461, p. 381, § 462, p. 385, § 464; *Bennet v. Bennet*, 13 N. J. Eq. 114; *Mercein v. People ex rel. Barry*, 25 Wend. 104, 35 Am. Dec. 653.

The abode of a minor child, of its own desire, with a third person or institution, with their consent and approval, where such person or institution has no legal claim on the minor, without the consent and against the opposition of the parents and natural tutor, is a withholding of the custody of the child from the one in whom the law vests it, and authorizes the issuance and maintenance of the writ of habeas corpus.

People ex rel. Tappan v. Porter, 1 Duer, 709; *People ex rel. Wilcox v. Wilcox*, 22 Barb. 178; *People ex rel. Trainer v. Cooper*, 8 How. Pr. 294; 2 Story, Eq. Jur. §§ 1339, 1340; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *People ex rel. Barry v. Mercein*, 3 Hill, 399, 38 Am. Dec. 644; *Queen v. Clarke*, 7 El. & Bl. 186.

The court, under the law and jurisprudence, generally in cases where the custody of minor children is involved, and especially under our law and Constitution, which authorize actions for the custody of children, is called on, not only to set aside the illegal detention, but to award and decree the delivery and custody in habeas corpus proceedings.

Bermudes v. Bermudes, 2 Mart. (La.) 183; *Hyde v. Jenkins*, 6 La. 436; *People ex rel. Trainer v. Cooper*, 8 How. Pr. 295; *Re Goodenough*, 19 Wis. 275; *Ex parte Williams*, 11 Rich. L. 452; *Hurd, Habeas Corpus*, pp. 453, 454, 531, 536; 2 Story, Eq. Jur. § 1340; *Queen v. Clarke*, 7 El. & Bl. 203; *King v. Greenhill*, 4 Ad. & El. 624.

Mr. Frank McGloin, for appellee:

An application precisely similar was denied, only a few days ago, by the honorable civil district court for the parish of Orleans, and the judgment of said court is pleaded as *res judicata*.

Freeman, Judgm. 4th ed. § 324; Church, Habeas Corpus, 2d ed. § 387; 9 Enc. Pl. & Pr. p. 1071.

The jurisdiction conferred by article 93 of the Constitution is original, not appellate.

Re Strickland, 41 La. Ann. 324, 6 So. 577; *State ex rel. Price v. Scott*, 43 La. Ann. 857, 9 So. 501.

It is concurrent with the jurisdiction, in similar cases, of the civil district court, and in no manner superior or supervisory.

Re Strickland, 41 La. Ann. 324, 6 So. 577; *State ex rel. Price v. Soott*, 43 La. Ann. 857, 9 So. 501.

Having an ample remedy in regular course, this honorable tribunal will not hear and determine the cause by means of any of the extraordinary writs.

State ex rel. Keplinger v. Perez, 48 La. Ann. 1348, 20 So. 164; *State ex rel. Dunn v. Richardson*, 49 La. Ann. 1612, 22 So. 960; *Airey v. Pullman Palace Car Co.* 50 La. Ann. 643, 23 So. 512.

The young lady in this case is almost eighteen years of age. She has shown herself intelligent and of full discretion. She has expressed clearly and unmistakably her choice to remain where she now is. Under the English laws and those prevailing in our various American states this choice will be respected.

Church, Habeas Corpus, 2d ed. § 447; 9 Am. & Eng. Enc. Law, p. 245; *St. Martin v. New Orleans*, 14 La. Ann. 113; *Welch v. Gossens*, 51 La. Ann. 852, 25 So. 472.

The controlling consideration in cases of this character, even in cases of infants not of the age of discretion, is the welfare and the happiness of the child.

Hurd, Habeas Corpus, 2d ed. 532, 533; Church, Habeas Corpus, § 431.

The jurisdiction of the courts of this state, in the matter of issuance of the writ of habeas corpus, is constitutional; it cannot be extended beyond the terms of the fundamental law.

Re Manouvrier, 16 La. Ann. 257; *State ex rel. De Buy v. Civil Sheriff*, 32 La. Ann. 1226; *State ex rel. O'Malley v. Houston*, 35 La. Ann. 1195; *People ex rel. Tappan v. Porter*, 1 Duer, 709.

Under articles 93 and 115 of the Constitution it issues only in behalf of one in "actual custody." A custody merely implied, constructive, or figurative cannot be "actual."

The courts of Great Britain and of all our sister states have ever held habeas corpus to be a writ of liberty. Wherever the party concerned, whether major or minor, has had sufficient age and discretion to make a choice of residence, he has been liberated, and not been put under restraint as to where he shall go or live.

Church, Habeas Corpus, 429, 431, §§ 447, 448, 532, 533; 9 Am. & Eng. Enc. Law, pp. 241, 242; *Re Goodenough*, 19 Wis. 274; *Re Wollstonecraft*, 4 Johns. Ch. 80; *Com. v. Hammond*, 10 Pick. 274; *Com. v. Hamilton*, 6 Mass. 273; *State, Baird, Prosecutor, v. Baird*, 18 N. J. Eq. 194; *People ex rel. Ordronaux v. Chegaray*, 18 Wend. 637; *People ex rel. Barry v. Mercier*, 8 Paige, 47; *Re M'Dowle*, 8 Johns. 328; *State v. Scott*, 30 N. H. 274; *People ex rel. Fowler v. Pillow*, 1 Sandf. 672; *State ex rel. Herrick v. Richardson*, 40 N. H. 276; *People ex rel. Davenport v. Kling*, 6 Barb. 366; *People ex rel. Wilcox v. Wilcox*, 22 Barb. 179; *Curtis v. Curtis*, 5 Gray, 537; *Com. ex rel. Goerlitz v. Barney*, 4 Brewst. (Pa.) 408; *Ellis v. Jesup*, 71 Bush, 403.
47 L. R. A.

This honorable court has always respected personal liberty, and declined to enforce compliance with mere civil duties or obligations.

Laroussini v. Werlein, 48 La. Ann. 13, 18 So. 704; *Baillie v. Western Assur. Co.* 49 La. Ann. 658, 21 So. 736; *State ex rel. Anglade v. Second City Ct. Judge*, 48 La. Ann. 1415, 20 So. 912.

All habeas corpus decisions reported, in which the will of a child has been ignored, have been in cases of children of tender years; and the departure from the general line of authorities, and the disregard of the writ, have been expressly justified on the ground that the infants were too young to exercise the right of choice.

Church, Habeas Corpus, §§ 674, 675; *King v. Greenhill*, 4 Ad. & El. 624; *King v. Isley*, 5 Ad. & El. 441; *Re Pulbrook*, 11 Jur. 185; *Re Fynn*, 12 Jur. 713; *King v. De Manneville*, 5 East, 221, 1 Smith, 358; *Re v. Johnson*, 1 Strange, 579, 2 Ld. Raym. 1333; *Re Lloyd*, 3 Mann. & G. 547, 4 Scott, N. R. 200; *Re Doyle*, Clarke Ch. 154; *Queen v. Clarke*, 7 El. & Bl. 186; *Re Race*, 26 L. J. Q. B. N. S. 169; Forsyth, Custody of Infants, 52 Law Lib. §§ 44, 74.

There is right on the part of the child as well as of the parent. The right of the latter has never in this country been held absolute, as plaintiff claims. The welfare and happiness of the child have always been "the pole star," guiding the courts in their settlement of these controversies.

9 Am. & Eng. Enc. Law, p. 241; Church, Habeas Corpus, § 446.

Watkins, J., delivered the opinion of the court:

The present appeal involves the consideration of an application addressed to the judge of the district court for a writ of habeas corpus and the prayer of the petition is that the mother superior of the St. Alphonsus Convent of Mercy, who is known to petitioner as Sister Philomena, be cited to answer, and that a writ of habeas corpus issue, directed to said mother superior, commanding her to produce, on the day specified, the body of Maria Theresa Prieto, and that after trial petitioner, her mother, "be declared entitled to the care, control, and custody of said child, and that said child be delivered into her custody." The petitioner alleges that her said daughter is the issue of her marriage with her late husband, Jose L. Prieto; that said daughter Maria Theresa was born in the island of Cuba on the 15th of October, 1881, and, being a minor, petitioner is entitled to her care and custody. She further represents that she had at all times the "care, keeping, and custody of her said child, and has at no time consented to part therewith; that she always provided for her said child as was her duty, and in accordance with her station in life; that owing to the insurrection prevailing in the island of Cuba in the early part of the year 1898, and in order to protect and better care for said child during the period of said insurrection, your petitioner removed with said child to the

United States, and, in order to give said child the advantages and benefits of an education, placed her, for that purpose, in St. Alphonsus Convent of Mercy, in this city, and which is presided over, as she is informed and believes, by a reverend mother superior, who is known in the administration of the affairs of the convent as Sister Philomena; and that the directions of petitioner to those in charge of said institution were to educate her said daughter so as to properly qualify her for the duties and responsibilities of life, and in accordance with her station in life." Petitioner further represents "that she is a communicant of the Roman Catholic Church, and that it was with the desire that her said child might receive the advantages and training of the said church, as well as for the educational purposes aforesaid, that she placed her said daughter temporarily in said convent." She further represents "that until the war terminated she was without available means to take charge of said child, and return to their home in the island of Cuba, but that at the termination of said war she requested her said child to return to their home, but that, owing to the influence exercised upon her said child by those in charge of said St. Alphonsus Convent of Mercy, she was persuaded, as she is informed and believes, to refuse to return; and being impressed with the idea and belief that any attempt upon her part to return to their home would be violative of the laws of the church and sacrilegious, entailing upon her Divine displeasure and consequent punishment," her said child declined to return with her to their home. Petitioner further represents "that, while she is a firm believer in the church of which she is a communicant, she will not yield her maternal authority, and the care, custody, and control of her child to the church." She represents further "that she has made every effort to secure the custody of said child, who is convalescing from a severe illness, and that she has made frequent visits to said convent, and asked to see and converse with her child, but has never been able to do so, except in the presence and hearing of one of the sisters or attendants of said institution"; that she "is entitled as aforesaid to the care and custody of the person of her said child, and the control of her education during her minority, and that neither the sisters connected with said convent, nor anyone else, has the right, against the will and consent of petitioner, to the care and custody of said child, and that it is the desire of the petitioner to take her said child to her home, in Cienfuegos, Cuba, where she is able and willing to provide, care for, and educate her said child." She further represents "that said child, by the influence exercised over her at said convent, and by the supervision and restraint to which she is subjected, is deprived of her liberty, and is now in said convent, under the control and direction of the sisters thereof, against the consent and wish of petitioner, who has made frequent demands for the custody of said child," without avail. She further represents that "she has means and

property in the island of Cuba, at or near Cienfuegos; that said child was born and reared there; that her family and your petitioner all reside there; that previous to his death the father of said child, who followed the profession of a notary, had property and interests there, and resided there until his death; and that, by petitioner securing the custody of said child and taking her to her home, she will have the care and direction of a mother, and be surrounded by her relatives and family connections."

Upon the foregoing petition, the judge *a quo* entered an order that a writ of habeas corpus issue, and be made returnable as prayed for, directing the civil sheriff to serve and execute the process. In accordance with the said order a writ of habeas corpus was issued, and addressed, "To the Mother Superior of the St. Alphonsus Convent of Mercy, known as Sister Philomena." That writ directed the production, before the honorable district court, of "the body of Maria Theresa Prieto, and [commanded the respondent] to then and there show cause why [she] detains said minor child, and why said minor child should not be given into the care and custody of the plaintiff herein, her mother, Mrs. Adelina Prieto." Upon the writ of habeas corpus, the sheriff returned that he had made personal service "on Sister Philomena, the mother superior of St. Alphonsus Convent of Mercy." The record shows that upon the following day an answer was filed to the foregoing petition of the following tenor, to wit:

Into court comes Reverend Mother Philomena, superior of the Convent of Mercy, of this city, appearing for herself and for her said convent, who, for answer to the petition and demand herein, avers that Maria Theresa Prieto is residing in the Convent of Mercy, and has been so residing for about a year; that during said period, her necessities have been supplied to her, even to musical instructions by said convent, without charge or remuneration of any kind. Appearer says that said Maria Theresa Prieto is and has been in said convent entirely of her own volition; that she is and has been always free to stay or to depart, as suits her best. Appearer specially denies that said Maria Theresa Prieto has been impressed by her, or by any inmate of said convent, with the idea, as alleged in the petition, that to leave said convent 'would be violative of the laws of the church, and sacrilegious, entailing upon her Divine displeasure and consequent punishment.' It is averred, on the contrary, that the rules of the Order of Mercy positively prohibit the reception of any member who has not been long and closely tried, in order to ascertain whether the applicant is fully determined to pursue the life of a religieuse, and understands fully the obligations and duties of the religious state, and that the laws of the Catholic Church do not permit the administration of religious vows, except to those whose wish to be so bound has been clearly manifested, and who have shown their disposition and proved their steadfast-

ness by a trial of sufficiently long duration; that accordingly no one is admitted to the Order of Mercy until she has remained at least six months, and ordinarily longer, as a postulant, and then two years additional, and ordinarily longer, as a novice; that after having thus persevered at least two years and a half in the vocation, and having shown themselves, by their conduct during said probation, proper subjects for the order, and being of full age, then only is an applicant allowed to take her vows and enter the Order of Mercy. Appearer shows that during all of said long period of probation the applicant is, and well knows herself to be, free, in fact and in conscience, to depart at her pleasure; and it is averred that the rules of all other religious orders of the Catholic Church are, as appearer is informed and believes, substantially the same. Appearer shows that the plaintiff herein, mother of said Maria Theresa Prieto, has always been allowed access to her daughter during reasonable hours, and that all allegations that the interviews between mother and child were under surveillance are untrue. It is further averred that said Maria Theresa Prieto is free to declare for herself, in the presence of the court, whether she wishes to depart from the convent or to remain therein; that if she elects to remain, and this court recognizes her freedom of election, then appearer is not disposed and will not close against her the doors of the convent. Wherefore appearer prays to be hence dismissed, with costs, and for general relief.

[Signed] Sr. M. Philomena, M. Sup.

The foregoing answer or return to the writ of habeas corpus was sworn to.

Upon the issues thus joined, a trial was had, and testimony was taken both for the relatrix and respondent; and thereupon the judge *quo*, "considering the law and evidence to be in favor of the respondent and against the relatrix, for the reasons orally assigned, and reduced to writing afterwards, ordered that the application for the writ of habeas corpus be discharged at relatrix's costs, and from that judgment the latter prosecutes this appeal.

In the course of his reasons for judgment the judge said: "I don't think that any person who has heard the evidence in this case entertains the slightest doubt as to the fact that the child, Maria Theresa Prieto, is not held under restraint by the sisters of St. Alphonsus Convent. She is free to go and come as she pleases. Counsel sought to establish the fact whether or not this young lady had been in any way influenced, or her mind poisoned, if that word can be used, so as to instill into it the idea that she would be breaking her vows and committing a great crime in leaving the convent at this time, if she saw fit. I find that the evidence does not justify any such charge. The young lady appears to be intelligent, and a person of her own mind; and she has reached the conclusion to become a nun, and she has reached this conclusion of her own volition. I find that the mother has not consented to her

daughter becoming a nun, except on one occasion, when she momentarily gave her consent. This was on the day that Maria Theresa entered the convent, and it was that consent that the young girl took advantage of to enter the convent, before the permission could be recalled. The question, then, is whether or not the mother is entitled to the possession of the child. The evidence shows that the girl is very nearly eighteen years of age." The judge then cites and analyzes several decisions of this court, and the provisions of article 218 of the Revised Civil Code, and observes: "The courts of the different states have repeatedly decided such questions upon writs of habeas corpus, and held that minors of a certain age have the right to choose their own domicile. That furnishes a reasonable authority, as it were, for giving to article 218 the interpretation that I place upon it,"—that is to say, that "the word 'quit' means to leave permanently; and therefore a proper interpretation of article 218 would be that a person under the age of puberty cannot leave the paternal domicile permanently, and that one over the age of puberty can."

An examination of the testimony shows the following facts: That the relatrix Mrs. Adelina Prieto, was the wife, and is now the widow, of Jose L. Prieto, and resides in Cienfuegos, Cuba, and is temporarily sojourning in the city of New Orleans; that she is a native of the island of Cuba, and was born, baptized, and married there; that her husband was a native of the island, and was born, baptized, married, and died there; that she and her husband always lived there, and that her husband died there on the 23d day of November, 1893; that he was, by profession, a notary, and at his death left quite a valuable estate; that there were seven children, issue of that marriage,—five daughters and two sons; that the subject of this controversy, Maria Theresa,—the young girl then present in court, and pointed out,—is one of the daughters, and the youngest of them, being seventeen years of age; having been born on the 15th of October, 1881.

The statement of the relatrix is that she arrived in the city of New Orleans on the 27th of November, 1898, accompanied by Maria Theresa and another daughter, and that one of her sons also accompanied her; that after her arrival she left the two daughters in the St. Alphonsus Convent of Mercy, the defendant, "to learn the English language;" that her daughter-in-law accompanied them to the convent. She states that she is a Catholic in her religion, and that while they were in attendance upon the convent they boarded at the parochial school, but that she never surrendered her maternal control over her child to the Convent of Mercy; that she had always fully provided her children with everything they required, according to their station in life; that she occasionally visited her daughter in the convent, and on those occasions she informed the sister that she was not satisfied to have her child in the convent, and that she wanted her (referring to Maria Theresa). She

states that on these occasions her daughter expressed "a willingness to return to her, and to her custody and keeping;" that on one occasion her daughter asked her "for money to pay her passage, and enough means to buy clothes, and so on." The witness indicates the time as being just before her daughter became sick in the convent. The witness then states that her daughter expressed this desire in a letter written to her while in Cuba, and that "she secured the authorization for the payment of her passage or trip to Cuba through the Morgan Line." That letter was filed in evidence, and is of the following tenor:

S. F. B. Morse, Esq.,

G. P. & T. A. Southern Pacific Company,
New Orleans, La.—

Dear Sir:

On presentation of this letter, please furnish Miss Theresa Prieto one first-class ticket, New Orleans to Havana. The amount of this order will be duly credited to the steamer for which this ticket is issued.

Very truly, yours,
Goldband Co.

Havana, June 23d, 1899.

Then follows this interrogation:

Q. Ask her if it was in consequence of the letter that she received from her daughter, expressing a willingness to return home, that this order was procured.

A. Yes, sir.

Q. Ask her if that letter that her daughter wrote her was written in her name, the name by which she was baptized, Maria Theresa, or was it written in a name which she adopted, or which the family gave her, of Conchita, or Chita, or Tata, and why it was done.

A. She says that the letter was in her own handwriting, and using her family name, but in the paragraph thereof, in the same letter, she used the colloquial name given her by the family, as Tata.

Q. Did she give any reason for that, at any time,—why she wrote in that name, and not in the name of Maria Theresa?

A. She says it was used in a postscript.

Q. Ask her when she came back here to her daughter,—when was it?

A. On the 23d of July last.

Q. Ask her how often she has seen her daughter since the 23d of July in the convent, about.

A. During a period of ten days she went every day for six or seven times.

Q. How often after the ten days did she repeat her visits to the convent?

A. After that period of ten days she went about two or three times, because she was sick.

Q. That is the reason she did not go more often.

A. Yes, sir; she was sick, and was attended by a physician.

—That is to say, the witness was sick.

It will be observed from the foregoing in-
47 L. R. A.

terrogation that the witness testified through an interpreter, she speaking no English; her native tongue being Spanish. The following is a continuation of her testimony:

Q. Ask her if, at any of the interviews she had with her daughter,—I speak of the last time, since her return to the States,—whether her daughter ever expressed a desire to go back home.

A. She says her daughter said to be patient; she was willing to go home.

Q. By the Court. That Maria Theresa, her daughter, told her (the witness) that she (the daughter) was willing to go home,—to go with her?

A. Yes. To be patient; that she was willing to go with her.

Q. By Counsel. Did your daughter give any reason when she expressed a willingness, but to be patient? Did she give any reason why to be patient? And if she had to get anybody else's consent, and, if so, what did she say?

A. She says what she always said. She told her to be patient; that she wanted to have a talk with the mother superior.

Q. That she wanted to have a talk with the mother superior, or that Theresa wanted to get the consent of the mother superior?

A. She says that the answer was, to be patient, and that she was going to talk with the mother superior; that she was very good, and undoubtedly she would give her permission to leave the convent.

Q. That who was very good? I know that she means the mother superior, but it don't appear on the record that way.

A. Mother Philomena.

Q. By the Court. Who is Mother Philomena?

A. By Counsel. The reverend mother superior of St. Alphonsus Convent of Mercy.

Q. By Counsel. Ask her to state the circumstances under which Maria Theresa left her home and entered the convent.

A. I don't know.

Q. By the Court. Ask her if she does not know how her daughter got to the convent at all.

A. She says one day the young lady, Theresa, left home and went to the convent for the purpose of learning English, and she was accompanied by other parties.

Q. Convent here, or in Cuba?

A. The convent here. And, when the other young ladies returned home, she asked where was Theresa. The ladies' answer was that Theresa remained in the convent, and she wanted to remain there; and it was due to that matter that she fell sick, and so on. And that was when she went to the convent four or five days after and she found the Mexican who interpreted the conversation.

The conversation here referred to is one that took place in the convent, and the Mexican referred to was a gentleman who interpreted what Maria Theresa said to the sisters, who did not speak Spanish.

Q. Ask her if her daughter was in a convent in Cuba, and ask her whether she is testifying about a convent here or in Cuba.

A. She says all references to a convent is about the convent here. She never was in any other convent than the one here in New Orleans.

Q. Ask her, then, if she brought her daughter here herself and put her in the convent, and how long ago it was, giving dates.

A. She says that she has already stated to the court, no, and that that question was heard here already.

Q. Ask her to state it again.

A. She says that she never placed her in the convent; that she (Maria Theresa) went with her (witness's daughter-in-law, and it was for the purpose of learning the English language.

Q. I want to establish when and where she got into the convent. She went through the gates of the convent once, and I want to know when and where and how she went through them.

A. She says she is not positive whether it was in April or May of last year.

Q. Where?

A. The Convent of Mercy in New Orleans.

Q. Ask her, was she (the witness) here at the time, in New Orleans?

A. Yes, sir.

Q. Then ask her if, after the daughter was in the convent, she (the witness) returned to Cuba? Is that the story, as I understand it?

A. She says that, after the young lady went into the convent, she (the mother) went to the island of Cuba on business; that she (the daughter) was left behind because she was not willing to go. She says she always offered her, when her brother Pietro returned to Cuba, that she would go with her brother.

Q. Ask her if she left her at school in the convent, or did the daughter intend to stay here, to enter the convent as a sister,—whether or not she left her daughter here to go to school, or whether her daughter remained because she wanted to go into the convent.

A. She answers that she left the city, and didn't take her because her daughter wanted to remain in the convent, with a promise to go to the isle of Cuba when this brother would return.

Q. Please understand exactly what I want to know. What I want to know is whether this young lady was left as a student in the convent, or whether she was left there to enter the order.

A. She says she never left her; that she remained there at her own will, under the idea of taking the veil.

Q. Ask her, if she (the witness) knew at the time that she wished to take the veil.

A. She says that her offer was after she entered the novitiate, when her brother returned to Cuba, she would accompany him, and owing to this promise she left. . . .

Q. By the Court. Ask her, did she consent?

47 L. R. A.

A. No, sir.

Q. Ask her how old her daughter was.

A. She says she didn't consent. She was satisfied, although she had to accept it, she could not help it. Her promise was to return to Havana or Cuba,—the promise of the child to return to Cuba, of course; that she would return with her brother; and at that time she accepted it because she did not have the means of taking her away.

Q. Ask her the direct question that the judge asked her: "Did she ever at any time consent to her daughter taking the veil?"

A. No, sir; never.

Q. Ask her if she didn't at all times object and protest against it.

A. She says she always protested and objected against her becoming a nun. . . .

Q. By the Court. I asked the age of the daughter at that time.

A. She says about seventeen,—not quite seventeen years of age.

Q. By Counsel. Ask her if she objects now to her daughter remaining in the convent.

A. She answers that she not only objects, but she answers, she is opposed,—“I am opposed to her remaining.”

Q. Ask her whether she has not objected at all times to her daughter being in the convent, except when she was there taking lessons in English in the parochial school.

A. With the intention of taking the veil, she has always been opposed to it.

Q. By the Court. Ask her whether or not the sisters knew that her daughter intended to remain in the convent for a time only, and then leave it.

A. She says she don't know whether the sisters knew it or not.

The following occurred on cross-examination of the relatrix:

Q. Now didn't you, one year ago, or over a year ago, engage a lawyer to see about getting your daughter out of the convent?

A. Yes; she went with him to the convent.

Q. Didn't your daughter then tell you and Mr. Quintero, the lawyer, that she wanted to stay there?

A. Yes, sir.

Q. She did tell you that?

A. Yes, sir; and that she had no means, but at the proper time she would bring the matter into court.

Q. But the fact is that, when this daughter was appealed to by Mr. Quintero and herself, that the daughter told her and her lawyer, Mr. Quintero, that she wanted to remain. That is a fact?

A. Yes, sir.

Q. And it is also a fact that the mother superior then told her and Mr. Quintero that, if this young lady wanted to go, that she was free to go?

A. They always expressed the same idea,—that, if the child wanted to go away from the convent, she could go, and so on, but that they could not throw her out.

Q. That is what the mother superior said to her at all times?

A. Yes, sir.

Q. That is, that they would not compel her to leave against her wish?

A. Yes, sir. She says that she always expressed that the child was a minor, and she wanted to take her out of the convent.

Q. Ask her if she didn't go back to the isle of Cuba after that interview, and expressed to Mr. Quintero and the sisters that she would let things stay as they were.

A. No, sir; she says as soon as she was able to she would return for her.

Q. Did she say that to Mr. Quintero?

A. No, sir; that is the reason why she abandoned the idea of taking the child; and she returned to Cuba because Mr. Quintero asked her for a certain amount of money that she could not provide, but that Mr. Quintero promised her, if she had the means to bring the case in court, that she could get the child.

Q. Ask her if she told that to the sister.

A. She says that at the time one of the sisters knew of the resolution of the lady,—the resolution the mother had made up to take the child away from her,—because the sister communicated to Theresa that she knew that her mother was taking steps to take her through the court, and impressed her with the resolution to take her to Cuba.

Q. I want to find out positively from this lady whether she wishes to be understood as testifying that she didn't have untrammelled intercourse with her daughter at the Convent of Mercy when she was there.

A. She says that sometimes she saw her, but at other times she was prevented from seeing her, on the excuse that she was out,—the young girl.

Q. I want to know whether she was spied on by the sisters.

A. No, sir; she says she can't swear to something she don't know.

Q. Ask her, did she see any spying?

A. She says several times she used to see sisters around, and she don't know the English language.

Q. Can she swear that anybody was in the room when she was there, listening to what she was saying?

A. She says she can't swear, because sometimes there were other parties there, in the parlors, and she can't say whether they listened or not.

Q. Ask her if she was not in the convent, in a room with her daughter, without anyone else being in the room.

A. Yes, sir.

Q. Ask her, wasn't it as a rule that she was in the room with her daughter alone?

A. Sometimes she was alone with her daughter, and very often she met other people there.

Q. Other visitors?

A. Yes, sir.

Q. You saw your daughter in the parlor?

A. Yes, sir.

Q. And sometimes there were other visitors in the parlor, also?

47 L. R. A.

A. Yes, sir.

Q. That is what she learned by people being there, isn't it?

A. Yes, sir; some sisters with other friends.

Q. She says that two of the sisters speak Spanish. Ask her who they are.

A. Sister Lucretia is one. The other, I don't know her name.

Q. How did she know that they spoke Spanish?

A. Because they spoke with her.

Q. I want to know whether she swears that those two sisters were standing anywhere near her daughter and herself when she spoke to her daughter in Spanish?

A. Only once, and that was at the time when she was sick, and they went with the two sisters; and when the conversation was begun between the daughter and the mother the two sisters sat on the bed,—one at the foot, and one at the head.

Q. That is the only occasion when these two sisters were present?

A. On one occasion she went to the convent to see her daughter, and there was a misunderstanding about the name of the daughter. They supposed she asked for Miss Antolina, and that was settled by an explanation. At the time Sister Lucretia came and spoke in Spanish with the daughter and her.

Q. That was the only occasion?

A. Yes, sir.

Q. Ask her, when she was sick was not her daughter allowed to visit her?

A. Yes, sir.

Q. How often?

A. The daughter went to see the mother three times.

Q. How long were you sick?

A. About eight days.

Q. Ask her whether or not one of the sisters accompanied her when she went, and whether that sister spoke Spanish.

A. Yes, sir; Sister Lucretia.

Q. Ask her whether Sister Lucretia went once, or every one of the three times.

A. Only once.

Q. One out of the three times?

A. Yes, sir; she says about once or twice; and the other time the sister didn't speak Spanish.

It was developed on the reinterrogation of the relatrix that her daughter, prior to the time she entered the convent, was at all times a respectful and obedient child, yielding to her mother's directions and commands; that she was very much astonished at the sudden change that took place in this respect after she went to the parochial school.

Q. By the Court. Ask her, when did that sudden change take place?

A. She says ever since she entered the convent.

Q. She has testified that her daughter has always been very obedient. Ask her whether or not, when she went to the convent against

her expressed will at the time, her daughter disobeyed her on that occasion.

A. Yes, sir.

Q. She disobeyed her?

A. Yes, sir. She says that there was an interim between the time the child entered the convent and the time she left for Havana. During that time, then, the child entered the convent, while she was absent.

Q. That was the occasion when the change took place?

A. Yes, sir.

Q. Ask her, again, so as to fix definitely the time in counsel's mind, whether she ever consented to the child going into the convent and remaining there.

A. No, sir; never.

On the part of the relatrix a witness was introduced who claimed to have known her for several years,—a lady who lives in New Orleans, and has lived there for a great many years. In the course of her interrogation the following occurred:

Q. You know the daughter, Maria Theresa?

A. Yes, sir.

Q. Do you know the circumstances under which they came to this country?

A. Yes, sir.

Q. Just state them briefly.

A. Mrs. Prieto came to this country on account of the Cuban war.

Q. Do you know when she came?

A. Some time in 1896, I believe; during November, 1896, if I am not mistaken.

Q. Do you know whether she had any available means at the time?

A. Well, when they came here they went housekeeping. That is all that I can say.

Q. They are people of means now, so far as you know, and so far as common report is concerned?

A. Yes, sir.

Q. Did you have occasion to visit the Convent of Mercy with Mrs. Prieto?

A. She sent for me three or four weeks ago, and when I went to see her she said, "Would you come to the convent with me, and see the mother superior, and see if she will listen to what I have to say?" I said: "I would rather not have anything to do with this matter, unless you do things right. You know I am a Catholic myself, and you know I follow my religion; but, if you want an interpreter, I will go and repeat every word you say." And she said, "That is all I want you for,—to repeat word for word." And we called at the convent, and I sent up my card, and some sister received us, and said the mother superior was sick and could not be seen; and so we left.

Q. Did you see Maria Theresa on that occasion?

A. No, sir, etc. . . . And again we called, and I asked for the mother superior again, and I think this sister (pointing to Mother Inez) came out, and another, stout sister, that speaks Spanish; and I said, "Are you the mother superior?" and she said, "No; 47 L. R. A.

but I am representing the mother superior." I said, "That is what I want; but, owing to Maria Theresa's severe illness, her mother here wants to take [her] to Cuba. If you have no objection, she will take another sister along, and defray all the expense." And the sister said that she would have to explain it to the mother superior, and that she must come back in a few days, "because we are now in retreat." I said, "What do you call a few days?" and she said, if it was left to her judgment,—three, four, or five days. Well, we called on the following Monday, but I didn't see the mother superior; she was sick; and they told us to come back in two days. We came back, and Mother Inez came and said that the mother superior was quite indisposed. I told Mother Inez that the mother of Theresa wanted to take the child to Cuba with another sister, . . . and after she was recovered she could come back, and that she had said she was perfectly willing to leave,—that is, Theresa,—and, if she once leaves here, she never can come back.

Q. Did Mrs. Prieto say that she consented to her daughter being in the convent?

A. Never, under no conditions, because, often, when anybody spoke to her about it, she always opposed it and said she never would consent.

Q. Did you ever hear Sister Theresa tell her mother that she wanted to go home?

A. Oh, she said, in my presence, to have patience; "If the mother wants me to go, I will go."

Q. That is what Theresa said,—that she would be willing to go home if the mother superior told her?

A. Yes, sir.

Q. And Mrs. Prieto told her daughter that the mother superior will never give her consent; and Mrs. Prieto said, "You see how sick I am from your opposition;" and she put her arms around her mother and said, "I will go, but I have to get the mother superior's consent."

Q. By the Court. Do I understand you to convey the impression that this Miss Prieto said to her mother that it was her (Miss Prieto's) desire to leave the convent?

A. Yes, sir.

Q. By Counsel. But that she had to get the mother superior's consent?

A. At one time she said that, and at another time she said, "Please do not repeat it to anyone." Those are the words of Sister Theresa in the parlor.

Q. Who is Sister Theresa?

A. Miss Maria Theresa Prieto.

Q. She asked her mother not to repeat that to anyone?

A. Yes, sir; and to have patience.

Q. What was it that she asked her mother not to repeat?

A. That her wishes were to go back with her mother.

Q. That her wishes were to go back home?

A. Yes, sir.

On the cross interrogation of this witness the following occurred:

Q. Mrs. Prieto went [to the convent] to make certain propositions?

A. Yes, sir.

Q. And the object of the visits was to propound to the sisters and to this young lady certain propositions?

A. Yes, sir.

Q. You stated that that proposition was that this young lady should be allowed to go down to Cuba to recover her health?

A. Yes, sir.

Q. And she was to come again if she wished to come?

A. Yes, sir.

Q. And, if necessary, the mother of this young lady would pay the expenses of a sister both ways?

A. Yes, sir.

Q. That was the only and sole proposition that you and this mother went to discuss with the sisters?

A. Yes, sir.

Q. Was this young lady present when you submitted these matters to the sisters?

A. No, sir; we only saw her on the last interview, although that was the proposition submitted to the sisters.

Q. And the sisters told you what?

A. That she was free to go.

Q. That she was free to go?

A. Yes, sir; but not to leave the convent, and that the mother would not consent at the present, but, if she consented, it would be later on.

Q. Who said that?

A. Mother Inez.

Q. Mother Inez said that she would not consent because the mother—

A. Mother Inez repeated the words half a dozen times: If the mother superior consents, it would not be at the present, but it would be later on, if she consented.

Q. Why was it,—because this young lady was weak?

A. I cannot say.

Q. Didn't she say it was too warm?

A. Yes, sir; that the mother superior said it was too warm.

Q. The mother did not refuse to let the child go to Cuba, but she would not let her go then, because it was too warm?

A. If she would let her go.

Q. And that was the only answer that you got?

A. Yes, sir.

Q. Didn't they tell you in addition that, if she chose to leave on her own accord, she could go, but they would not take her back again?

A. No, sir; if the mother would consent, it would be later on, [but] she did not make any promise.

Q. Wasn't what the daughter stated to you, that she would be glad if she could come back again?

A. She said, if the mother superior said [she] could go, [she] would go.

47 L. R. A.

Q. Did she say she would go without the mother superior's consent?

A. No, sir; she told her mother to be patient, and she would go.

Q. Didn't she tell her mother to be patient, and the reverend mother superior would consent?

A. Yes, sir; and I put the decision to her: "Why don't you make the choice? You see how sick your mother is."

Q. Now, didn't she say in answer to that question, "I will go if the mother superior consents; and be patient, and she will consent?"

A. She said, "If the mother superior says I can go, I will go."

Q. Wasn't it said all together?

A. No, sir.

Q. Wasn't it in the same talk and in the same conversation?

A. Yes, sir.

Q. By the Court: Allow me to ask you one question. Do I understand you to mean that Miss Prieto stated that she was desirous of leaving the convent permanently, and that the only thing that prevented her was that she could not get away?

A. She didn't use the word "permanently," but she said, "I will go if the mother superior consents."

Q. What did she mean by leaving the convent,—for good?

A. Yes, sir.

Q. You understood her to say that she desired to leave the order permanently if she obtained the consent of the mother?

A. Yes, sir.

Q. By Counsel: Please give the exact words.

A. She told her mother, "If the mother superior says I can go, I will go."

Q. Those were her exact words?

A. Yes, sir.

Q. Did she say "leave the convent," or "go?"

A. She said "leave the convent."

Q. You are positive of the language?

A. Yes, sir.

Q. Who was present?

A. Mrs. Prieto and myself and the young girl.

Q. Anybody but you?

A. No, sir.

Q. You are positive, on your oath, that she used the words, "leave the convent?"

A. Yes, sir.

The deputy sheriff by whom the process was served on the defendant, through the mother superior, made this statement in regard to what occurred at the time of the service: "I told her (the young lady) that I served the paper on Mother Philomena, and I wanted to know whether she was willing to go to her mother, or appear in court; and she didn't know what to do. And I said, 'Are you willing to go with your mother?' And she said, 'Yes, providing that Mother Philomena says yes.' And the mother superior came in and I told her; and she said herself that she would make no standing in

court, and she wanted to let it go. After a while she said to me the second time, 'I would rather see Mr. McGloin, and consult him about it.' I said, 'That is the right that you have, mother;' and she said, 'Well, then, it is no use to take the young lady out to-day. I will postpone it until eight o'clock to-morrow.' . . . The girl said she would go provided the mother superior consented; but she said, 'I would like to come back, provided the mother superior would consent that she would receive me in the convent when I came back.'"

Then the following interrogation occurred:

Q. In that discussion, was there any time when she should have the privilege of returning discussed?

A. If I am not mistaken, it was about three years, when she would be twenty-one years of age; and then the sister said she would be glad to take her back.

Q. The sister said when she was of age she would be glad to take her back?

A. Yes, sir; she would leave on the promise of the mother superior that she would take her back when she was twenty-one years of age.

Q. She said she would be willing to go if she could get back voluntarily?

A. Yes, sir.

Q. She didn't indicate that she wanted to abandon her religious vocation?

A. She didn't say that. It was provided that at a certain time, when she came back, she could get back; and the mother superior told her yes, she would receive her at any time she came back, providing she was of age.

Q. But still she said she expected and wanted to come back?

A. Yes; the supposition is yes, because she told me that she wanted to return in a certain length of time, when she was of age,—that is, three years hence.

Miss Maria Theresa Prieto, the daughter of the relatrix, who is the subject of this controversy, was interrogated as a witness on the part of the respondent, and from her examination the following is extracted:

Q. What is your name? Are you Maria Theresa Prieto?

A. Yes, sir.

Q. This lady who was on the stand as the first witness is your mother?

A. Yes, sir.

Q. Are you living now at the Convent of Mercy?

A. Yes, sir.

Q. Are you an inmate of the Convent of Mercy? You are living at the Convent of Mercy?

A. Yes, sir.

Q. How long have you been living at the Convent of Mercy as an inmate?

A. One year and three months.

Q. Now, sister, it has been alleged in the petition in this case that you are there against your will and consent. Would you

state to the court whether that is a fact or not?

A. No, sir; I am in the convent from my own free will. They never keep me there. I am there just because I want to be. I am as free as a bird. I can leave the convent entirely. I am free to go home until I make my vows. Nobody keeps me there but myself.

Q. Would you state to the court whether the sisters of the convent, or the mother superior in there, are using any compulsion on you at all, please.

A. No, sir; they always tell me I can leave the convent if I want. I am free as a bird if I want to go.

Q. How long has your mother been here, the last time, about?

A. She says she came here on the 24th of July.

Q. That is the date she told you she arrived?

A. Yes, sir.

Q. Has your intercourse with your mother been restricted by the sisters in any way during that time? Have they stopped you from seeing your mother?

A. No, sir; my mother used to come to see me every day. I was unable to go out of doors because I was sick, and sometimes the sisters would pass by when my mother was there seeing me, just to see my mother, because she was from Cuba, and they wanted to see her. . . .

Q. When you first went into the convent, did you have your mother's consent or not?

A. One day I asked her, and she told me yes.

Q. Well, how long after that was it that you went in?

A. Two days after.

Q. Well, when you went in, did you have your clothes?

A. No, sir; I just took the clothes I had with me, and then she sent some after.

Q. How long after?

A. Oh, a few days, when I needed it. I asked her, and she sent them to me.

Q. Have you at any time told your mother or anybody else that you were willing to give up your religious vocation and live with her in Cuba?

A. I have never been willing to lose my religious vocation. I have always been willing to stay and live in the convent.

Q. Do you know how long you would have to remain in the convent before you could take your final vows?

A. The sister under whom I am says I would have to stay two and one-half years, because I am under age.

At this point an objection to the testimony of this witness was urged on the part of the relatrix, which was to the effect "that she has no consent to give, so as to deprive her mother of the parental authority invested in the mother by law." Upon this objection the court ruled as follows: "It seems to me that this is the very merit of this case, and

I will refer this objection to the merits of the case."

Q. That was explained to you,—that you would have to stay in the convent two years before making your final vows?

A. Yes, sir; they told me I could not make the vows until I was of age.

Q. What is the rule?

A. It is to be a postulant five or six months or so, and then two years or so, when you would have the right to take the final vows.

Q. You understand fully that you cannot take the final vows until you are of age?

A. Yes, sir.

Q. I believe you stated that you never told your mother or anybody else that you would be willing to give up your religious vocation, and give up the convent for good.

A. No, sir; I always told my mother I was always willing to come to Cuba with another sister, as a sister, so I would be able to come back.

Q. That is all that you told your mother,—that you are willing to go to Cuba as a sister, with another sister, and to come back?

A. Yes, sir.

Upon cross-examination the following occurred:

Q. How old are you, sister?

A. I will be eighteen next October.

Q. Your mother has always been a good, kind, affectionate, and devoted mother, has she not?

A. Yes, sir.

Q. Do you love her?

A. Yes, sir.

Q. How old is your mother? Do you know?

A. Let me see. She is fifty-three.

Q. Your father is dead?

A. Yes, sir.

Q. You are the youngest child, ain't you?

A. Yes, sir.

Q. Where did you live before you came to the States?

A. In Cienfuegos, Cuba.

Q. You was born there?

A. I was born there.

Q. Your mother lives there, don't she?

A. Yes, sir.

Q. All the family live there?

A. Yes, sir.

Q. You have four sisters, have you not?

A. Yes, sir.

Q. Three are married?

A. Yes, sir.

Q. And one is single?

A. Yes, sir.

Q. You have two brothers?

A. Yes, sir.

Q. Your mother has always provided for you in accordance with your station in life, and in proportion to her means, and has always given you clothes, and fed you, and cared for you, and educated you?

A. Yes, sir.

Q. She has been a good mother?

A. Yes, sir.

47 L. R. A.

Q. You have no complaint against her?

A. No, sir; none at all.

Q. She is a good, honest woman, is she not?

A. Yes, sir.

Q. When did you first come to the state?

A. To New Orleans?

Q. Yes.

A. We left Havana on the 23d of November, 1896.

Q. Why did you leave Cuba and come here? Was it because of the war in Cuba?

A. Yes, sir; my mother said she would educate me here, on account of the war.

Q. Your mother was born in Cuba?

A. Yes, sir.

Q. She was a Cuban?

A. Yes, sir.

Q. And your father was a Cuban?

A. Yes, sir.

Q. And your sympathies were all with the Cubans in their contest with Spain?

A. Yes, sir.

Q. And you were in a position that you would have lost all your property if the Spaniards had succeeded?

A. Yes, sir.

Q. You would have been poor, then, if you had lost all your property?

A. Yes, sir.

Q. Well, now, your mother brought you here to educate you?

A. Yes, sir.

Q. Your brother was here already?

A. Yes, sir.

Q. You have always been a good Catholic?

A. Yes, sir.

Q. Do you love your religion?

A. Yes, sir.

Q. Your mother is a Catholic?

A. Yes, sir.

Q. And the family are all Catholics?

A. Yes, sir.

Q. And all are good, devout Catholics, ain't they?

A. Some are not.

Q. But your mother is?

A. Yes; she is a Catholic.

Q. Well, now, when you came here to be educated, who took you to the parochial school of the St. Alphonsus Convent?

A. My sister-in-law. She was the only one at home that could speak a little English, and she went to the convent, and spoke to the reverend mother superior of the convent about the school.

Q. You and your sister both went to the school?

A. Yes, sir.

Q. And you would go there in the morning, and go home to lunch, and back in the afternoon; and, after the session of the school in the afternoon was finished, you went home?

A. Yes, sir.

Q. Did you attend to your church and to your duties regularly?

A. Oh, yes.

Q. You never told your mother at that time that you wanted to become a nun?

A. Yes, sir; I told her sometimes I wanted

to be a sister; and sometimes she didn't want to believe me; and I told her I wanted to be a sister.

Q. She always objected, didn't she?

A. She objected; but at last she just did give me the consent, and I thought I had the vocation, and I liked to be a sister very much. And one day I was asking my mother, kneeling down before her, and asking her to let me go into the convent; I just wanted to go; and she said, "My child, yes;" and I went to the convent, and told her I was going to the church first; and then I went into the convent. I didn't bring anything but just the clothes that I needed for the day, and after that I sent for my clothes.

Q. Now, at all times, except on this one occasion to which you have referred, when you were kneeling down before your good mother, she always objected to your ever becoming a sister, didn't she?

A. Yes, sir.

Q. She was willing to make every sacrifice— Wasn't your mother a good Catholic, loved her church, and prepared to make every sacrifice for the church, except the sacrifice of her children?

A. I don't know.

Q. Do you know of any call that was ever made upon your mother, in your recollection, as a member of her church, that she didn't respond to?

A. Yes, sir.

Q. She always responded at all times to her church?

A. Not to them all.

Q. Now, you say you went to the convent and you only took enough clothes to last you that day?

A. Yes, sir.

Q. Now, sister, did your mother know at that time that you were going to the convent on that night to remain?

A. I don't think so. I told my mother. She told me to wait until Monday. I said, let me go that day. I am not sure if she knew it or not. I told her I was going on that day, and she told me to wait until the next Monday. I am not sure if she knew it or not.

Q. Don't you know, sister, as a matter of fact, that your mother didn't know that you were going there that night, and that your absence from home caused her great distress?

A. Yes, sir; they said that to me; but she told me that I could go and to wait till Monday, because my brother was coming the next day.

Q. She was hoping that your brother would persuade you not to do that what you had made up your mind to do?

A. She told me to wait.

Q. That is the only time she ever consented, and on all occasions she protested and objected. Isn't that true?

A. Yes, sir.

Q. You spoke of having your clothes sent to you in the convent. Now, isn't it true, and isn't it a fact, that the only clothes that were sent to you were two night dresses,

and that they were brought by a young lady who said that you were without a night dress in which to sleep?

A. I brought night dresses for that night and then sent for some more, and that lady brought the night dresses and some stockings.

Q. But no other clothes?

A. No, sir; because the reverend mother superior gave me some, and I told her that my mother gave me the consent, and they gave me the sister's habit.

Q. So the only clothes that you got were brought to you by a young lady, and that consisted of a night dress and some stockings?

A. Yes, sir.

Q. Do you know whether the mother superior ever asked your mother's consent for you to take the veil?

A. Of my mother?

Q. Yes.

A. I don't know. I was six months in the convent before I took the veil; and once I told my mother, when I took the veil, "it will be easier for me to visit you," because as a postulant I could not go so far away; and I told my mother, when I took the veil, that it would be "easier for me to make you a visit to Cuba."

Q. By the Court. How soon after you entered the convent was it that your mother saw you again?

A. I went to see my mother about a week or two after I entered. I went myself to see my mother, because she was unable to come and see me. She was not very well, and I went to see her first, before she went to see me.

Q. By Counsel. And didn't your absence from your home cause her such distress that she was taken sick, and didn't she tell you that she was sick on account of your entering the convent?

A. Yes; she did tell me that.

Q. So she was unable to go out because she was prostrate with grief. Isn't that true?

A. Yes, sir.

Q. Hasn't your mother at all times, except in one instance to which you refer, when you knelt by her side, and, you say, got her consent,—hasn't your mother at all times protested and objected to your remaining in the convent?

A. Sometimes, and sometimes she didn't tell me anything. Sometimes I went to see her, and she spoke to me about going home.

Q. Hasn't she always appealed to your affections, and to your duty as a daughter to go home with her, accompanied with the promise that after you had reached the age of majority, and you still felt inclined to go into the convent, that she would have to yield her consent? Is that true?

A. Yes, sir.

Q. Is not that absolutely true in every particular, as I have stated it?

A. Yes, sir; she told me that.

Q. Now, while I don't say, and while I would not say, in the sense that would be offensive, that the sisters have exercised any improper influence over you, because they

are good and noble women, haven't they persuaded you, from a higher sense of duty, and in the sense, as they believe, that the true way to serve your God is to serve Him in the capacity of a sister?

A. They never told me anything to cause me to stay in the convent; and, any time my mother wanted to take me out of the convent, I used to tell the mother, and she would say: "You are free. You can leave any time you want." They always told me I was as free as a bird, "to leave whenever I wanted."

Q. Have not they always told you, and is it not true, and don't you believe to-day, that your best services to God Almighty is in a capacity that you will serve Him as a sister?

A. I believed that before I entered the convent, without the sisters saying anything to me.

Q. But have they not strengthened you in that belief?

A. They just told me many times—They never told me it would be sacrilegious, but I think myself I would lose my soul if I went out of the convent. I would lose the grace of God. This is my own impression, and I want to save my soul. I think that is the true way to serve God; not because the sisters told me so, but because I believed that before I entered the convent.

Q. You had that impression because you have always been a good, honest, devout Catholic; but hasn't that belief been supported and strengthened by your readings since you have been a sister, and by hearing the good sisters discuss the duties, the cares, and the responsible duties which rests upon the sister in the service of God?

A. I repeat and say that the sisters never

Q. You have not answered my question.

A. What is the question? (The question is repeated to witness.)

A. Yes, sir; of course, that is our duty,—to say all the truth and to speak to the Lord.

Q. Didn't you express a willingness to go with your mother, if Sister Philomena would not object?

A. No, sir; I just said I would leave the convent if I was forced to do so by law.

Q. If the judge ordered you to return to your mother?

A. Yes; I would only leave that way; but I was not willing to leave. He said to me, could I not be a sister when I was twenty-one years?—it would be just the same; and I told him it was very hard for me to leave the convent after I had been there one year and three months.

Q. Didn't you tell them— Think carefully. I don't want you to say anything that is not true, and I know you won't, because I believe you respect your obligation here in court, independent of your vows. Don't you know that you told your mother that you would go home with her?

A. No, sir; I told her one day—She was crying. I said, "Don't worry so much," because she said she had so many cares. I 47 L. R. A.

said, "If you have patience, our Lord will one day reward you."

Q. By the Court. What do you mean by having patience?

A. It means not to despair; to have patience in everything; just to wait. I thought one day I would be able to go with another sister,—to go to Cuba,—if she was willing to pay the passage for both. Maybe I could be able one day to go and see them in Cuba. I meant to have patience. In other words, we must all have patience in our trials, and she thinks it is a trial to have me away from her; and I told her to have patience, and the Lord would one day reward her.

Q. By Counsel. You think that the Lord would reward her because she had the patience to wait for your coming?

A.

Q. Did Sister Philomena ever tell you that you could not take the veil until you were of age?

A. The sister said I can never make my vows until I was of age,—twenty-one. I never could make my vows, and I told my mother many times, because she was opposed to it.

Q. Your mother has been very sick, hasn't she, for the last two or three weeks?

A. Yes; she was sick.

Q. Did you visit her?

A. Yes, sir; three times.

Q. With whom did you go on each of such occasions?

A. Once with Sister Theresa, a postulant; and a second time with Sister Lucretia; another time with a postulant; I don't remember her name.

Q. Which one of these three spoke Spanish, or did all three of them speak Spanish?

A. Sister Lucretia.

Q. Do you know what caused your mother's recent illness,—the last sickness?

A. I don't know, sir.

Q. Wasn't your act and your conduct in refusing to return with her to her home the cause, and didn't she tell you so?

A. When?

Q. When she was sick,—this last sickness.

A. She wanted to see me, and she told me if I didn't come home she would take me by the law on Monday if I didn't go on Monday morning. I said: "Mother, you won't do that. I will see about it, and will think,"—because I can do nothing without thinking, and asking the Lord what I am going to do.

Q. You wanted time to think?

A. Yes; I wanted time to think, and ask my God to give me courage; and I couldn't go Monday.

Q. You appealed to God to give you wisdom and direct you in the right direction?

A. Yes, sir.

Q. Who else did you appeal to on earth to assist you? Did you appeal to anyone on earth? Did you speak to any one of the sisters?

A. No, sir.

Q. Not to one?

A. I told the reverend mother that my

mother was going to take me by the law; and she had a letter, where they said I was unable to leave the convent. I don't know who wrote the letter that I was unable to leave the convent, and I went to the reverend mother and told her, and she said: "Child, you are as free as a bird. You can leave whenever you want to. I never keep anybody here against their will, and you can go now if you want to."

Q. When was it that she told you that?

A. I went to see my mother on a Saturday. I think it was Saturday or Sunday. I am not sure.

Q. When your mother told you she was going to appeal to the law to get possession and custody of you, you said, by Monday morning; you said you wanted time to think. What was on Monday?

A. No, sir; she told me that when I came on Sunday. The first was on Saturday. She told me to come back on Sunday; and I told her I could not come back on Sunday, because I had the typhoid fever, and that, if I was able to go on Sunday, I would go, but that I would see her on Monday, because she said she was going to take me out by the law. I said not to do that, because I did not want to leave the convent.

Q. Now, Maria, do you remember the Mexican, acting as interpreter?

A. Well, sir; I will tell you. My mother thought it was a Mexican, but it was Mr. McCune, a Spanish man.

Q. Who is Mr. McCune?

A. I don't think I have seen him since. I never spoke to him before. As my mother says, he came one day there first when she went to the convent with Mr. Quintero. She saw Mr. McCune, and he asked her if she was satisfied for me to be in the convent; and she answered no; she would never be satisfied for me to be in the convent. I was not present at all.

Q. She was not satisfied?

A. No, sir.

Q. You don't know what answer he gave to the sister superior?

A. No, sir; I was not there, sir.

Q. You had a conversation with the sister about your leaving the convent on your own free will, or your leaving by the order of this court?

A. No, sir. Yesterday, when I saw the gentleman who came there, Mr. Morel, and the other gentleman who came to me, and when she said, "There is the lady," I said, "Do I have to go, reverend mother?" She said: "I suppose you will. Because you are a minor, I suppose you will have to go." I went in the parlor to talk with them, and they told me I would have to go with my mother. I said to the reverend mother. "The end of this is, I will have to go with my mother." I said, "At the end of four years, will I be able to come back, when I am of age?" And she said, "I suppose so, child," etc.

Q. Now, Miss Prieto, do you believe it is one of the rules of that order that, if you

leave that convent of your own free will, that you cannot return? . . .

A. Yes, sir.

Q. You want to return?

A. Yes, sir.

Q. When you are of age?

A. Yes; because I have to go before; and if I am able, and my mother consents, I will go back.

Q. Don't let your feelings or wishes interfere with your judgment just now. Down in the bottom of your heart, do you think you wish to stay there now, or that you would be willing to go with your mother, if you could return afterwards?

A. No, sir; if I am not forced, no, sir. If the law don't force me to go, I am willing to remain forever, until I die. Unless the law makes me go with my mother, I will stay always. It is not my own free will to go with my mother, but my mother wants to take me out; and, of course, I will have to do just what the judge tells me to do. I have to obey the laws of the court.

Q. If you are free to go as you wish, would you go with your mother? If you could go back afterwards, if there was no law in it at all, and they would let you come back whenever you wanted, then what would you do?

A. I don't think I would ever leave the convent.

Q. You don't think, or are you sure?

A. Yes; I said just now I won't.

Q. Your mind is not fully made up yet?

A. Yes, it is; my mind is made up. You know I have made up my mind to remain in the convent.

The Reverend Mother Philomena was introduced as a witness upon the part of the respondent, and the following is an extract from her interrogation:

Q. Mother Philomena, you are superior of the St. Alphonsus Convent of Mercy?

A. Yes, sir.

Q. Do you know Maria Theresa Prieto?

A. Yes, sir.

Q. She is an inmate of your convent?

A. Yes, sir.

Q. And for how long?

A. Since May, 1898.

Q. Would you state to the court whether or not she is there under any compulsion or restriction of yourself or any of the sisters?

A. None whatever.

Q. She is free to leave, in conscience and law?

A. Yes, sir.

Q. Have you told her, or have any of the sisters told her, that she would be committing a sin if she were to quit the convent?

A. No, sir.

Q. When her mother was here, did you allow her free access to her daughter?

A. Yes, sir; every liberty possible.

Q. Did you tell the mother that?

A. I told it to her.

Q. Did you ever have any espionage on her?

A. Never.

Q. Did you ever put anybody to hear what the mother and daughter said to each other?

A. Never.

Q. When she came to the convent, do you know what she brought with her, and whether any clothes were sent to her afterwards?

A. She came, and a day or two afterwards her clothes came.

Q. Do you remember what clothes they were that came?

A. Some wearing apparel. I didn't examine them.

Q. You don't remember the articles?

A. No, sir.

Q. Did you have an interview with the mother of this young lady about sending a sister on to Cuba with her daughter?

A. No, sir; I got a message asking to allow a sister to go with her to Cuba.

Q. You were sick at the time, mother?

A. Yes, sir.

Q. What answer did you send back?

A. I was not prepared to give an answer.

Q. Did you subsequently send an answer?

A. I said no.

Q. That you could not send a sister there?

A. Yes, sir.

Q. Was that the request made by the mother of the young lady at that time?

A. Yes, sir.

On cross-examination by the counsel of relatrix, the following interrogation occurred:

Q. Sister, when Maria first entered the school, she was taking a course of English instructions, was she not?

A. Yes, sir.

Q. Simply a day attendant in the parochial school attached to the convent?

A. Yes, sir.

Q. Did you ever get her mother's consent to her entering the convent, personally?

A. Not personally.

Q. Was that consent ever given in your presence?

A. The young lady came and applied for admission, and I told her I wouldn't accept her without her mother's consent, and that she could come as soon as she received her mother's consent. She came as soon as she received her mother's consent.

Q. She told you that?

A. Yes, sir.

Q. You didn't hear the mother say so?

A. No, sir.

Q. The mother never confirmed it to you?

A. No, sir.

Q. She always protested?

A. I had very little conversation with the mother.

Q. On one occasion, as brief as the conversation was, she protested against her daughter remaining in the convent?

A. She would rather have her home.

Q. Didn't she object seriously?

A. I won't say seriously, but she objected.

Q. Did she not ask you to allow her daughter to return; you had no objection?

A. I have no objection. She is free. We are not restraining her at all. . . .
47 L. R. A.

Q. Isn't the rule nearly inflexible in its enforcement, that you only accept novices or those who desire to become sisters, only after the parents give their consent?

A. That is for the most part. Of course, when one is old enough to answer for herself—But we always want the permission of the parents.

Q. Particularly when under twenty-one years of age?

A. Yes; we always exact that, because they cannot make their vows until twenty-one.

Q. The reason for that is because they are not beyond parental control until twenty-one?

A. I never thought of that part of it. We desire them to have more of a trial.

Q. You want them with matured minds?

A. Yes, sir; we want them to be there, and to understand what they want to do.

Q. Did you hear her say anything about whether she was willing or desirous of leaving?

A. She said, whatever the court decided, she would do. It was not for her to remain in the convent; but what I wanted our lawyer to do was to vindicate the community.

Q. Did she, or not, appear to approve your action in the matter?

A. I don't know whether she did or not. I didn't take notice.

Q. You heard Mr. Morel state, sister, that, after you had been served with the papers, that you said you did not intend to make any opposition to the delivery of the child to her mother.

A. I meant, we are not coming to court, because we don't like this business; and to let the child decide for herself.

Q. Wouldn't you, as the head of the community of the St. Alphonsus Convent, as I understand you are, rather that a mother with an aching heart, appealing here for the custody of a child, should have her, than to yield to the unmaturing judgment of a child of seventeen years of age?

A. I am not yielding to the judgment of the child. I think that the judge should decide that, and we are willing to abide by the court's decision.

Q. Then you are not here opposing the mother for possession of her child?

A. No, sir.

Q. And in no manner to the delivery of the child to the mother?

A. No, sir; I am not opposing; and whatever the court decides, we will abide by.

Q. Are you opposing it, or are you yielding obedience to the writ of habeas corpus?

A. In obedience to the writ of habeas corpus. That is why I am here.

Q. Have you any cause to show why the child should not be given up to its mother. I ask you as the head of St. Alphonsus Convent of Mercy.

A. We are neutral in the matter. We have no reason to tell the child to go, as far as the community is concerned.

Q. I am asking you now, as the head of

the St. Alphonsus Convent of Mercy, if you have any cause to show to this court why the application of Mrs. Prieto, the relatrix and the mother, should not have the custody and possession of her child.

A. I don't understand the question. (Question repeated to the witness.) . . .

A. I have no reason to, except as I have said before. We have no reason to tell her to go. I can't give you any better answer.

Q. And that is the only reason?

A. That is all that I can say."

The foregoing is a fair analysis—and in great part a repetition—of the testimony which was adduced on the trial in the district court, and from which we gather the following summary of substantial facts, in so far as they affect the issue involved: The relatrix, as a witness, states that while her daughter was attending the parochial school she went into the convent without her consent; that she never at any time gave her consent for her daughter to enter the convent; that she at all times protested against it; that while her daughter attended the parochial school she was accompanied by other girls, and on one occasion, when they returned home without her, she inquired for her, and was by the girls informed that "she had remained in the convent, and wanted to remain there." She further states that she sent her daughter to the parochial school to learn the English language, but that she never surrendered her maternal control over her on that account; that at the time she entered the convent her daughter was not quite seventeen years of age; that while her daughter was in the convent she occasionally visited her, and on such occasions she informed the sisters that she was not satisfied to have her in the convent; that she subsequently went to her home, in Cuba, and there remained for a time; but her daughter was left behind, she being unwilling to accompany her, but promising to accompany her brother when he returned home to Cuba; that it was on this promise that she left. It does not affirmatively appear from the evidence that the mother had free and uninterrupted intercourse with her daughter when she went to the convent to see her, except on one or two occasions. The explanation that is afforded by the evidence is that on one or two occasions the mother superior was reported sick; on another, that the daughter was quite ill; on another, that there was a misunderstanding as to the name of the person who was called for; and on some occasions some of the sisters would respond when the mother superior was called for. The statement of another witness, who on some occasions accompanied the mother to the convent, was to the effect that, for different reasons, they were denied access to the mother superior frequently, and on several successive days. The return of the respondent is to the effect that the mother "was allowed access to her daughter during all reasonable hours;" thus evidencing the fact that the mother's visits were subordi-

nated, in a certain sense, to the discretion of the mother superior, under the regulations of the convent. It appears that, on the occasion of the daughter's visits to her mother's residence in the city, she was accompanied by one or two of the sisters, some of whom were conversant with the Spanish language, and that the sisters were present at the interviews between the mother and daughter. The mother declares that her daughter was at all times a respectful and obedient child, yielding to her directions and commands, but that she was much astonished at the sudden change that took place in this respect after she first disobeyed her, while in attendance in the parochial school, and went into the convent against her protest; that on all occasions, and in all interviews between the mother and the daughter, after the latter had entered the convent, she expressed a willingness to return home with her if the mother superior told her she could go. The evidence discloses that the manifest object of the mother's frequent visits to the mother superior was to gain her consent for her daughter to return home. It appears that the cause of the mother having a friend to accompany her on such occasions was that she might act as an interpreter, the mother superior not being able to speak Spanish. The statement of this friend is that on one occasion the daughter put her arms around her mother, and said, "I will go, but I have to get the mother superior's consent" (or, in other words, it was the daughter's desire to leave the convent, if the mother superior would give her consent); that on one occasion the mother submitted, to the sister who represented the mother superior, a proposition to allow a sister to accompany her daughter to Cuba, and that she would defray all her expenses, and her reply was that, "if the mother superior consents, it would not be at the present, but would be later on." That witness affirms—and the statement is not denied—that "Mother Inez repeated the words half a dozen times, 'If the mother superior consents, it would not be at the present, but it would be later;'" that on one occasion Mother Inez stated that the mother superior "did not refuse to let the child go, but she would not let her go then, because it was too warm." The deputy sheriff who made the service, as a witness, states that when he served the process on the Mother Philomena he spoke to the girl, who was present, and asked her if she was willing to go with her mother, and her reply was, "Yes, provided Mother Philomena says yes;" but she also said that she would like to come back, provided the mother superior would consent that she would receive her in the convent when she came back. The witness states that in the course of that conversation the question as to the time when she would have the privilege of returning was discussed, and it was stated to be about three years, when she would be twenty-one years of age, and that the mother superior said "she would be glad to take her back;" that "the sister said when she was of age she

would be glad to take her back;" that the girl said she would leave on the promise of the mother superior "that she would take her back when she was twenty-one years of age;" that the girl did not say she wanted to abandon her religious vocation, but that she was willing to go, "provided, at a certain time, when she came back, she could [get into the convent], and that the mother superior told her she would receive her at any time she came back, provided she was of age;" that "she wanted to return in a certain length of time, when she was of age; that is, three years hence." The statement of the girl is that she was an inmate of the convent of her own free will and consent; that she is "as free as a bird, and can leave the convent entirely;" that she is free to go home until she makes her vows; that the sisters of the convent and the mother superior tell her she can leave the convent if she wishes to do so. She states further that she was aware of the fact that she would have to remain in the convent two and one half years before she could take her final vows, because she was under age; that the sisters told her she could not take the vows until she was of age; that the rule of the church is that one must be a postulant five or six months, and then two years or more a novice, before she would have the right to take the final vows; that she further understood that she could not take the final vows until she was of age. The witness relates the circumstances under which she went into the convent as follows: That her sister-in-law took her to the parochial school of the St. Alphonsus Convent, as she was the only one at home who could speak a little English, and she went to the convent, and spoke to the mother superior about the school; that when she first attended the parochial school she would go in the morning, and back to lunch in the afternoon, and after the session of the school in the evening was finished she would return home; that she told her mother she wanted to become a nun, but she did not want to believe her; that one day, while kneeling before her, she asked her mother to let her go into the convent,—“that she just wanted to go,”—and her mother said yes; that she went immediately to the convent, but did not carry any clothes; and that she afterwards sent for her clothes. She states that, upon all other occasions than the one related, her mother objected to her becoming a sister; that she did not believe that her mother “knew at that time that she was going to the convent on that night to remain;” that she had told her mother of her intention to go, and her mother told her to wait until Monday, but she said, “Let me go” that day. “I am not sure if she knew it or not. I told her I was going on that day and she told me to wait until next Monday. I am not sure if she knew it or not.” Her mother wanted her to wait till Monday, because her brother was coming home the next day, and she was hoping that her brother would persuade her not to go. That is the only time she ever consented, and on all other occasions she pro-

tested and objected. She said that when she left home she “brought night dresses for that night, and then sent for some more, and that a lady brought night dresses and some stockings, but no other clothes;” that on this occasion she told the mother superior that her mother had given her consent. She says that she went to see her mother a week or two after she entered the convent, because her mother was unable to come to see her, she being sick at the time; that, when she went to see her mother, she told her “that she was sick on account of her entering the convent.” She denied having said that she was willing to go with her mother if Sister Philomena did not object, but stated that she did say that she would leave the convent if she was forced to do so by law; that, if the judge ordered her to return to her mother, she would leave the convent in that way, but she was not willing to leave otherwise. She stated that Mother Philomena told her that she could not take the veil until she was twenty-one years of age. She relates the circumstances of having a conversation with the deputy sheriff when he came to serve the process on the mother superior, and states that she asked the reverend mother superior if she would have to go, and that she replied: “I suppose you will. Because you are a minor, I suppose you will have to go.” I went into the parlor to talk with them, and she told me I would have to go with my mother. I said to the reverend mother that the end of this is, ‘I will have to go with my mother, and at the end of four years I will be able to come back, when I am of age;’ and she said, ‘I suppose so, child.’” The mother superior, as a witness, states that there is no compulsion or restriction placed upon the girl by either herself or the sisters, and that she “is free to leave, in conscience and law.” She states that when her mother was here she was allowed “as free access to her daughter, as possible.” She says that she received a message from her mother, proposing to allow a sister to accompany her to Cuba, but that she replied that she was unable to give an answer. She admits that she never obtained her mother’s consent personally to her entering the convent; that, when the young lady came and applied for admission, she told her she would not accept her without her mother’s consent, but that she could come as soon as she received her mother’s consent, and when she came she told her that she had her mother’s consent. She said that after she came to the convent she had very little conversation with the mother, but, brief as the conversation was, she protested against her daughter remaining in the convent. She says that the rule of the order is only to accept novices, or those who desire to become sisters, after the parents gave their consent; that is, for the most part. “Of course, when one is old enough to answer for herself, she may come, but we always want the permission of the parents. We always exact that, because they cannot take their vows until they are twenty-one.” She said that whatever the court decided, she

would do; that she was not yielding to the judgment of the child, but that she thought the judge should decide, and that the community she represented was willing to abide by the court's decision; that she was not there in court opposing the mother for possession of her child, and was not opposing, but whatever the court decides, she will abide by. "We are neutral in the matter. We have no reason to tell the child to go, as far as the community is concerned."

A careful consideration of the evidence satisfies our minds of the following facts: First. That the daughter of the relatrix was in her seventeenth year when she entered the St. Alphonsus Convent of Mercy. Second. That she entered the convent without having previously obtained the consent or permission of her mother to do so, notwithstanding the reverend mother superior permitted her admission into the convent on the hypothesis that she had obtained that consent. Third. That the mother superior knew at the time of her admission that the girl was a minor, and that it would be nearly three years before the law of the church would permit the administration of her religious vows. Fourth. That the girl was likewise conscious of the fact that her minority was a barrier to the immediate consummation of her desire, by taking the veil, and that she was at all times conscious of her mother's opposition to her taking the veil and becoming a nun, but her filial duty and obedience were overborne by religious enthusiasm that influenced her to act against her mother's will and yield herself to the church. Fifth. That the reverend mother superior permitted the girl to remain in the convent and to receive spiritual ministrations therein, and did not send her home, after she became aware of her mother's opposition to her becoming a nun, and that she had not given her consent to her daughter entering the convent; and notwithstanding the mother proposed to pay the expenses of a sister, if she would allow one to accompany her daughter to Cuba, the reverend mother did not give her consent. Sixth. That the girl is willing and anxious to remain in the convent, contrary to her mother's protest and entreaty, though she states that she is at perfect liberty to go to her mother; and the reverend mother superior says she will not send her away if she is desirous of remaining. But at the same time the reverend mother superior states that she is not making opposition to the writ of habeas corpus, but is willing that the law should take its course; that the community she represents is perfectly ready and willing to abide by the decree of the court. And the girl expressed a willingness to do so likewise. On this statement, our conclusion is that the girl is, in a certain sense, in legal duress, and restrained of her liberty, and her mother, as her legal guardian, is deprived of her custody,—she being the person to whom the law confides such duty,—unless, by reason of her age and intelligence, she is legally capacitated to give her consent to remain in the convent against her mother's will. To

this test the issue must be submitted at last, as upon the determination of that question our judgment must depend. In attempting a solution of this problem, attention must necessarily be first given to the provisions of our own law which define the relations and duties of parent and child, as it must govern our decision, in the absence of allegation and proof that the *lex domicilii* of the relatrix is different from our own. The chief reliance of the counsel for the relatrix is upon the following provisions of the Revised Civil Code, to wit: "A child, whatever be his age, owes honor and respect to his father and mother." Article 215. "A child remains under the authority of his father and mother until his majority or emancipation." Article 216. "As long as the child remains under the authority of his father and mother, he is bound to obey them in everything which is not contrary to good morals and the laws." Article 217. And the respondent's counsel rests its case mainly upon the following provision of the Revised Civil Code. *viz.*: "A child under the age of puberty cannot quit the paternal house without the permission of his father and mother, who have a right to correct him, provided it be done in a reasonable manner." Article 218.

The contention of respondent's counsel is that the phrase "quit the paternal house" signifies a permanent departure from home; and he draws the conclusion therefrom that, as "a child under the age of puberty cannot quit the paternal house without the permission of the father and mother,"—that is, permanently remove therefrom,—one above that age can permanently remove therefrom. And, inasmuch as the daughter of the relatrix was over the age of puberty at the time she entered the convent, she was at perfect liberty to do so without first obtaining her mother's consent. The contention of relatrix's counsel is that such a construction of article 218 does violence to the provisions of article 216, which is found in the same chapter which treats "of paternal authority," and in the same immediate connection, so that one is necessarily the context of the other, and hence the two must be construed as laws *in pari materia*. *Per contra*, the respondent's counsel insist that article 218 must be treated as a special law, which serves to modify the apparently conflicting provisions of the preceding articles that are to be construed as a general law; the provisions of the special law governing and controlling those of the general law. Our learned brother of the district bench accepted the interpretation placed upon that article by respondent's counsel, and, that view having obtained, a judgment against the relatrix necessarily resulted.

In our opinion, the argument in favor of that construction of article 218 is ingenious, but not sound. In the first place, it is in complete opposition to the terms of article 216, which declares that "a child remains under the authority of his father and mother until his majority or emancipation;" for, if the child remains under the authority of his

father and mother until his majority, he cannot permanently depart from his paternal home as soon as he arrives at the age of puberty. But, if the phrase "quit the paternal house" be literally construed as a temporary removal from the paternal house, it is perfectly harmonious therewith; and that view is strengthened by the remaining language of the sentence, giving the father and mother the right to correct the child,—supposedly for his disobedience in leaving "the paternal house without their permission." But there are many other and comparative provisions of the Revised Civil Code that support the contention of relatrix's counsel, and, among others, the following may be cited: "Birth subjects children to the power and authority of their parents." Article 26. "Age forms a distinction between those who have and those who have not sufficient reason and experience to govern themselves and to be masters of their own conduct. But as nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage, and forming other engagements." Article 34. "Emancipation and the other ways which free the son or daughter of family from the father's authority, regard only the effects which the civil law gives to paternal power, but changes in no respect those that are derived from natural right." Article 35. "Males who have not attained the age of fourteen years complete, and females who are under twelve, are under the age of puberty; and males who have attained fourteen years complete, and females the age of twelve complete, are distinguished by the name of adults." Article 36. "Minors are those of both sexes, who have not yet attained the age of one and twenty years complete; and they remain under the direction of tutors till that age. When they have attained that age, then they are said to be of full age." Article 37. "The domicile of a minor not emancipated is that of his father, mother, or tutor," etc. Article 39. "Fathers and mothers may, during their life, delegate a part of their authority to teachers, schoolmasters, and others to whom they intrust their children for their education, such as the power of restraint and correction, so far as may be necessary to answer the purposes for which they employ them. They have, also, the right to bind their children as apprentices." Article 220. "The father and mother have a right to appoint tutors to their children, as is indicated in the title: 'Of Minors, of Their Tutorship and Emancipation.'" Article 219. "The time of the engagement of minors [as bound servants or apprentices], if there be no stipulation that it shall terminate sooner, shall expire for males when they attain the age of eighteen years, and females when they attain the age of fifteen." Article 106. "Bound servants and apprentices and their masters may be compelled to the specific performance of their respective engagements." Article 170. "The

minor not emancipated is placed under the authority of a tutor, after the dissolution of the marriage of his father and mother." Article 246. "After the dissolution of marriage by the death of either husband or wife, the tutorship of minor children belongs of right to the surviving mother or father." Article 250. "Whenever a minor, over the age of eighteen years, shall desire to be relieved from the time prescribed by law for attaining the age of majority, he shall present a petition to the judge. . . . This petition shall be accompanied by the written assent of the tutor," etc. Article 385. "If any minor, desiring to avail himself of the provisions of the two preceding articles, has a father or mother living, the consent of the father or mother, or both, shall be necessary to authorize the judge to act," etc. Article 387. The provision appertaining to the emancipation of minors found in article 263 of the Revised Civil Code of 1825 is as follows, viz.: "The minor, that is, the male who has not arrived to the full age of fourteen years, and the female who has not arrived to the full age of twelve years, are both, as to their person and their estate, placed under the authority of a tutor. Above that age, and until their majority or emancipation, they are placed under the authority of a curator." But in the revision of that Code in 1870 that provision was entirely abrogated, and the present article 246 substituted in its place. That article of the Code of 1825 was first modified by the statute of March 17, 1828, but the entire text was changed by the statute of March 11, 1830, and made to read as follows, viz.: "The persons and estates of minors shall in all cases be placed under the power of tutors and under-tutors; and the powers, duties, and responsibilities of tutors and under-tutors, as well as their liability to be removed from office, shall continue until the minors attain the age of majority, or are otherwise emancipated." These provisions are found incorporated in the Revised Civil Code, and they serve to show the clear intention of the legislature to continue the state of a child's pupillage until it arrived at the full age of twenty-one years, unless emancipated sooner. There are other provisions of the Code in keeping with the foregoing, but a sufficient number have been cited for the purpose of demonstrating that the interpretation which was placed upon Rev. Civ. Code, art. 218, by the judge *a quo*, cannot be sustained. And in this connection it may well be observed that, while a notable alteration was made by the legislature in the provisions of article 263 of the Code of 1825,—which exactly conformed to such interpretation, as has been explained,—no corresponding alteration was made in article 236, it being exactly the same as Rev. Civil Code, art. 218 (art. 236), and likewise the same as Civil Code 1808, art. 39, § 1, p. 52.

But respondent's counsel directs our attention to the comparative provisions of the Code Napoleon [art. 374] which are of the following tenor, viz.: "A child cannot quit

the paternal mansion without the permission of his father, unless for voluntary enlistment after the full age of eighteen years." In the discussion of this article counsel for the respondent makes this statement in his original brief (page 7), viz.: "Were our article 218 thus worded, petitioner might have a cause or action; but the fact that the framers of the Code of this state made so radical change from the French law upon this point is conclusive against her." In our view, the elimination of the proviso or exception of the French text strengthens the contention of the counsel of the relatrix; for, if same be omitted, it would read thus: "A child cannot quit the paternal mansion of his father," the same being in terms an absolute prohibition. But our article 218 proceeds further, and says, "without the permission of his father and mother, who have a right to correct him, provided it be done in a reasonable manner." It seems to us quite impossible to conclude that this language would have been employed by the law-maker if he had intended the phrase "quit the paternal house" to be construed as a permanent departure of the child; for, if that were so, the power of the parent to administer punishment to the child for a disobedience in that regard would be immediately negated by his selection of another domicile, and a permanent departure from "the paternal house." The context of article 374 of the Code Napoleon confirms this interpretation. "A child, at every age, owes honor and respect to his father and mother." Article 371. "He remains subject to their control until his majority or emancipation." Article 372.

In view of these various provisions of law, —all of which, in our opinion, are inconsistent with the interpretation given to Rev. Civil Code, art. 218, by the judge *a quo*,—we arise from the study of the question with a perfect conviction that a minor under the age of twenty-one years remains under the authority and control of his father, if living, and of his mother, if he be dead; and that during his minority, unless sooner emancipated, he is without capacity, under our Code, to leave the parental domicile permanently, and select for himself another domicile or residence. This is a fundamental principle that lies at the very foundation of society, and was intended to support and maintain the exercise of paternal authority in the family and the home, and to guard and protect the children of the family until their minds should become sufficiently cultivated, and their judgment sufficiently matured, to enable them to make judicious and proper selections of places of abode for themselves. The precise limit of time is fixed by law, and it cannot, in any case, be either enlarged or diminished by evidence, however cogent, or by argument, however persuasive. It is a well-recognized principle of law that minors do not possess the power or capacity to make a valid and binding contract. Rev. Civil Code, art. 1782. Another principle, equally well recognized, is that "there must

be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point." Rev. Civil Code, art. 1798.

Applying the foregoing precepts to the case before us, our conclusion is that Maria Theresa Prieto, being of the age of seventeen years, approximately, when she entered the St. Alphonsus Convent of Mercy, and became a postulant therein, was without legal capacity to thus permanently depart from the home of her mother—her father having died previously—against her protest, and take up her domicile or abode therein; and that any covenant or agreement she may have made to that effect, if any, with the Catholic community, through the reverend mother superior, cannot be recognized as having any binding effect as against the exercise of parental authority by her mother. This principle being recognized, the province of this court is to determine whether the judge *a quo* should have granted to the relatrix the relief she prayed for; that is, the liberation of her daughter from the convent, if she was, in a legal sense, restrained therein of her freedom, or if the mother was unduly deprived of her legal and rightful custody of her child. It is manifestly true that if the girl of seventeen had not the legal right to leave her mother's home, and enter the convent, she had no legal power to consent to therein remain against her mother's protest. Without attempting any refined distinctions with regard to duress or illegal restraint, we feel safe in stating it to be a fact disclosed by the record that the daughter has been by the Catholic community afforded an asylum or place of abode within its convent walls, where she is entirely beyond the control and authority of her mother; albeit this abode and shelter was at first permitted to the child by the reverend mother superior under the mistaken belief that she entered the sacred precincts of the convent with her mother's permission,—she being a minor at the time of her admission. This appears to be none the less true because of the fact that the reverend mother superior affirms that the Catholic community is making no opposition to the demand of the mother of the girl, and that she is willing to permit the law to take its course, and to abide in good faith and willingness by the decree of the court in the premises; in other words, that the community is neutral,—that is, taking no active part in the litigation, but will not submit to the mother's authority over the child while in the convent, or send the child away, against her insistence to remain,—leaving the court to mediate between them. In this situation of affairs, the province of the court is exceptionally delicate and difficult; but, as the matter has been placed before us, our appreciation of the duty imposed upon the court is that we are to exercise a purely civil function, and decide a mere legal question, without in any way trenching upon the religious tenets or voca-

tion of the Catholic Church, or the community of the St Alphonsus Convent of Mercy; and this is made perfectly clear by the statement of the reverend mother superior that she would not permit the young girl to take upon herself the final vows of the Order of Mercy until she became twenty-one years of age, as it would be in violation of the law of the church.

The writ of habeas corpus is a highly privileged writ, and has for its object the release, by judicial decree, of persons who are restrained of their liberty, or detained from the control of those who are entitled to the custody of them. Provisions have been made in our Code of Practice for the issuance and exercise of this writ, and an analysis of same will simplify the scope of the investigation with which the court is charged. In treating of the powers which are granted to courts of justice, the Code of Practice declares that "the first of these powers is that of issuing the writ of habeas corpus, that privilege granted to all free persons of being released from illegal arrest or detention." Article 787. In defining the scope and province of the writ, it provides that "the habeas corpus is an order in writing, issued in the name of the state by a judge of competent jurisdiction, and directed to a person who has another in his custody, or detains him in confinement, commanding him to bring before the judge the person thus detained, at the time and place appointed, and to state the reasons for which he thus keeps him imprisoned, and deprived of liberty." Article 791. It will be observed that primarily the writ contemplates an application being made by a person *sui juris* for a release from confinement or the custody of another; but the relief is full enough for a person *non sui juris* to avail of its benefit, as the petition for the writ may be signed by "some other person" in the name of the person who is in confinement,—the name of the latter being mentioned therein (art. 794); and that "he is illegally imprisoned or confined" (art. 798); and same must be accompanied by a prayer that such person be "released from illegal arrest or detention" (arts. 787, 799). In treating of the manner in which the respondent is to obey the writ it says that "obedience to the habeas corpus is manifested on the part of the person to whom it is directed by his producing the person to be set at liberty, if that person be in his custody," etc. (art. 806), and, in addition, it is the duty of the respondent to state in his return "whether he has, or has not, in his power, or custody, the person to be set at liberty; or whether that person is confined by him" (art. 807). It provides, further, that, "if the person on whom a habeas corpus is served had held the petitioner in confinement, or had detained him within three days preceding the service, or had transferred the custody to another, he shall state particularly in his answer to whom, at what time, for what cause, and by what authority he made the transfer." Article 808. It further declares that the person kept in

confinement, or the petitioner representing such person, may deny all the facts stated in the respondent's return to the writ, and he may "show that his detention or imprisonment is illegal, or that he has a right to be set at liberty," etc. Article 818. It provides, further, that on issues thus made up the judge shall "hear the testimony and the reasons adduced, as well by the party confined as by the party confining, and shall pronounce on the whole subject, as the nature of the case may require." Article 819. And "if it shall appear to the judge from return and annexed documents, or otherwise, that there is no cause for arrest or confinement, or if he think that such arrest and confinement cannot legally continue, he shall immediately set the prisoner at liberty." Article 824. "But if the judge decide that the party cannot be released from confinement, nor admitted to bail, he shall remand him to prison, or place him under the same custody in which he was, if the detention was legal; otherwise he shall place him in the custody of the person to whom the law confides such duties." Article 825. (Our italics.) From the apparent interchangeable employment, in the foregoing articles, of the terms "illegal arrest or detention," "illegally imprisoned or confined," "power or custody," "illegal detention or imprisonment," and "arrest or confinement," leads to the supposition that the framers of the Code intended to broaden the scope of habeas corpus so that it would afford ample relief to anyone who might be either illegally imprisoned or restrained of liberty, or unreasonably or improperly held in duress, and detained from the custody of the person to whom the law confides such duties; and the judge granting the writ was, consequently, empowered, upon finding the party unduly restrained of liberty or held in duress, to immediately set him at liberty, or "place him in the custody of the person to whom the law confides such duties."

The power, in respect to habeas corpus, that the Constitution confers upon district judges, does not essentially differ from that which is conferred by the Code of Practice. Const. art. 115. Counsel, in his argument, attracts our attention to the fact that the Constitution only confers upon district judges the "power to issue the writs of habeas corpus at the instance of persons in actual custody," and his insistence is that it cannot, therefore, be issued at the instance of any other person than the person in actual custody. Const. art. 115. In support of that proposition counsel cites the opinion of our predecessors, in *Re Manouvrier*, 16 La. Ann. 257, wherein it was held that the jurisdiction of the supreme court "to issue writs of habeas corpus extends only to cases where the parties are in actual custody under process." That decision was rendered in 1861, when the Constitution of 1852 was in force, and the words italicized were quoted from article 69 thereof. The court consequently correctly declined to take appellate jurisdiction in a habeas corpus case that re-

lated to the custody of a child. But the Constitution of 1898, *has ex industria*, conferred upon this court appellate jurisdiction of "all matters" appertaining to the custody of children (art. 85); and the jurisdiction of district judges to issue writs of habeas corpus extended to all cases where a party is in "actual custody," omitting the phrase "under process;" thus, broadening the relief afforded by this highly privileged writ. In the case of *Bermudez v. Bermudez*, 2 Mart. (La.) 181, our early predecessors entertained an appeal in a habeas corpus proceeding the object of which was to enable the father to recover from the mother the custody of the children of the marriage, and the court sustained the plaintiff's claim, and granted the relief prayed for, and "ordered that the plaintiff's sons and daughter be delivered to him." That case was decided in 1812,—the year in which Louisiana was admitted into the Union. In *Hyde v. Jenkins*, 6 La. 427, the court held that, "the writ of habeas corpus may be used in civil as well as in criminal and political cases. A tutor deprived of the custody of his ward, or the husband of the company of his wife, may seek restoration to their rights by a recourse to a writ of habeas corpus." Similar views to those expressed by this court were entertained by the New York court in two well-considered cases: *People ex rel. Tappan v. Porter*, 1 Duer, 709, and *People ex rel. Wilcox v. Wilcox*, 22 Barb. 187. In the former case the court employed this language, to wit: "But, when the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody; because the law presumes that, where the legal custody is, no restraint exists." And in the latter case the court used this language, viz.: "An infant of such tender years as to be incapable of rationally expressing its wishes—which is all I can understand by incapable of making a choice—is of necessity under restraint; and, in order to determine whether the restraint is legal, the court must determine to whom the custody belongs, . . . and, in order to remove the illegal restraint, the court must see that the infant is delivered to its legal custodian. . . . To this extent, I entertain no doubt, the legitimate office of our statute writ of habeas corpus extends, and to this extent it may be executed by a commissioner at chambers."

Another pertinent expression of judicial opinion on one feature of the instant case is found in *People ex rel. Trainer v. Cooper*, 8 How. Pr. 294, which is as follows: "It is insisted that there is no restraint, because the child remains with the respondent of her own free will. This brings up the important inquiry, What is legal restraint, as applied to an infant of this tender age? The position of the counsel would undoubtedly hold true of an adult, who, when delivered from the detention, becomes his own master, and is presumed to know where to go, and how to take care of himself, but it is by no means true of a young, ignorant child. In such cases there may be legal restraint without

47 L. R. A.

the exercise of any force or coercion. It is enough that the accused interferes to prevent the father from forcibly taking possession of the child. The person having the custody of such an infant without any claim of right is bound to deliver it over into the hands of the father, whenever he presents himself to receive it, and is not permitted to retain possession of it under the pretense, however true it may be, that the child desires to remain. Thus, if a child go to a neighbor's house, and conclude to abide there, when the father demands it of that neighbor it is not sufficient for the latter to say to him, 'You may come in, and persuade it to go home, and, if you succeed in gaining its consent, you may take it; but you shall not compel it to go.' He is bound to permit the father to exercise his parental authority of coercion, and, if he prevents that, he is guilty of restraint, within the fair meaning of the term. In *Mercein v. People ex rel. Barry*, 25 Wend. 80, 35 Am. Dec. 653, the court employed a very similar expression of opinion, thus: 'The question here is not whether the child is actually suffering under duress of imprisonment, but whether there is that kind of restraint which defeats the right of the father. The respondent, having the child under his roof, positively forbids the father to enter the house, except upon terms which a proper self-respect made inadmissible; but, if he could submit to the terms, he only had a license to enter the house—"to see Mary"—not for the purpose of taking her under his care and protection. It is impossible to deny that this is such a restraint as defeats the right of the father to the custody of his child, and lays the proper foundation for asking redress by habeas corpus.' In the case before us it is clear that the child is studiously guarded and kept beyond the reach of the father. The most that is pretended is, in the language of the return, that 'she has enjoyed, and, so far as the respondent is concerned, shall enjoy, entire and undisturbed liberty to go where she pleases. In other words, and this fact is sustained by the proof, she is prepared and resolved, knowing the child's partiality for herself, to maintain Jane in her determination not to go to her father, and to repel all attempts on his part to obtain possession of the child against her will. We have no hesitation in determining that the conduct of the respondent amounts in law to restraint." Much to the same effect is *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375. In *People ex rel. Trainer v. Cooper*, 8 How. Pr. 294, we find this further expression of opinion: "But, independent of this overwhelming proof of actual indiscretion, we cannot sanction, or give countenance to, the doctrine that such children are to control their own movements, and to select their own places of residence. It has no foundation in reason or justice, and is plainly opposed to the laws of the land, as well as the law of God. The court must, therefore, go further than merely remove the restraint, by rendering a judgment which shall

dispose of the custody of the child and conclude this controversy. It would be an idle ceremony for the court to try a cause without making a decision by which the fruits of the litigation could be reaped. We have a multitude of precedents for our guidance in this particular." In *Re M'Dowle*, 8 Johns. 328, the court ordered the boys to "be delivered to their master, and directed an officer to attend and protect them in their return." In *People ex rel. Barry v. Mercein*, 3 Hill, 399, the opinion of the court is expressed in these words: "An order must, therefore, be entered that the child be delivered to the relator." In *People ex rel. Nickerson v. —*, 19 Wend. 16, the court made an order that "the child be delivered to the father, and that the care and custody of her be committed to him." In *Re Goodenough*, 19 Wis. 274, a similar doctrine is announced. In *Ex parte Williams*, 11 Rich. L. 459, this pertinent expression of opinion occurs: "A judge would greatly mislead, and might seriously injure, a youth of fifteen, by telling him that he was free to go where he pleased, if room was left for the misconstruction that he was not bound to obey his father." The decisions of this court are very well summarized and expressed by an excellent author in the following language, to wit: "The term 'imprisonment' usually imports a restraint contrary to the wishes of the prisoner, and the writ of habeas corpus was designed as a remedy for him, to be invoked at his instance, to set him at liberty; not to change his keeper. But, in the case of infants, an unauthorized absence from the legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment, and the duty of returning to such custody as equivalent to a wish to be free. It has been held that the writ may not only issue without privity of the child, . . . but against its express wishes. . . . To confine the writ of habeas corpus . . . exclusively to cases of illegal confinement would be destructive of the ends of justice. I apprehend it is not going too far to say that the interests and welfare of society require that, under peculiar circumstances, the fact that the child of tender years is detained improperly from the person entitled to its possession is sufficient ground to maintain the writ of habeas corpus." Hurd, *Habeas Corpus*, p. 454. Much to the same effect is the French jurisprudence, as will appear from the following quotation from a treatise of Pothier, to wit: Pothier, in his *Traité des Donations des Personnes et des Choses*, vol. 13, pages 429, 430, referring to that feature of the paternal power which confers upon parents the right to govern with authority (*gouverner avec autorité*) the persons of their children until they should have reached the age to govern themselves, says: "De la premiere partie de la puissance paternelle, n'aît le droit qu'ont les pere et mere de retenir leurs enfants aupres d'eux ou de les renvoyer dans tel college ou autre endroit ils jugent a propos de les renvoyer pour leur education. De la

il suit qu'un enfant soumis a la puissance paternelle ne peut entrer dans aucun etat, se faire novice, faire profession religieuse, contre le consentement de ses pere et mere, sous la puissance desquels il est. Cela a été juge contre les jesuites au profit de M. Airault, lieutenant-general d'Angers, par arret de 1587, contre les feuillans, par arret de 10 aout, 1601, contre les capucins, au profit du president Ripault, par arret du 24 mars, 1604. Ces arrêts sont fondees en grande raison. L'etat religieux n'est que de conseil evangelique or il est evident qu'on ne peut pas pratiquer un conseil evangelique parle violement d'un précepte, tel qu'est celui de l'obeissance a ses parens, qui nous est prescrite par le quatrieme commandement de Dieu. D'ailleurs, la profession religieuse, quoique bonne et utile en soi, ne convient pas néanmoins a tout le monde; tous ne sont pas appele a cet etat. Or les pere et mere sont presumes etre plus en etat de juger si leurs enfants sont appeles a cet etat que leurs enfants, qui n'étant point encore parvenus a la maturité de l'age, ne sont pas encore capables de juger par eux memes de l'etat qui leur convient. (Voyez les Capit de Charlemagne, liv. I., ch. 5.)"

The foregoing are a few of the pertinent opinions expressed by courts of other states on the question at issue; and very many others of like import might, with perfect propriety, be cited, though we do not deem it necessary. Those quoted, in our opinion, are in keeping with the provisions of the Code of Practice which have been cited, as well as the provisions of the Constitution, and the decisions of this court. Altogether, they constitute a complete consensus of judicial opinion on the subject, which is at once authoritative and controlling. Consequently, we are of the opinion that habeas corpus is the appropriate remedy, and that the relatrix has brought her case clearly within the principles announced, and that she is entitled to the relief she demands. For the foregoing reasons, we are of the opinion that the judgment appealed from is erroneous, and must be reversed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the writ of habeas corpus be reinstated and maintained. It is further ordered and decreed that the relatrix, Mrs. Adelina Prieto, have the custody and control of her daughter, Maria Theresa Prieto; she being yet a minor, and incapable of selecting and establishing a domicile of her own choice against the will and consent of her mother. It is further ordered and decreed that the respondent, St. Alphonsus Convent of Mercy, through its reverend mother superior, permit and allow the relatrix to have the custody and exercise control over said Maria Theresa Prieto, without exercising any restraint over her or making any opposition thereto. It is further ordered that all costs be taxed against respondent and appellee.

Breaux, J., dissenting:

I dissent, for the reason that, in my opinion, the young lady who is the subject of this litigation is not in the custody of anyone. The law of habeas corpus is intended to go to the relief only of those in the custody of someone, restrained in some way, or deprived of his liberty. I do not understand that this is the case here. This young lady, in her eighteenth year, chose to seek a home in a convent where she was a pupil. It was her own act in carrying out her will, and for which she alone is to blame, if blame is to be imputed to anyone. After she retired to the convent to make it her permanent home, the evidence shows, as I read it, that she was always free to leave. This is her solemn declaration under oath, corroborated by the respondent and those who were with her at the convent. In all the articles of the Code of Practice, "custody" and "restraint" of the person is the moving cause in issuing the writ. Thus, in the first article on the subject, the "habeas corpus" is defined as an order in writing directed to a person "who has another in his custody." The petition for the writ "shall state, in substance, that the party applying is imprisoned or deprived of liberty, and by whom" (Code Pr. art. 795), "if the imprisonment or detention has not been made by virtue of a judicial order." "The person on whom a habeas corpus is served shall declare positively in his answer whether he has or has not in his power or custody the person to be set at liberty." If Miss Prieto is entirely free, the respondent, as I view these articles, does not come within their grasp. The respondent obeyed the writ, appeared in court, and disclaimed all restraining power over the young lady. The creed of this young lady has naught to do with the case. She stands before the court as anyone else would stand whom the mother thinks is improperly influenced, and the extent of the mother's authority is no greater and no less than her authority would be regardless of all creed or religious belief. The question, considered from a point of view entirely secular and civil, does not, in my opinion, differ very much from the one presented in this case. May I not to some extent, at least, illustrate by the following: Let us suppose that a difference has arisen between a wealthy and devoted father and the son, who desires to become a skillful workman or expert mechanic, an idea with which the father does not at all sympathize. The son in his nineteenth year, unwilling to lead a life of leisure, calls on one skilled in one of the practical arts or other attractive occupation, and soon improves in the trade or occupation he has selected. An honorable friendship springs up between the master and the subordinate in the art. One becomes quite partial to the other. The special teacher was told by the son, in the first interview, that he came after having obtained the consent of the father, but the father soon appears upon the scene, and informs the honorable friend of his son that he objects to his son working under his guid-

ance and remaining with him. The father is told by the master that the son is free to do as he pleases,—return if he chooses,—but that, if he remains, he will find work and shelter for him. This is disappointing to the father, and he sues out a writ of habeas corpus. In answer, the one who has become devoted to the son, and sympathizes with his views and wishes, now made defendant in a proceeding by way of habeas corpus, appears in court, and relates the facts to the judge, corroborated by the son. He claims nothing, and says to the court that, whatever it may be, the law must be obeyed, and he desires the court to inform all the parties of the rights of the son. From the court's action, in response to this request, an appeal is taken. There being no tie of any kind between the one made respondent and the son, save that of sympathy and good will, which one good man will nearly always feel for another, there would scarcely be a decision found anywhere under which the respondent could be condemned to deliver him over to a relator in a habeas corpus case. May it not be that, after admonishing the son of the necessity of respecting the wishes of his father in a proper case, he might be, in substance, told by the court that, although not quite of age, the court none the less recognizes that he has some rights which the court will respect; that he must go to his father, and respect his wishes, but that he will not be sent there under the writ of habeas corpus, as the court does not find that his liberty of action has not been respected. My only purpose is to illustrate that the writ of habeas corpus is not intended to reach or prevent the kindly influences which exist among men, even when an inoffensive error of judgment has been committed. It is not my opinion that one cannot be condemned to deliver another under the writ of habeas corpus save when he has him under actual restraint. I did not find that to be the case here. In my view of the different questions, I do not pretend for an instant that I may not be mistaken. Long meditation and study have been devoted to these questions. Many decisions have been written on the subject, and many views expressed. Under the civil-law system, I find that greater power is given to parents over their children, and that the state is somewhat prone to impose its authority, in order to vindicate that power. In the ancient world, during classic days, the control of the father over his children was unlimited. Those who, like Pothier, borrowed much from the pandects and other ancient law, have readily recognized the authority of the state to intervene, and bring its strong arm to bear to coerce obedience. These principles were afterwards made part of the Code Napoleon. They are not all copied in our Code. There is a difference on this subject in the articles of the two Codes quite evident on reading and comparing the different articles. Under the common-law system, the authority of the state, as I take it, is not so easily invoked in the interest of complaining parents. More

rights, properly, I think, are conceded to the child who is capable of reasoning for himself as if of age. The common-law system, it does appear to me, is more in accordance with the spirit of the age on this point. I do not understand that the common-law decisions are favorable to the interposition of state interference, under the writ of habeas corpus in such cases. These are my

views regarding the legal aspect of the case. The question is one of interpretation. Differing from my colleagues as relates to the interpretation to be placed on the law, I do not claim any conscientiousness and sincerity of purpose which I do not readily concede to the majority of the court.

Rehearing denied February 5, 1900.

WISCONSIN SUPREME COURT.

Mary Emeline McCOY, *Resp't.*,
v.

NORTHWESTERN MUTUAL RELIEF ASSOCIATION, *Appt.*

(92 Wis. 577.)

1. A certificate of membership and the application therefor, which provide against liability in case of death by suicide, constitute a contract between the parties, prevailing over by-laws of the association, which do not authorize such limitation upon liability.
2. A policy of life insurance cannot be broadened out by the application of the law of waiver or estoppel, so as to cover a case of death by suicide which is excluded from the policy by its terms.

(March 10, 1896.)

NOTE.—Conflict between by-laws and certificate, or policy, of a mutual benefit society or insurance company.

Although it is well settled that the by-laws of a mutual society or company in force at the time of the admission of a member are a part of the contract, whether referred to in the certificate, or policy, or not, there have been but few decisions on the exact question dealt with in the note.

The decisions that have been made support the doctrine of the principal case, that in case of conflict between the by-laws and certificate, or policy, the latter prevails, in the absence of any conflict with the charter or articles of association.

Thus, *Davidson v. Old People's Mut. Ben. Soc.* 39 Minn. 303, 1 L. R. A. 842, 39 N. W. 803, holds that a by-law limiting the society's liability to the amount paid to it on the certificate in case of the insured's death within sixty days after reinstatement is ineffectual, where the certificate provides that a member who has forfeited the same may be "restored" upon certain conditions. The court mentions the fact that it nowhere appears that the charter or articles of association prohibits the society from issuing a policy in the form of the one in question, and holds that by issuing such a policy the society must be deemed to have waived the by-law.

Fitzgerald v. Equitable Reserve Fund Life Assn. 18 N. Y. S. R. 914, 3 N. Y. Supp. 214, holds that a certificate contemplating an assessment to meet each death loss prevails over by-laws tending to limit the number of assessments, laying down the general principle that in case of conflict between the by-laws and certificate the latter shall prevail.

Falley v. Fee, 83 Md. 83, 32 L. R. A. 311, 34 Atl. 839, applied the same doctrine where there was a conflict between the certificate and a by-law L. R. A.

APPPEAL by defendant from a judgment of the Circuit Court for La Fayette County in favor of plaintiff in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Reversed.*

Statement by Marshall, J.:

This action is brought by the plaintiff against the defendant, a corporation doing an insurance business on the co-operative plan, on certificate of membership No. 7-844, issued to William McCoy, April 11, 1889, which matured and became payable to plaintiff as beneficiary, by his death by suicide, July 8, 1892, unless the manner of such death constitutes a defense to plaintiff's claim. The certificate, by its terms, requires defendant to pay plaintiff 80 per cent of an assessment made upon the members of the association, under its system, not exceeding

law with reference to the time of payment, al-
luding to the fact that the articles of association provided that the amount should be paid as provided in the by-laws or in the certificate.

Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co. 59 Wis. 162, 18 N. W. 13, holds, in effect, that a by-law restricting membership to persons under a certain age may be waived by issuing a certificate to a person over that age; distinguishing *Luthe v. Ripon Farmers' Mut. F. Ins. Co.* 55 Wis. 543, 13 N. W. 490, upon the ground that in the latter case the restriction was in the charter.

Union Mut. F. Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375, upholds a policy issued by a mutual fire insurance company, with full knowledge of the facts, insuring property in a class other than that to which it belonged, according to a by-law adopted by the directors pursuant to a provision of the charter requiring them to divide all property into four classes and determine the property to be included in each class. The decision is put upon the ground that the directors, having adopted the by-law, might waive it.

In *Doane v. Millville Mut. Marine & F. Ins. Co.* 45 N. J. Eq. 274, 17 Atl. 625, the contract, if determined by the charter and policy, gave all persons insured an equal claim upon assets for indemnity whether the risk was marine or fire, but the by-laws restricted the revenues from each branch to the payment of losses in that particular branch. The court held that the policy should prevail over the by-law, stating that the tender of a policy under such a charter is for all practical purposes equivalent to a declaration that there are no inconsistent by-laws, and, further, that if the by-law were to prevail it would overrule the charter, in view of the provision of the latter that the company should be bound agreeably to the policy.

Miller v. Hillsborough Mut. F. Ins. Assn. 44

in all \$2,000. The only method or remedy by which plaintiff can enforce her rights as beneficiary is by an action in equity to compel the association to comply with the terms of the certificate by making an assessment upon its members, and paying the proceeds thereof to her, not exceeding in all \$2,000. Plaintiff's claim was duly proved under the rules and regulations of the association and the terms of the certificate, and, after the termination of the period within which defendant was required to levy the assessment, it having neglected and refused so to do, on the ground that the assured came to his death by suicide, this action was brought.

The application made by the assured for membership in the association, upon which the certificate was issued, contained the following: "I hereby agree that the association assumes no liability in case of suicide or self-destruction, and that the certificate of membership shall contain the usual terms, conditions, and regulations. . . ." Indorsed on the back of the certificate, and made a part of the contract of insurance, was the following: "(1) Suicide or self-destruction of the member herein named, whether voluntary or involuntary, sane or insane, at the time thereof, is not a risk assumed by this association. . . . (2) Neither the member . . . nor the association shall be liable upon the certificate . . . for any suicide or self-destruction or for a greater amount than eighty per cent

of the assessment paid by such member." The trial court found facts in accordance with the foregoing. Also, in effect: That the articles of organization of the defendant, when the certificate was issued, provided that members should be entitled to receive benefits upon such terms and subject to such regulations as prescribed by the board of directors or the executive committee. That, until January 15, 1890, there was no by-law or regulation of the defendant adopted in accordance with such articles, or at all, authorizing the issuance of a certificate with the provision against liability in case of death by suicide or self-destruction. That by the by-laws and regulations existing prior to the date mentioned, all certificates were payable absolutely upon maturity, by death, whether caused by suicide or otherwise, and that the form of application and certificate used by the association up to February 7, 1899, was in accordance therewith, after which date, by the secretary of the association, without authority of the board of directors, a provision was inserted in the applications and indorsed on the back of the certificates used, similar to the provisions in the application and on the back of the certificate in question, limiting mortuary benefits to cases of death from causes other than suicide or self-destruction. That in November, 1899, notice was sent to the members of the association, including the deceased, of a proposed amendment to the by-laws, providing against

N. J. Eq. 224, 14 Atl. 278, 10 Atl. 106, held that insured in a policy issued by a mutual fire insurance company subject to "constitution, by-laws, and conditions," was entitled to have his policy reformed so as to be subject only to the by-laws annexed thereto, where at the end of the policy, under the words "conditions of insurance," certain by-laws, not including the one relied upon by the company as a defense, were annexed.

Barbot v. Mutual Reserve Fund Life Assn. 100 Ga. 681, 28 S. E. 498, is not opposed to the doctrine of the foregoing cases, but merely gives the constitution and by-laws effect in construing the certificate. In that case the constitution and by-laws provided for assessments sufficient to meet existing claims. There was attached to the certificate an "assessment rate table," which, after providing that each survivor should pay for each \$1,000 of the amount of his certificate "as follows," purported to give the amounts (termed rates) on \$1,000 for different ages. The court held, in view of the constitution and by-laws, that it was not the purpose of the table to fix a limitation upon the amount of the gross assessment, but only to furnish a guide, after such gross amount had been ascertained, for its equitable and fair apportionment among the members according to their relative ages.

It is apparent from the foregoing that the adjudged cases sustain the general rule laid down by the court in the principal case, viz., that the certificate, if within the power of the association under its charter or articles of organization, will prevail over by-laws inconsistent with it; but the opinion does not make it clear why the case does not fall within the exception to the rule. It will be observed, from the statement of facts preceding the opinion, that the articles of organization provided that members should be entitled to receive benefits upon such terms and subject to such regulations as should

be prescribed by the board of directors or the executive committee; that at the time the certificate in question was issued there was no by-law or regulation authorizing the issuance of a certificate with a provision against liability in case of suicide; and that such provision was inserted by the secretary, without the authority of the board of directors, in the applications and certificates used at the time the certificate in question was issued. The implication seems to be, although it is not expressly so stated, that the act of the secretary was without the authority of the executive committee. It would therefore seem that the insertion of the provision in question was not authorized by the articles of association.

It may be that the issuance of the certificate was regarded as the act of the board of directors or executive committee, and therefore as a compliance with the provision of the articles of association, since it does not require the terms and regulations to be prescribed in by-laws or in any other particular form.

Moreover, the provision of the certificate as to suicide was manifestly for the benefit of the association, and for that reason the provision of the articles of association for "benefits on such terms and subject to such regulations as prescribed by the board of directors or the executive committee" may have been deemed inapplicable. That is to say, this restriction may be deemed to be for the protection of the association alone. If so, it would prohibit the insertion of unauthorized stipulations which would increase the liability of the association, but would not prohibit its officers from inserting any stipulations that might further protect the association. This seems to be a reasonable interpretation of the articles, and may well be the ground on which the court sustained the stipulation against suicide, though the association had not authorized it by any by-law or regulation.

G. H. F.

liability in case of death by suicide or self-destruction; and on the 15th day of January, 1890, pursuant to such notice, such an amendment was duly adopted, and it was provided that all certificates issued prior to January 25, 1890, should be known as "Old Series," and those issued after January 24, 1890, should be known as "New Series." A new provision was made in regard to the classification of certificates and in regard to assessments, applicable only to the new series; and it was further provided that members holding old series certificates should be assessed according to the old by-laws, though such holders might exchange such certificates for certificates of the new series. That on the 9th day of January, 1890, accompanied by a notice of an assessment, the deceased received a communication from the defendant in the form of a circular letter addressed to each member of the association, to the effect that after January 21, 1890, a new form of certificate would be issued, containing advantages over the old form, in that, among other things, there would no longer be any liability in case of death by suicide; and thereafter, July 11, 1892, he received another circular letter, calling attention to the new regulations, and urging the exchange of the old for the new certificates, because of the exemption from liability in case of suicide. That prior to the death of the assured he paid eighteen assessments in consequence of the death of members, two of which were by suicide, one of such being November 30, 1890, and the other April 29, 1891, and in each case notice of the assessment was given, together with notice of the cause of death. The court found, as conclusions of law, in effect, that the provisions in the application and on the back of the certificate in regard to liability in case of death by suicide, were not in accordance with the by-laws of the defendant existing at the time such certificate was issued, and therefore they formed no part of the contract of insurance; that defendant had repeatedly shown that it so interpreted the contract by assessing the assured upon his certificate to pay death losses caused by suicide, and that defendant had waived any right to insist on such provisions by repeatedly assessing the assured for his full proportion of losses which accrued to the association on account of the death of members by suicide. Exceptions were taken on the part of defendant necessary to raise the questions here considered. Judgment was rendered in plaintiff's favor in accordance with the conclusions of the trial court, and from such judgment this appeal was taken.

Mr. N. W. Chynoweth for appellant.
Messrs. Orton & Osborn and Wilson & Martin, for respondent:

The defendant is liable notwithstanding William McCoy, the insured, died by his own hand.

The stipulations to the contrary are interpolations placed there by the secretary and manager without any authority whatever, and contrary to the by-laws of the association and its articles of incorporation, and 47 L. R. A.

are therefore void, and form no part of the contract.

The contract set out in the by-laws was the only authorized contract for mortuary benefits to be paid by the defendant, in force when this certificate was issued; and such contract, containing no exception in case of suicide, bound the defendant in that case the same as if death ensued in any other way.

Cooke, Life Ins. § 41; *Darrow v. Family Fund. Soc.* 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093; *Niblack, Ben. Soc.* last ed. § 156; *Mills v. Redstock*, 29 Minn. 380, 13 N. W. 182.

The directors have no authority to disregard the by-laws.

Niblack, Ben. Soc. p. 196.

These interpolations are void for two reasons:

For want of authority on the part of the officers to insert them in the contract.

Niblack, Ben. Soc. last ed. § 97; *McCoy v. Roman Catholic Mut. Ins. Co.* 162 Mass. 272, 25 N. E. 289; *Evans v. Trimountain Mut. F. Ins. Co.* 9 Allen, 329; *Sweet v. Citizens' Mut. Relief Soc.* 78 Me. 541, 7 Atl. 394; *Hirsch v. United States Grand Lodge, O. of B. A.* 56 Mo. App. 101; *Hall v. Merrill*, 47 Minn. 260, 49 N. W. 980; *Covenant Mut. Ben. Asso. v. Spies*, 114 Ill. 463, 2 N. E. 482; *Metropolitan Safety Fund Accl. Asso. v. Windover*, 137 Ill. 417, 27 N. E. 538; *Cooke, Life Ins.* § 11; 2 Am. & Eng. Enc. Law, p. 176; 15 Am. & Eng. Enc. Law, p. 44; *Day v. Mill-Owners' Mut. F. Ins. Co.* 75 Iowa, 694, 38 N. W. 113; *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493.

If the secretary may interpolate a provision into the contract between the association and its members for any purpose, the provision here inserted, limiting the liability of the association in case of the suicide of the holder of a certificate, is invalid because it destroys the equality of rights and liabilities between certificate holders, which is the essential principle of mutual insurance.

MacKinnon v. Mutual F. Ins. Co. 83 Wis. 12, 53 N. W. 19; *Davis v. Parcher & J. & A. Stewart Co.* 82 Wis. 488, 52 N. W. 771; *Great Western Teleg. Co. v. Burnham*, 79 Wis. 47, 47 N. W. 373; *Bowen v. Kuehn*, 79 Wis. 53, 47 N. W. 374; *Clevenger v. Mutual L. Ins. Co.* 2 Dak. 114, 3 N. W. 313.

Assessments must be made in strict conformity to the provisions of the by-laws, and cannot be enforced if made otherwise.

16 Am. & Eng. Enc. Law, p. 66; *Marblehead Mut. F. Ins. Co. v. Hayward*, 3 Gray, 208; *People's Equitable Mut. F. Ins. Co. v. Arthur*, 7 Gray, 267.

If the interpolated rule indorsed upon this certificate was ever valid, the defendant association has waived the condition, and is now liable notwithstanding.

Stylow v. Wisconsin Odd Fellows Mut. L. Ins. Co. 69 Wis. 224, 34 N. W. 151; *Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13.

The defendant has by its various communications with McCoy in his lifetime, and assessments made upon him to pay suicidal

losses, practically construed the interpolated suicidal clauses in the certificate in suit as invalid and ineffectual, which construction it should now be bound by.

Ballou v. Gile, 50 Wis. 614, 7 N. W. 561.

Marshall, J., delivered the opinion of the court:

It clearly appears from the foregoing statement of facts that the contract which the appellant and the assured made, as evidenced by the application for and the certificate of membership, provides in clear, unmistakable language against liability in case of death by suicide or self-destruction; but it is contended that, notwithstanding such is the case, the provisions in that regard do not form a part of the contract between the parties, because the by-laws of the association, at the time deceased was admitted to membership, did not authorize any such limitation upon its liability, and that such by-laws must prevail over the express contract of the parties in case of conflict. Such is the position of the respondent, as we understand it, and of the learned circuit judge before whom the case was tried at the circuit. If such is the law, obviously the judgment must be affirmed, because it is well settled that, if a contract for life insurance does not provide against liability in case of death by suicide or self-destruction, then such cause of death does not constitute a defense. *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372; *Freeman v. National Ben. Soc.* 42 Hun, 252. The articles of organization of the association did not contain any prohibition against the acceptance of members under contract providing against liability in the event of death by suicide or self-destruction. So, at the most, the issuance of the certificate in this case was a mere violation of the by-laws, which would not necessarily affect the contract. *Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13. It was there held, in effect, that where the certificate of membership of a mutual benefit society is inconsistent with the by-laws of the association, the certificate is, nevertheless, binding upon the company, according to its terms; distinguishing between the rule thus laid down and the rule in *Luthe v. Farmers' Mut. F. Ins. Co.* 55 Wis. 543, 13 N. W. 490, where a policy of insurance, issued in a manner prohibited by the charter of the company, was held void on that ground. To the same effect is *Davidson v. Old People's Mut. Ben. Soc.* 39 Minn. 303, 1 L. R. A. 842, 39 N. W. 803; also *Fitzgerald v. Equitable Reserve Fund Life Asso.* 18 N. Y. S. R. 914, 3 N. Y. Supp. 214, where it is held, in effect, that, in the absence of fraud, a provision in a certificate of membership in a mutual life association will prevail over a clause in the by-laws of such association conflicting therewith, and tending to limit its liability, though the application stipulates that such by-laws shall constitute a part of

the contract. So in *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313, 64 Am. Dec. 375, where it is held, in effect, that if a policy of insurance is issued in violation of the by-laws, if not prohibited by the charter, it is binding, according to its terms, on the corporation or association issuing it. *Hirsch v. United States Grand Lodge, O. of B. A.* 56 Mo. App. 101, cited to the contrary, appears to be in perfect accord with the foregoing. While the decisions are not numerous on this subject, there is no substantial conflict, and we understand the general principle to be firmly established that though, generally speaking, a member of a mutual benefit association or insurance company is bound to take notice of its by-laws, even if not recited or referred to in the certificate of membership or policy, yet, when such certificate or policy and the by-laws conflict, so long as the contract as written is within the power of the association under its charter or articles of organization, it will prevail over the by-laws, and by it the rights and liabilities of the parties must be determined. *Niblack, Ben. Soc.* § 147. It follows from the foregoing that the conclusion of the trial court, to the effect that the by-laws of the appellant must prevail over the application for and the certificate of membership, cannot be supported, but, on the contrary, the latter must prevail, and be held the measure of the liability of the association on the certificate, and that no recovery thereon can be had unless by reason of the facts it is estopped from insisting upon the contract as made, and from setting up the cause of death as a defense.

It is claimed that the conduct of the association in its dealing with the deceased was such as to induce a belief on his part that, in the event of death by suicide, that fact would not be insisted upon as a defense, notwithstanding the provisions of the contract in that regard; that he relied upon such conduct by refusing to exchange his certificate for one of the new series, though repeatedly invited so to do, and twice paid assessments when the cause of death was suicide; and that it should now be estopped from having the benefit of any different position under its contract to the prejudice of the plaintiff. On this branch of the case much learning is displayed, and the general subject of waiver and estoppel in cases of forfeitures by breaches of conditions in contracts of insurance is ably discussed in respondent's brief in support of the contention that appellant is estopped from insisting upon a forfeiture in this case; but we are unable to see how the settled rules under which it is held that a forfeiture or condition of forfeiture may be waived applied here. What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel against insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture. It is a misuse of the term to so speak of the loss of benefits under the certificate in question. What is here sought is not to prevent a forfeiture,

but to make a new contract; to radically change the terms of the certificate so as to cover death by suicide, when by its terms that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance and with the knowledge of the insured, and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss. To illustrate the principle here laid down, a policy of insurance against loss by fire cannot have ingrafted upon or added to it, by way of estoppel or waiver, provisions for insurance against loss by any other cause; and no more can a policy of life insurance, expressly limited to payment of a sum of money in the event of death from causes other than suicide or self-destruction, be broadened out by the application of the law of waiver or estoppel so as to cover the cause excluded under the contract. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all.

From the foregoing it follows that *the judgment of the Circuit Court must be reversed*, and the cause remanded, with directions to dismiss the complaint, and render judgment in favor of the defendant for costs.

James R. RICKETSON, *Respt.*,

v.

City of MILWAUKEE *et al.*, *Appts.*

(.....Wis.....)

1. Letting a contract for a garbage crematory, without making or filing any plan of the proposed plant, or adopting any system of garbage cremation, or specifying the dimensions of buildings or description of machinery to be used, but merely calling for a complete garbage cremation plant that will destroy a certain quantity of garbage per day, leaving the bidders to submit plans and specifications showing a description of the buildings, machinery, furnaces, and appurtenances, is in violation of Laws 1874, chap. 184, which requires an advertisement for such work after a plan or profile of the work, accompanied with specifications or other appropriate and sufficient description of the work, has first been placed on file for the information of bidders and others.

2. The right of a city to acquire a patented process without advertising

NOTE.—As to municipal contract for work or articles which embody a patented invention, see *Kilvington v. Superior* (Wis.) 18 L. R. A. 45, and *note*.

47 L. R. A.

for bids does not justify the letting of a contract for a complete garbage crematory, with the necessary buildings, machinery, and appurtenances, as well as the use of a patented process, without complying with the statutory requirements as to filing plans and specifications in letting contracts for public works, and without any compliance with the statutory provisions as to securing the right to use patented processes.

3. The court will hesitate to restrain the execution of a municipal contract on the ground that the board of public works did not exercise an independent judgment upon the bids submitted therefor, but acted conjointly with certain committees of the council, where it is not shown that the opinion of the board was influenced by their associates.

4. A reservation in contracts for public work, in favor of the city, of certain powers given to the board of public works by Milwaukee charter, chap. 5, § 20, should, to avoid ground for litigation, make full and complete reservations as to both the rights and powers of the board as pointed out.

5. An objection that a plaintiff is not prosecuting the action in good faith, and is not the real party in interest, should be determined by proof on the trial, and not upon the pleadings and affidavits upon preliminary hearing.

(February 2, 1900.)

A PPEAL by defendants from an order of the Superior Court for Milwaukee County restraining defendants from proceeding to construct a garbage crematory at the expense of the city. *Affirmed*.

Statement by Bardeen, J.:

This action is brought by the plaintiff, a resident and taxpayer of the city of Milwaukee, to restrain the city, its board of public works and other officers and the Engel Sanitary Cremation Company, from constructing a garbage crematory at the expense of the city. Upon the complaint and affidavit of one Vincent, a restraining order was made. The complaint, among other things, alleged that on June 5, 1899, the council adopted a resolution directing the board of public works to advertise for proposals to furnish the city, ready for operation, with a suitable garbage crematory, including all necessary buildings, which shall be of brick, with stone foundations and iron roof, for the incineration of all garbage within the limits of the city, together with the right to use all patents which may be necessary for the complete operation of the same. Such bids or proposals were to be for buildings and equipments suitable for the reduction and disposal of 100 tons of garbage each twenty-four hours. The buildings were to be located on lands owned by the city near the sewerage pumping works. The bidder was to specify the system of incineration to be employed by him, the size, dimensions, and manner of construction of the building and plant, the number of tons of fuel required for the disposal per ton of garbage, and the number of men necessary for its operation. If possible, it was to be so located as to use the

smoke stack of the sewerage pumping works, and was to be so located in connection with said works as the city engineer should decide to be economical in the operation of both plants according to specifications to be prepared by him. The resolution also provided that, in addition to the charter requirements, the contract and specifications should require: (1) A guaranty that the plant when completed would do the work required in a sanitary manner without emitting any unwholesome or offensive odors. (2) That the city should have the right to test it for sixty days. (3) If the city decided to accept the plant, the bidder was to give a bond of \$10,000 conditioned that it should do the work properly for one year. (4) A conveyance to the city of the right to use all patents applied for, pending or issued, covering the plant and methods of operating the same. (5) An agreement that if not accepted the contractor would remove the plant. (6) That no payment should be made until the works had been tested and accepted. (7) Such further provisions as the board of public works and city engineer might require.

The resolution further provided that the board of public works and committee on health should be empowered to select the lowest and best bidder, all things considered, but before making a contract they were to report their conclusion to the council for approval. An appropriation not exceeding \$60,000 was made to meet the expense. Pursuant to this resolution, the board of public works prepared some general specifications, a copy of which is attached to the complaint. No plans of any kind were prepared. The specifications covered the requirements of the resolution, but left it for the bidders to submit plans and specifications showing a description of the buildings, machinery, furnaces, and appurtenances. Nothing was said as to the size or dimension of the buildings or of any of the rooms therein, or of the finish of the same, except that the buildings were to be of brick with iron or slate roof, and as nearly fire proof as possible. No specifications as to machinery were included except that it was stated that the furnaces were to be of such a number as to permit the cremation of 100 tons of garbage per day, delivered in scows at a dock in front of the plant three times a day. Proper trainways were to be built with a traveling crane for each furnace. A coal shed was to be erected of capacity to store six months' necessary supply of coal. The smoke stack was to be of ample capacity and height for the best draft necessary. If the stack of the sewerage pumping works was of sufficient height and capacity in connection with the boilers of said works, or if the heat from the cremation furnaces can be used for generating steam at the necessary pressure in the boilers at the pumping works, the present stack, with the approval of the board, may be used and the flue connected with the boiler furnaces. The plant was to be so designed as to make the handling of garbage and the receiving of coal by vessel convenient and eco-

nomical, and must be complete in every respect and of first-class material.

Due advertisement was made by the board and bids received as follows:

Dixon Garbage Crematory Company	\$51,000 00
Davis Garbage Furnace Company	53,000 00
" " " "	50,000 00
Jacobi Company	57,000 00
Engel Sanitary & Cremation Company	57,800 00
Davis Garbage Furnace Company	68,000 00
Duke & Kellner Construction Company	79,845 00

These bids were opened and reported to the council with a recommendation that they be referred to the board of public works, health commissioners, committee on health and committee on public buildings and grounds. This was accordingly done. On September 18, 1899, these committees with the board made a joint report to the council, setting out the specifications upon which bids were asked, the notice to bidders, the bids received, and a recommendation that the "bids, plans, and specifications of the Engel Sanitary & Cremation Company be accepted," and that all other bids be rejected. They stated their reasons for rejecting the other bids as follows. The Davis Garbage Furnace Company's bid came too late. The Duke & Kellner Construction Company bid was exorbitant, and the plans and specifications defective in certain specified particulars. The Jacobi Company failed to comply with the general specifications, and the Dixon Garbage Crematory Company also failed to comply therewith, and its plans, etc., were defective in certain particulars stated. There was no report that any of the bidders were incompetent or otherwise unreliable, nor was there any recommendation from the board of public works that the lowest bid was unreasonably high. After due consideration the council adopted resolutions rejecting all bids, and awarding the contract to the Engel Sanitary & Cremation Company at the sum of \$57,800 as being the lowest bidder who had complied with the charter requirements and the specifications and advertisement under which bids were received. Before the restraining order was served, a contract was entered into between the city and said company. Answers were filed admitting most of the facts hereinbefore stated, alleging compliance with the charter provisions and good faith in all their transactions. Upon the record so made, the attorneys for the Engel Company obtained an order to show cause why the restraining order should not be vacated. Upon the hearing, several affidavits were used which do not materially change the situation. The court denied the motion. The city has appealed.

Messrs. Carl Runge and Joseph E. Doe, for appellants:

The city had the benefit of all the competition which the nature of the work admitted, and the statute ought not to be so construed as to exclude the city from availing

itself of desirable patented works or improvements, as to which, in the nature of the case, there can be no competition, and when for performing the work and furnishing the materials the advantage of competition is secured.

Kilvington v. Superior, 83 Wis. 222, 18 L. R. A. 45, 53 N. W. 487.

If it is not practicable to make a definite plan with specifications, it is competent for the board of public works, by "other appropriate and sufficient description of the work required to be done and of the kinds and quality of material to be furnished," to describe what is required.

Ibid.; *Ampf v. Cincinnati*, 17 Ohio C. C. 516.

Where the charter contains qualifying words, as "lowest and best bidder," or "lowest competent and reliable bidder for such work," a discretion is vested in the common council, and in the absence of fraud the courts will not interfere.

Holden v. Alton, 179 Ill. 318, 53 N. E. 556; *McClain v. McKisson*, 15 Ohio C. C. 517; *State, Wilson, Prosecutor, v. Trenton*, 60 N. J. L. 394, 44 L. R. A. 540, 38 Atl. 635; *Johnson v. Chicago Sanitary Dist.* 163 Ill. 285, 45 N. E. 213; *Fergus v. Columbus*, 6 Ohio N. P. 82.

The letting of contracts for works of public improvement to the lowest bidder is not a duty of strictly ministerial nature, but involves the exercise of such a degree of official discretion as to place the officer charged therewith beyond the control of courts by mandamus.

Beach, *Modern Law of Contracts*, § 1183, note 3, §§ 1184, 1185, 1186; *State ex rel. Phelan v. Fond du Lac Bd. of Edu.* 24 Wis. 683.

The right to maintain an injunction similar to the one granted in this case has been denied in *Judd v. Fox Lake*, 28 Wis. 583; *Sage v. Fifield*, 68 Wis. 546, 32 N. W. 629; *Gilkey v. Merrill*, 87 Wis. 469, 30 N. W. 733.

A city council is not required to adopt plans and specifications before receiving bids for construction work of the character of a garbage crematory. The council has the right to determine the best system.

Reno Water, Land, & Light Co. v. Osburn (Nev.) 56 Pac. 945; *Kelly v. Chicago*, 62 Ill. 280.

There is grave doubt whether, assuming the position of respondent to be correct, he is entitled as a taxpayer or otherwise to an injunction.

Joint School Dist. No. 17 v. Reid, 82 Wis. 96, 51 N. W. 1089; Beach, *Modern Law of Contracts*, § 1183; High, *Extr. Legal Rem.* § 92; *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343.

Mr. W. H. Timlin, with *Messrs. Austin, Fehr, & Gehrz*, for respondent:

A resident taxpayer may maintain an action to enjoin the illegal and improper waste of public funds, thus increasing the burden of taxation.

Re Cole, 102 Wis. 1, 78 N. W. 404; *Quaw v. Paff*, 98 Wis. 586, 74 N. W. 369; *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798; *Bay Land & Improv. Co. v. Washburn*, 47 L. R. A.

79 Wis. 423, 48 N. W. 492; *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657, 17 N. W. 401; *Nevil v. Clifford*, 55 Wis. 161, 12 N. W. 419.

Under the charter it was competent for the common council in the first instance to adopt some plan and specification or other appropriate and sufficient description of the work to be done, and thereupon it became the duty of the board to file the same for the information of bidders, and advertise for proposals to do the work and furnish the materials "according to the plans and specifications on file;" or the common council could order the work done, and leave it to the board to prepare the plans and specifications and file the same, and then invite bids thereon.

Koch v. Milwaukee, 89 Wis. 220, 61 N. W. 918.

In the case at bar no plan was made or filed.

The specifications and advertisement are insufficient to admit of honest and fair competition.

If the description in fact was not sufficient to secure full and fair competition, it would destroy the very purpose of the act.

Wells v. Burnham, 20 Wis. 113.

If the contract system is to prevail it is necessary that the call for bids should be in such form and upon such basis as will permit of what is denominated competitive bidding.

Bigler v. New York, 5 Abb. N. C. 69; *People ex rel. Putnam v. Buffalo County Comrs.* 4 Neb. 150; *Hertenstein v. Herrman*, 6 Ohio N. P. 93; *Boren v. Darke County Comrs.* 21 Ohio St. 311; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *Goring v. McTaggart*, 92 Ind. 200; *State ex rel. Dunn v. Barlow*, 48 Mo. 21.

Public work must be let in the manner prescribed by law.

Addis v. Pittsburgh, 85 Pa. 379; *State ex rel. Dunn v. Barlow*, 48 Mo. 22; High, *Inj.* §§ 1251-1253; Dill. *Mun. Corp.* 4th ed. § 460; *Tiedeman, Mun. Corp.* § 172.

Where public work is to be done which may be performed separately, some of which is patented and some of which is not, separate proposals should be invited for that part which is not patented, and for which there can be no competition.

Re Eager, 46 N. Y. 100.

The contract was not let to the lowest bidder, as required by the charter.

Wells v. Burnham, 20 Wis. 113; *Mitchell v. Milwaukee*, 18 Wis. 99; *Kneeland v. Milwaukee*, 18 Wis. 411.

Since all the powers of a corporation are derived from the law and its charter, no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers.

Lake Shore & M. S. R. Co. v. Chicago, 144 Ill. 391, 33 N. E. 602; *Short-Conrad Co. v. Eau Claire School Dist.* 94 Wis. 535, 69 N. W. 337; 1 Dill. *Mun. Corp.* 4th ed. § 317.

If contracts for work and supplies can arbitrarily be let to the highest instead of the lowest bidder under charter provisions simi-

lar to this, then the provision can always be nullified, and will serve no useful purpose.

People ex rel. Coughlin v. Gleason, 121 N. Y. 634, 25 N. E. 4; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *State, Shaw, Prosecutor, v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695.

The board of public works did not of itself act independently, and determine upon the bids.

Koch v. Milwaukee, 89 Wis. 229, 61 N. W. 918; *People v. Bork*, 96 N. Y. 199; *Oase v. Hoffmann*, 100 Wis. 357, 44 L. R. A. 728, 75 N. W. 945; Dill. Mun. Corp. 4th ed. note 4, and cases cited.

The contract is void because it does not contain important and beneficial reservations required by the charter.

Bardeen, J., delivered the opinion of the court:

The following propositions are involved in the decision of this appeal:

(1) That the proceedings of the common council and board of public works were not in accordance with the provisions of the city charter in that no proper plans and specifications of the work to be done were even filed with the board of public works.

(2) That said contract was not let to the lowest bidder.

(3) That the board of public works, in acting upon the bids and recommending the making of the contract with the Engel Company, did not act alone, but conjointly with the commissioner of health and the committees on health and public buildings and grounds.

(4) That the board in letting the contract did not make the reservations therein required by § 20 of chapter 5 of the city charter.

(1) The city charter provides for an executive board, called the board of public works. This board is empowered to make contracts in the name and on behalf of the city for the purposes and under the limitations prescribed therein. They are also to have special charge of all public buildings and grounds, and of all public works commenced or undertaken by the city or either of its wards. §§ 1, 6, chap. 5, chap. 184, Laws 1874. Section 9 of said chapter provides that, "whenever any public work or improvement shall be ordered by the common council, the said board shall advertise for proposals for doing the same; a plan or profile of the work to be done, accompanied with specifications for doing the same, or other appropriate and sufficient description of the work required to be done, and of the kinds and quality of the material to be furnished, being first placed on file in the office of the board for the information of bidders and others." The section further provides for the advertisement for such work; that proposals shall be sealed and accompanied with a bond, in such penal sum, not less than 30 per cent of the amount of the engineer's estimate of the cost of such work, as the board may require, or a cash deposit, conditioned that he

"will execute and perform the work for the price mentioned in his proposal and according to the plans and specifications on file," in case the contract is awarded him, etc. Under the charter, the primary authority for the institution of projects for public improvements or the building of public buildings was vested in the council. It alone had authority to take the initial step. It was its duty to procure the proper plans and specifications for any work proposed. It is true, as held in *Koch v. Milwaukee*, 89 Wis. 229, 61 N. W. 918, some subordinate body might secure such plans and specifications, and the council might ratify such action, but the council alone has the power to determine whether such work shall be done or not. The necessity of having a proper basis upon which to found corporate action is too apparent to require emphasis. The manner of procedure is mapped out by the charter. Its limitations bind the council as well as lesser functionaries. They and each of them may proceed step by step within their prescribed orbit and in strict conformity to the law that sets them in motion. Many cases have arisen which serve to illustrate the strictness of this rule. In *Myrick v. La Crosse*, 17 Wis. 442, the plaintiff was required to grade the street in front of his lot "to the grade line as established." There were no specifications of the work to be done, and this lack was held fatal to subsequent action by the commissioners. In *Kneeland v. Milwaukee*, 18 Wis. 411, certain street commissioners' certificates of work done in constructing a sewer in front of plaintiff's lots were held void, because they had failed to make and file proper plans and specifications. Chief Justice Dixon there says: "The making and filing of the plans and specifications were conditions precedent to the power of the commissioners to award the contract." In *Wells v. Burnham*, 20 Wis. 112, the plans were defective, and because no one could bid for the contract intelligently, and such omissions might, to some extent, prevent competition in bidding, the proceeding was avoided. We quote a passage from *Kneeland v. Furlong*, 20 Wis. 438. "Work cannot be let by contract to the lowest bidder within the meaning of the city charter, unless the bidders are informed, before bidding, of the terms or principal stipulations of the contract each successful bidder is to enter into. Bidders should be informed either by the notice of the letting or by the specifications in the proper office to which it refers, of the terms of the contract, at least of the quantity or amount of work, whenever it can be specified, to be included in any one contract; the time within which it is to be finished; the manner in which it is to be done; and, if materials are to be furnished, their quality." This was said with reference to a contract for street improvements, and is here referred to as illustrating the necessity of providing, beforehand, some accurate guide to bidders to enable them to make intelligent bids, and at the same time preserve the element of competition. The law requiring a plan intends that it shall be as full and perfect as

is usual for persons of competent skill to make of such works. *Houghton v. Burnham*, 22 Wis. 301.

Since all the powers of the corporation are derived from the law and its charter, and there being no discretion vested in the governing body, it is evident, from what has been said, that the council must follow the charter requirements with substantial strictness under penalty of having their action set aside. The charter requires that a "plan or profile of the work to be done" shall first be placed on file in the office of the board of public works. This plan or profile must be accompanied with "specifications for doing the same, or other appropriate and sufficient description of the work required to be done, and of the kinds and quality of materials to be furnished," for the information of bidders. Has that been done in this case? It is admitted that no plan of the proposed plant was ever made or filed with the board prior to the call for bids. Indeed, the general specifications adopted required each bidder to submit with their bids "complete plans and specifications, fully showing and describing the buildings, machinery, furnaces, and other necessary appurtenances of the entire cremation plant in detail, with all dimensions given." This was a plunge in the dark. In a general way, such specifications called for the construction of a complete garbage cremation plant, capable of destroying not less than 100 tons of garbage per day. No system of garbage cremation was adopted; no dimensions of buildings or description of machinery was given; each bidder might bid with reference to using the smoke stack of the sewerage pumping works, if it was of sufficient height and capacity and the board approved of its use; each bidder was to use his judgment as to what were "proper foundations," except that they were to be stone or concrete; ample provisions for windows were to be made, but how many, or of what dimensions or quality, was left to the bidder; a coal shed of sufficient size to store six months' supply of fuel was to be erected, leaving it for the contractor to determine its size and shape; no attempt was made to describe or locate the machinery or any of the necessary appurtenances; the number of furnaces was left to the discretion of the bidder, except that the daily capacity must be as stated; "the plant must be complete in every respect,"—a result greatly to be hoped for, but left to the judgment of each individual bidder; in fact, the whole scheme was so indefinite, uncertain, and unascertainable as to lead to the very result that followed. But it is said that "the proposition in this case was to erect a plant for the incineration of garbage under a patented process." Section 24, chap. 5, of the charter provides the manner in which the board, under proper authority from the council, may secure the right to use any patented article or process. If it be admitted that the projected scheme contemplated the use of a patented process, the council had the undoubted right to authorize the board to secure the privilege of using it without resort to an advertisement for bids.

Such, however, was not their procedure. They submitted their general scheme to the owners of the different processes for garbage incineration, and invited bids, not only for the use of their patented invention, but for the erection of buildings, and for furnishing all the necessary machinery and appurtenances. Such was not the proper procedure as mapped out by the charter. The indefinite character of the specifications, and the absence of plans, had the effect of stifling all competition. Each bidder was called upon to make a proposal, resting largely upon his own judgment, with absolutely no guide as to details. No one could tell which was the lowest bid, because no two would be on the same basis. That fact alone condemns the action taken. Of course the court must take into consideration what was sought to be accomplished. At the same time it must consider that it can only be accomplished in the way pointed out by the charter. If it be true, as assumed, that the different methods of garbage cremation are held under letters-patent, the first and the business-like plan would be for the council to fix upon some one of the different systems. If the system adopted contemplated the use of certain makes of furnaces which were necessary to its successful operation, there is no perceivable reason why the city may not bargain for them, with the right to use the process. Having fixed upon a definite scheme, the preparation of appropriate plans and specifications for the plant could be gone ahead with, and bidders secured for its erection as pointed out. It is admitted that the right to construct the garbage crematory should be thrown open to the public to bid so that the city shall get the freest competition, but it is argued that this cannot be secured by the adoption of any given system; that it can only be secured by the line of policy pursued in this case. As already demonstrated, there can practically be no competition when the bidder is left to his own will or judgment in matters material to the scheme. Neither is it demonstrated that there is any such necessary connection between the furnace used and the buildings to inclose them as to prevent the preparation of proper plans and specifications and a competitive letting of the contract for their construction. If there is any such relation the record in this case fails to disclose it. Permitting us to judge from the specifications printed in the record, it would seem that the cost of the buildings for the plant will cover quite a large part of the total expenditure. It is not for us to say whether the plan adopted in this case, or some other one, might lead to the best results for the city. We need only determine whether the line pursued is within charter limitations or not. Certainly the city has not attempted to comply with the charter provisions as to securing the right to use patented processes. It is equally certain that it has not complied with the other provision as to the preparation of plans. If the city has not a sufficiently definite idea of what it wants to cause proper plans and specifications to be made, then it

must wait until further information can be secured, or the plan has become so far developed as to be more than a long-felt want. There is no similarity between this case and *Kilvington v. Superior*, 83 Wis. 222, 18 L. R. A. 45, 53 N. W. 487. In that case there was a definite, well-settled price for the patent, at which it was offered to the city and all contractors, so that there was full and free competition as to all other things that entered into the plant. The same thing can be secured here by the adoption of a system, and the letting to the lowest bidder the doing of those things necessary for its construction. In *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, this court held that where a city was empowered by its charter to improve streets at the expense of adjoining lot-owners, but to let all such work to the lowest bidder, it could not contract for laying a pavement at the expense of such lot owners, the right to lay which was patented and owned by one firm. As limited by *Kilvington v. Superior*, 83 Wis. 222, 53 N. W. 487, that rule still prevails in this state. Any one curious to note the conflict of decisions on this point can have his curiosity satisfied by referring to a note to this case in 18 L. R. A. 45.

(2) What has already been said is sufficient to indicate that no proper basis for bidding had been secured. Notwithstanding this, bids were received as indicated in the statement, ranging from \$51,000 to over \$79,000. The board recommended, and the council decided, that, "all things considered," the bid of the Engel Company for \$57,800 was the lowest. Section 10, chap. 5, provides that "all contracts shall be awarded to the lowest bidder, who shall have complied with the foregoing requirements." When the lowest bid is unreasonably high, the board may reject all bids and relet. Whenever any bidder, in the judgment of the board, is incompetent or otherwise unreliable for the performance of the work for which he bids, the board shall report to the council a schedule of all bids with a recommendation to accept the bid of the lowest competent and reliable bidder, with their reasons for such recommendation, and thereupon the council may direct the board to let the work to such bidder or relet the same anew. Judging from the report of the board and the committees with whom they were associated, the Engel system was preferred over the Dixon proposal, chiefly because they thought it was more convenient of operation and a little more definite in detail. This case illustrates the dangers that may arise from indefiniteness in the primary requirements as to bids. The very avenue which was supposed to have been closed by the charter restrictions was left open. Each bidder supposed he was bidding on a complete plant, and yet, because there were no definite standards by which they could judge, the board and the council discovered a leeway of discretion between bids, of nearly \$7,000. As they say, "all things considered" the Engel Company bid was the lowest. It was to avoid giving them any chance for the exercise of discretion in that regard that the 47 L. R. A.

charter required definite plans and specifications, and a letting to the lowest competent and reliable bidder. The letting must be to the lowest bidder under the charter, unless the board shall find his bid to be unreasonably high, or that he is incompetent or otherwise unreliable, or shall have previously failed to complete some contract with the city. Cases without number might be cited to the proposition that the lowest bidder is entitled to the contract. Such was the holding of this court in *Wells v. Burnham*, 20 Wis. 112, where it is said that "the law requiring contracts to be let to the lowest bidder is based upon public economy, and originated, perhaps, in distrust of public officers whose duty it is to make contracts. It is of great importance to taxpayers and ought not to be frittered away by exceptions." 1 Dill. Mun. Corp. § 466, and cases; Tiedeman, Mun. Corp. § 172.

The legislature having seen fit to hedge about municipal action by restrictions so obviously of value to the body politic, it is not for the courts to alter or vary them. Courts have no power to throw the law into a melting pot and recast it at pleasure. They must enforce plain provisions and restrain palpable evasions. The object of the law being to prevent favoritism, corruption, extravagance, and improvidence in municipal action, any arbitrary decision on their part outside of the prescribed limits will be closely scrutinized and promptly restrained. Where all the bidders start on a common ground and bid for a definite object, there is usually very little difficulty in ascertaining which is the lowest bid. The Dixon people claimed that their bid, with the accompanying plans and specifications, covered just such a plant as was called for in the general specifications prepared by the board. If the preliminaries had been definite and regular, they would have been entitled to the contract; but we are brought to face the fact that before it can be determined which bid was the lowest, there must not only be a comparison of systems, but a comparison of buildings, machinery, and appurtenances. Any scheme which gives the officials the right to make this comparison and determine the relative merits of the different plans and systems, defeats the plain object and purpose of the statute, and opens the door for favoritism and improvidence.

(3) The fact that the board did not give their independent judgment upon the bids submitted, but acted conjointly with certain committees of the council, is urged as a reason why the execution of the contract in question should be restrained. Ordinarily such action of the board would be of doubtful propriety. No doubt it is the theory of the law that the council shall have the unbiased judgment of the board as a body. Cases might arise when the opinion of the board might be influenced and perhaps overturned by the numerical strength of the joint committees. No one could say that the joint report exactly represented the opinion of the board. It is a much safer and better line of policy to follow the charter requirements, and leave the board free to give the

council their own conclusions, uninfluenced by a committee of associates. In the pursuit of the object here sought to be attained, it was important to secure the very best plan possible. It may be that the aggregation of wisdom and knowledge represented by the health commissioner and the several committees would materially assist in a proper solution of the garbage problem. In the absence of any showing that the opinion of the board was influenced by their associates, we would hesitate to restrain the execution of a contract, upon the sole ground that they made a report upon joint action with other parties.

(4) Section 20, chap. 5, provides that in every contract made by the board of public works, certain powers shall be reserved by the board; that certain reservations in favor of the city shall be contained therein, and that every contract shall be made expressly subject to the powers given the board by this section. In the contract in question was the following clause: "And it is hereby agreed and declared that this contract is made expressly subject to the powers given to said board of public works by § 20, chap. 5," of the charter. It is urged that this reference does not sufficiently meet the requirements of the section. The criticism is that the section requires the contract itself to contain the reservation of certain rights to the board, for instance, to determine performance, to order reconstruction, to employ more men in case the work is not prosecuted with due diligence, etc., which are said to be distinct from the powers given the board. This may seem a little hypercritical, yet so long as it leaves room for argument and contention, it ought to be avoided. The provisions of the section are plain and easy to be followed, and, to avoid ground for litigation, it were far better to follow the strict letter of the law, and make full and complete reservations both as to rights and powers of the board as pointed out.

(5) Some contention is made that the allegations of the answer, that the plaintiff is not prosecuting this action in good faith, and is not the real party in interest, have not been fairly met. It is true that plaintiff's affidavit in this respect is somewhat indefinite and evasive. If it was intended to set up these facts in abatement of the action, a matter which is not entirely clear from the answer,—the matter should be determined by proof on the trial, and not upon the pleadings and affidavits on a preliminary hearing.

The order of the Superior Court of Milwaukee County is affirmed.

Alfred P. SELLECK, *Resp't.*,

v.

City of JANESVILLE, *Appt.*

(.....Wis.....)

1. A judgment recovered by a wife for

NOTE.—For use of photographs as evidence, see *Dederichs v. Salt Lake City R. Co.* (Utah) 47 L. R. A.

her own injuries in an action to which her husband is not a party is not conclusive of defendant's liability. In a subsequent action by the husband for the loss of her services.

2. Complaints to a street commissioner of the bad condition of a sidewalk, and a resolution offered by an alderman for building a new walk, are inadmissible to show that the walk was defective, when there is no disputed issue as to notice.
3. A physician's testimony that a person will require future attendance, by reason of an injury, on an average of twice a week, is incompetent as invading either the field of baseless conjecture or that of common knowledge.
4. Photographs showing an injured foot in aggravated aspects, well calculated to arouse the sympathy of the jury, are inadmissible in an action by the husband of an injured woman to recover damages for nursing, medical attendance, and loss of services and society, where there was other evidence showing the expense and the extent of the impairment of her condition very fully.
5. Photographs not substantially necessary or instructive to show material facts or conditions, and which are of such a character as to arouse sympathy or indignation or divert the minds of the jury to improper or irrelevant considerations, should be excluded from evidence.
6. The recovery of damages by a husband for the loss of his wife's services on account of personal injuries is not limited to the proved money value of her services as a hired servant, but include the loss or impairment of his right to conjugal society and assistance.
7. Mistake or errors of a physician or surgeon who was employed, in the exercise of ordinary care, will not preclude the recovery of all the damages sustained from personal injuries.
8. The value of the services of the husband himself in necessary attendance upon his wife may be recovered by him in an action for her personal injuries, but not in an amount beyond that for which he could have hired reasonably competent attendance and nursing by others.

(November 24, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Rock County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligently permitting a sidewalk to become out of repair to the injury of plaintiff's wife. *Reversed.*

Statement by Dodge, J.:

Action to recover damages resulting to plaintiff, as husband, from personal injuries suffered by his wife on October 18, 1893, from an alleged defective sidewalk upon one of the principal streets of the defendant; the defect alleged consisting in a generally defective and rotten condition of planks and stringers, whereby the planks were loose, so that as plaintiff's wife was walking upon said sidewalk one of said planks was tipped

35 L. R. A. 802; and *Hampton v. Norfolk & W. R. Co.* (N. C.) 35 L. R. A. 808, and note.

up by another person stepping on the end thereof, her foot caught thereby, and she was thrown to the ground, suffering a severe wrench of the ankle and foot, whereby ligaments were torn loose, resulting in a permanently disabled foot, twisted from its natural position, and incapable of use up to the time of the trial, November 28, 1898, and substantially certain to so continue through life. At the commencement of the trial, defendant was permitted to amend its answer so as to admit notice to the officers of the city of the actual condition of the walk. Plaintiff recovered, and defendant appeals, assigning very numerous errors, in the discussion of which such further facts as are material thereto will be mentioned in the opinion. Plaintiff's wife has already recovered her damages for the same injury, the judgment therefor having been affirmed by this court. 100 Wis. 157, 41 L. R. A. 563, 75 N. W. 975.

Mr. William Ruger, with Mr. F. C. Burpee, for appellant:

Defendant's admission that its common council and street commissioner had full notice of the condition of this sidewalk for one year next prior to the 18th day of October, 1893, made it wholly unnecessary to prove notice.

In some cases it is necessary and proper to show the condition of the sidewalk or other thing at a prior or subsequent time, and connect such proofs with the time in question by further showing that nothing had been done to change the condition in the meantime. But it was not necessary to adopt this mode of proof in the present case. If the former condition was bad, the presumption that the public officials did their duty required the inference that the sidewalk had been repaired in the meantime.

The jurors, overlooking presumptions of law, would naturally infer that if the sidewalk was defective although not unsafe two years before, it had become more defective and unsafe by the lapse of time, and that the negligence of the defendant was aggravated by long continuance, so that the defendant's case in general would be prejudiced, and especially on the question of the present condition of the walk.

11 Am. & Eng. Enc. Law, 2d ed. pp. 501, 502, and notes; Jones, Ev. §§ 137, 139; *Griffin v. Willow*, 43 Wis. 509; *Kelley v. Fond du Lac*, 31 Wis. 179; *Montgomery v. Scott*, 34 Wis. 339; *Olsson v. Telford*, 37 Wis. 327; *Collins v. Dorchester*, 6 Cush. 396; *Wheeler v. Framingham*, 12 Cush. 287.

The prejudicial character of these proofs is manifest.

Lang v. Sanger, 76 Wis. 71, 44 N. W. 1095; *Jennings v. Albion*, 90 Wis. 22, 62 N. W. 926; Jones, Ev. § 290; *Baird v. Gillett*, 47 N. Y. 186.

The court erred in receiving in evidence the photographs of the injured foot of plaintiff's wife.

11 Am. & Eng. Enc. Law, 2d ed. p. 539.

In her action the wife recovers a *solatium* for the injury to her person, and the statute 47 L. R. A.

giving the husband a right of action should not be extended by construction so as to give him a *solatium* also for any resulting interference with his feelings or personal comfort.

8 Am. & Eng. Enc. Law, 2d ed. pp. 535, 536, title *Damage*, and note 5; *Jenson v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 589, 22 L. R. A. 680, 57 N. W. 359.

Messrs. Fethers, Jeffris, & Mount, for respondent:

The issues adjudicated in *Selleck v. Janesville*, 100 Wis. 157, are *res judicata* in the case at bar.

Lindsey v. Danville, 46 Vt. 144; 1 Herman, *Estoppel & Res Adjudicata*, §§ 107, 111, 140, 213.

The charge of the court in regard to recovery for the loss of the comfort of the wife's society and her services was proper.

Furnish v. Missouri P. R. Co. 102 Mo. 669, 15 S. W. 315; *Citizens' Street R. Co. v. Twiname*, 121 Ind. 376, 7 L. R. A. 352, 23 N. E. 159.

Dodge, J., delivered the opinion of the court:

1. Counsel for plaintiff argues that the liability of defendant is *res judicata*, by virtue of a previous judgment recovered by plaintiff's wife for her own injuries. This contention has some support from decisions in states where the husband is a necessary party plaintiff to recover for the wife's injuries, and the damages therefor belong to him. Under such circumstances the argument in favor of the conclusiveness of the judgment is difficult to escape; but where, as in Wisconsin, he is not a party to such action, and not interested in the recovery, the reasons for conclusiveness all disappear. A judgment is conclusive only between parties and privies. The husband was, of course, not a party. His wife sued alone. Nor is there any privity between him and his wife as to his now asserted demand. The cause of action is not one which once belonged to her, and has been transferred or transmitted to him.

2. Error is assigned for that, against objection, the court admitted in evidence: (a) The testimony of Hanthorn, street commissioner: "Complaints were made to me that the sidewalk was in bad condition; a number of complaints along in the summer,"—and that of Alderman Lutz: "Complaints about the walk were made to me some time about October 10, 1892." (b) Testimony of Alderman Lutz that he introduced a resolution to require a new walk as soon as the complaint was made, and records of common council to show introduction on October 10, 1892, of such resolution, and receipt of a communication October 24, 1892, from Tallman, the owner, stating that he intended to build in the spring, and asking delay till then. The issue as to whether the city had notice of defects, to which this evidence might have been relevant and competent, had been wholly eliminated by admission in the answer. As to the remaining issue, *viz.*, existence of defects, it was wholly secondary

and hearsay. The statements or complaints made by others to witnesses Hanthorn and Lutz out of court, and unsanctioned by oath, were incompetent, under the most elementary rules of evidence. The offering of a resolution by Alderman Lutz had no force or relevancy, save as a declaration or admission by him that the walk needed to be rebuilt; and the same is true of the communication from Tallman. It hardly needs to be stated that declarations or admissions by third persons are not competent evidence to establish a fact. The issue whether the walk was defective was sharply disputed, and this secondary and hearsay evidence on the subject assuredly influenced the minds of the jury, and must have been prejudicial to the defendant. Its admission was error.

3. A medical expert testified, over objection, to his opinion that "it is most certain that Mrs. Selleck will require future attendance of a physician by reason of this injury. Judging by the past, she will require attention every two or three days,—a fair average, I would say, would be twice a week for the future. Our usual charge is \$1 a visit." This court has recently announced the decision (without the writer's concurrence then, but to which he now yields in deference to the rule of *stare decisis*) that such testimony is improper, as invading either the field of baseless conjecture or that of common knowledge, where the expert cannot guide, though he may mislead, the jury. *Crouse v. Chicago & N. W. R. Co.* (Wis.) (decided Nov. 7, 1899) 80 N. W. 752. Its admission was error, and clearly prejudicial on the question of damages.

4. Error is assigned upon admission in evidence of three photographs, showing the injured foot in variant poses. The distortion was most serious, and its exhibition in aggravated aspects was well calculated to arouse the sympathy of the jury, and to divert their minds from the merely secondary and pecuniary considerations alone relevant to the plaintiff husband's recovery, to thoughts of pain and suffering, both physical and mental, which the injured woman had endured. The photographs were wholly unnecessary to a full description and explanation of her condition, so far as it affected the damages recoverable, namely, expenses for nursing and medical attendance, and loss of service and society. Other evidence having shown that expense and the extent of impairment of the wife's condition very fully, the appearance of the foot could hardly be instructive or helpful. In *Baxter v. Chicago & N. W. R. Co.* (Wis.) (decided Oct. 20, 1899) 80 N. W. 644, this court (Marshall, J.) said: "There is a limit to the use of photographs as evidence, and it was nearly, if not quite, reached in this case. They are competent for some, but not for all, purposes. They may be used to identify persons, places, and things, to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same, and the photographs will better show the situation than will testimony of witnesses, and where the testimony

will be better understood by the use of photographs. . . . There must be some substantial, legitimate reason for the use of such representations, else they should not be received." We are unable to resist the conclusion that the limit so indicated was passed in the present case. There was no substantial, legitimate reason for their use in order to show even the degree of disablement, so far as relevant to the damages the jury had a right to consider. The situation is much as if, in an action under the statute to recover damages for causing death, the plaintiff should show by photographs a terribly mangled condition of the deceased. As a corollary of the rule in the *Baxter Case*, we hold that where photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded. *Gilbert v. West End Street R. Co.* 160 Mass. 403, 405, 38 N. E. 60; *Harris v. Quincy*, 171 Mass. 472, 50 N. E. 1042; *Fore v. State*, 75 Miss. 727, 23 So. 710; *Dobson v. Philadelphia*, 7 Pa. Dist. R. 321.

5. Some evidence was admitted, over objection, bearing on the condition of the sidewalk at times extending as much as two years prior to the injury. Most of it was, however, connected with the time of the accident by some showing of continuance of the conditions. The court seems to have been induced to admit some of this evidence as relevant to the issue of notice to the city. While it may be unnecessary to decide whether the admission of any of this evidence constituted reversible error, we deem it proper, in view of a new trial, to point out that where notice of the condition is admitted, so that no proof thereof is necessary, no evidence should be received which is too remote to bear on the question whether the walk was defective at the very time of the accident.

6. Appellant complains because the court instructed the jury that: "In finding the value of her services, you may consider the loss, if any, sustained by her husband in the deprivation of regular attendance, services, and comfort of his wife's society. The comfort of her society can hardly be separated from her services, and the word 'service' implies whatever of aid, assistance, comfort, and society the wife would be expected to render or bestow upon her husband under the circumstances, as shown by the evidence in the case, in the condition in which the husband and wife were placed." The criticism is that the jury were thereby authorized to allow as damages something in excess of the proved money value of the wife's services as a hired servant. The action here brought was well known to the common law, except that our statute (Rev. Stat. § 1339) and its predecessors were necessary to render a municipal corporation liable thereto. *Hunt v. Winfield*, 36 Wis. 154, 17 Am. Rep. 482. It is brought in the husband's own behalf, and for a wrong done to his own rights.

It closely resembles the action of the father for injury to or disablement of his child, or the master for his servant. The measure of recovery differs just as the rights invaded differ,—just as the legal duty owed by the wife differs from that owed by the child or servant. Each of the latter owes the duty of service or labor. The wife owes a broader and a higher duty, of which physical labor may or may not be a part, according to circumstances. Her duty is called in the common-law writs *consortium*, which means conjugal society and assistance. Anderson, Law Dict.; Bouvier, Law Dict. So we find that the common law recognized the right of the husband to maintain action against one who tortiously impaired the ability of a servant, child, or wife to perform her duty, and thus deprived the owner of his right thereto. Such action, if based on personal injury, was in trespass on the case, *per quod servitium amisit* if for a child or servant, and *per quod consortium amisit* if for the wife. Bl. Com. pp. 139, 142; *Winsmore v. Greenbank*, Willes, 577. From before the days of Blackstone down to the present time, the authorities, English and American, are, without well-considered exceptions, in accordance with the reason above stated,—to the effect that the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word "services" is used, it signifies wifely services, such as are due from her, and includes the idea of her society. *Guy v. Livesey*, Cro. Jac. 501; *Hyde v. Scyesor*, Cro. Jac. 538; *Cooley*, Torts, p. 266; 2 Hilliard, Torts, p. 498; *Schouler*, Dom. Rel. § 143; *Reeve*, Dom. Rel. p. 38; 3 Sutherland, Damages, § 1252; *Meese v. Fond du Lac*, 48 Wis. 323, 14 N. W. 406; *Shanahan v. Madison*, 57 Wis. 276, 15 N. W. 154; *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420, 45 N. W. 522; *Hopkins v. Atlantic & St. L. R. Co.* 36 N. H. 9, 72 Am. Dec. 287; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L. R. A. 631, 46 N. E. 1063; *Laughlin v. Eaton*, 54 Me. 156; *Drew v. Peer*, 93 Pa. 234; *Jones v. Utica & B. R. Co.* 40 Hun, 349; *McKinney v. Western Stage Co.* 4 Iowa, 420; *Mowry v. Chaney*, 43 Iowa, 609; *Berger v. Jacobs*, 21 Mich. 215, 221; *Furnish v. Missouri P. R. Co.* 102 Mo. 669, 15 S. W. 315. The wifely services or *consortium* may, and often do, include services such as might be rendered by hired servants; and when that is the case it is usually permitted to prove the customary or market value of such services by testimony of experts familiar with such market value, but it is not necessary that any such physical services should customarily be rendered in order to justify some recovery. *Bigaquette v. Paulet*, 134 Mass. 124, 45 Am. Rep. 307; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L. R. A. 631, 46 N. E. 1063; *Berger v. Jacobs*, 21 Mich. 215, 221; *Furnish v. Missouri P. R. Co.* 102 Mo. 669, 15 S. W. 315; *Cooley*, Torts, p. 266; 3 Sutherland, Damages, § 1252. In the light of these principles, it was not error to instruct the jury that, in placing a value upon the wife's services, they were to

understand that word as including, not alone such services as a hired domestic servant might perform, but also such as the wife can, and this wife was accustomed to, render, if they found those to be disabled by her injuries, which was substantially the effect of the charge. From the foregoing it is apparent that the husband's damages are the value of his wife's services to him, as the court also charged under exception. They cannot be entirely the subject of market value, though part of them may be. Their value is not to be tested by what they could be hired for, or what another would pay for them, for they are not a hireable commodity. This does not at all deny what was said in *Keller v. Gilman*, 93 Wis. 9, 12, 66 N. W. 800; for there the subject of inquiry was the market value of certain services, of a kind which might be the subject of hiring, as to which opinion evidence only of value generally, and not to any particular person, has always been held permissible. It should be noted, however, that such of the services or *consortium* owed to the husband as are not mere physical services are less likely to be impaired by an injury merely physical. Because a wife is incapacitated to perform such services as a cook or a housemaid, it by no means follows that she may not extend to her husband the aid of her society and counsel, or her pervading superintendence and care over his household, or nurture and guidance of his children. In the case before us much of conjugal assistance and society was within the injured woman's power, and a caution to this effect might very properly have been given, though its omission, in absence of any request therefor, is, of course, not error. We cannot, however, concur in appellant's view that the evidence disclosed no loss of such elements of the *consortium*. Of a woman bedridden, or compelled to move on crutches, suffering severe pain, with shattered nerves, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, even other than physical, which would otherwise have been within her power. *Furnish v. Missouri P. R. Co.* 102 Mo. 669, 15 S. W. 315.

7. There was no error in charging the jury that plaintiff, having used reasonable care in the employment of physicians of good reputation, was not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure. *Selleck v. Janesville*, 100 Wis. 157, 41 L. R. A. 563, 75 N. W. 975.

8. The court charged that plaintiff might recover the value of his own services in necessary attendance upon his wife by reason of her injuries, and refused a request for a contrary instruction. The plaintiff owed his wife the duty of care and nursing rendered necessary by her injuries, and was entitled to recover the expenses therein necessarily incurred. If he devoted his own time and services, to the loss of their pecuniary value if otherwise employed, it was obviously a legitimate expense,—as much as if he had hired such attendance from another; and he might recover therefor, subject, of course, to

the rule that he must not thus enhance the damages. However valuable his own time and services, he should not be allowed therefor more than the amount for which he could have hired reasonably competent attendance and nursing by others. No such limitation was requested to be given in the charge to the jury, however; hence no error. *Salida v. McKinna*, 16 Colo. 523, 27 Pac. 810.

As the cause must be remanded for a new trial, we deem it unnecessary to discuss the further assignments of error as to the details of the trial. They are either not tenable, or the errors complained of are such as are not likely to be repeated.

Judgment reversed, and cause remanded for a new trial.

Frank FINLEY, *Recept.*,
v.
William PRESCOTT, *Appt.*

(.....Wis.....)

1. An order dismissing an appeal from a justice's court, which terminates the action and prevents a judgment from which an appeal can be taken, is appealable.
2. A signature to a paper by a mark made by a person for the purpose of identifying himself as a party thereto constitutes a good signature at common law, without any attestation thereof by a subscribing witness.

(November 24, 1899.)

A PPEAL by defendant from a judgment of the Dodge County Court dismissing his appeal from a judgment of a justice of the peace in an action brought to recover money paid and damages sustained by alleged breach of warranty in the sale of a threshing engine. *Reversed*.

Statement by **Marshall, J.**:

Defendant appealed to the county court of Dodge county from a judgment duly rendered against him in justice court. The notice of appeal purported to have been signed by the appellant by his mark, as was also the affidavit required by the statute. There was no subscribing witness to the mark and no proof that it was made by appellant, except the fact that the appeal affidavit was sworn to before a notary public, who certified to that fact, and that the affiant subscribed the same in the usual form. When the case on appeal was reached for trial, respondent moved to dismiss it for want of jurisdiction, in that the appellant's marks to his notice of appeal and affidavit were not witnessed. The motion was granted solely upon the ground stated. An order or judgment was rendered accordingly, which shows upon its face that it was grounded on

the fact that appellant's marks to the appeal papers were not witnessed.

Messrs. North & Lindley, for appellant:

If the notice of appeal were unsigned, and the record, as in this case, showed that said notice was presented to the justice by the appellant or his authorized agent, said notice would be sufficient.

Evangelical Lutheran St. Peter's Gemeinde v. Kochler, 59 Wis. 650, 18 N. W. 476.

This is an order which in effect determines the action, and is appealable.

Rev. Stat. § 3069, subsec. 1; *Cavanaugh v. Titus*, 6 Wis. 143; *Drake v. Scheunemann*, 103 Wis. 458, 79 N. W. 749.

Messrs. Lamoreux, Davison, & Davison for respondent.

Marshall, J., delivered the opinion of the court:

A point is made that the determination of the trial court, dismissing the appeal, is not appealable to this court because not a final order terminating the action and preventing a judgment from which an appeal can be taken, *Reinhart v. Fire Asso. of Philadelphia*, 93 Wis. 452, 67 N. W. 701, and *St. Patrick's Congregation v. Home Ins. Co.* 101 Wis. 155, 76 N. W. 1125, being relied on. In each of those cases the motion to dismiss was denied, so, obviously, the cause remained in court and could proceed to a final judgment from which an appeal might be taken. Such is not this case. It is like *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357. There the motion to dismiss for want of jurisdiction was granted, and it was held that the order dismissing the action was appealable. In such a situation, strictly speaking, a judgment is improper, the province of the court being limited to a mere order of dismissal and for the payment of costs. *Felt v. Felt*, 19 Wis. 195; *Ketchum v. Freeman*, 24 Wis. 296. Formerly, as indicated in the cited cases, only motion costs were proper, but, as the statute now stands, full costs are recoverable on a dismissal for want of jurisdiction where the appeal is from justice court. Rev. Stat. § 2925. Though, where the court has no jurisdiction, the proper practice is yet to enter an order of dismissal and for the payment of costs. However, if the determination be in the form of a judgment, the irregularity is not prejudicial. Strictly speaking, a judgment is a determination of the rights of the parties; all other directions by the court are orders. *Lewis v. Chicago & N. W. R. Co.* 97 Wis. 368, 72 N. W. 976; Rev. Stat. § 2882. All that was said in *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357, as to the recovery of motion costs only on a dismissal for want of jurisdiction, does not apply to an appeal from justice court because of the statute on the subject. Clearly, where the circumstances are such that only an order, or a judgment having the effect of an order, is proper, and such determination effectually prevents any other proceedings, it terminates the action and prevents a judgment from which an appeal

NOTE.—For signature by mark, see *Re Gullfoyle* (Cal.) 22 L. R. A. 370, and note; also *Sheehan v. Kearney* (Miss.) 35 L. R. A. 102.

For proof of signature by mark when attesting witnesses are dead or cannot remember the transaction, see *Wienecke v. Arbin* (Md.) 44 L. R. A. 142, and note.

47 L. R. A.

can be taken, within the very letter of the appeal statute.

We are unable to see why the mere fact that appellant's marks were not witnessed should in any way affect the sufficiency of the appeal papers. The statute (subdiv. 19, § 4971) expressly provides that if a person is unable to write, his signature may be written in his presence by some other person by his direction, or he may sign by his mark. It does not require that the mark shall be witnessed, and the court cannot add that as a requisite. The appeal papers appear to have been regularly signed by appellant in the manner allowed by statute. They were presented to the justice of the peace and acted upon by him as genuine. They comply with every statutory requisite. In the absence of some affirmative showing that they were not executed as they purport to have been, they were just as effective as if signed by appellant's written signature.

A signature to a paper by a mark, made by a person for the purpose of identifying himself as a party thereto, was good at common law without any attestation thereof by a subscribing witness, even in case of a witness to a will. Greenl. Ev. 272; *Zacharis v. Franklin*, 12 Pet. 151, 9 L. ed. 1035. Except as controlled by statute, a mark made for one's signature is good whether he can write or not, and whether witnessed or not. *Baker v. Dening*, 8 Ad. & El. 94; *Brown v. Butchers' & D. Bank*, 6 Hill, 443; *Willoughby v. Moulton*, 47 N. H. 205. The statute does not enlarge the methods of executing written instruments, but modifies the common-law rule so that a person can sign by his mark only when he is unable to write. It does not add a requirement that the mark shall be witnessed. *Willoughby v. Moulton*, 47 N. H. 205; *Shank v. Butsch*, 28 Ind. 19; *State v. Byrd*, 93 N. C. 624. One is liable to be led astray on this question by a statement in Story, Prom. Notes, p. 15, to the effect that if one sign by his mark the signature must be witnessed to be valid. How that eminent author came to make such a statement as the law, unsupported by any

authority, and contrary to substantially all authority except, perhaps, decisions in states expressly abrogating the common law on the subject, is not easily understood. Even in states where the statute requires the mark to be witnessed, it has been held that the only effect of it is that the added feature goes to the sufficiency of the paper as proof, itself, of its genuineness; that if the mark is witnessed the paper will be taken as prima facie genuine, without other proof; but if not, proof *aliunde* must be produced to entitle the paper to be introduced as evidence or to be recovered upon as genuine. *Ex parte Miller*, 40 Ark. 18, 3 S. W. 883.

Under § 4102, Rev. Stat., every written instrument purporting to have been signed or executed by any person is proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall specifically deny the signature to or execution of the same by his oath or affidavit or by his pleading duly verified. That applies to all instruments except those purporting to have been signed or executed by a person who shall have died previous to the requirement of the proof, and to a writing purporting to have been signed by a party by making his mark, precisely the same as if signed in any other way. A paper so signed prima facie establishes its genuineness; that is, if signed by a mark, that the signer was unable to write his name, and that he therefore made his mark for the purpose of adopting that in lieu of a written signature, and that the mark was made by the person by whom it purports to have been made. Unlike the Arkansas statute, and some others, our statute, as before indicated, makes no mention of a witness to a person's mark in case of his signing that way. The general practice of having such a signature witnessed misled counsel and the trial court as to the necessity for it, as it did, evidently. Judge Story, when he wrote his valuable work on commercial paper.

The judgment of the County Court is reversed, and the cause remanded for further proceedings according to law.

SOUTH CAROLINA SUPREME COURT.

Mrs. E. B. SAMPLE, *Respt.*,
v.

LONDON & LANCASHIRE FIRE INSURANCE COMPANY of Liverpool, England,
Appt.

(46 S. C. 491.)

A stipulation that suit can be brought on an insurance policy only "within

twelve months next after the fire" gives the insured twelve months after the accrual of his right of action, where the policy provides that suit shall not be sustainable until after full compliance with numerous requirements, and that the loss shall not be payable until sixty days after notice and proofs of loss and an award by appraisers, if appraisal is required.

(March 28, 1896.)

NOTE.—Stipulation limiting time for suit on insurance policy—when begins to run.

- I. Scope of the note.
- II. Fire-insurance policies.
 - a. Limitation for fixed period after loss.
 1. General statement as to.
 2. The literal construction.
 3. The relative construction.
 - b. Limitation for fixed period after fire.
 1. General statement as to.

47 L. R. A.

II. a.—continued.

2. The literal construction.
3. The relative construction.
- III. Accident-insurance policies.
- IV. Life-insurance policies.
- V. Marine and other miscellaneous insurance policies.
- VI. What will prevent or delay the running of the limitation.
- VII. To what actions the limitation applies.
- VIII. Summary.

APPPEAL by defendant from a judgment of the Common Pleas Circuit Court for Edgefield County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sheppard Brothers, for appellant:

Such a provision in a policy of insurance is valid, and the court will respect and enforce it.

Wood, Ins. § 460; May, Ins. § 478; *Riddiesbarger v. Hartford Ins. Co.* 7 Wall. 386, 19 L. ed. 257; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349.

When the terms and stipulations in a contract are plain and clear we are bound to adhere to the terms as the only authentic expression of the intention of the parties.

Hart v. Citizens' Ins. Co. 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332.

When a policy of fire insurance provides that no action shall be maintainable thereon until an award fixing the amount of the claim, nor unless commenced within twelve months from the occurrence of the fire, the time does not continue until twelve months after the award.

Johnson v. Humboldt Ins. Co. 91 Ill. 92, 33 Am. Rep. 47; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Tasker v. Kenton Ins. Co.* 58 N. H. 469; *Hocking v. Howard Ins. Co.* 130 Pa. 170, 18 Atl. 614.

There is a distinction between cases in which the policy provides that the action shall be commenced within six months after the right to sue the company has accrued and those which provide that the suit cannot

I. Scope of the note.

This note does not go into the question of the validity and effect of stipulations in insurance policies limiting the right to sue thereon, or into the question of the interruption, suspension, or waiver of such limitations after they have commenced to run. It is limited strictly, as its title would indicate, to the question when the limitation of time for suit begins to run. Questions with relation to stipulations as to a period of time within which, after loss or proof of loss, an action is not to be brought, are also excluded, though some of the cases speak of such stipulations as creating limitations, their real object being to give the insurer opportunity to examine proofs of loss and decide upon the merits of the case, and make payment if it is found to be meritorious without being interfered with by suit, as distinguished from the limitation of the right to prosecute a demand after it has become stale, or after evidence with relation to it may no longer be available, which is the object of the stipulations here considered.

II. Fire-insurance policies.

a. Limitation for fixed period after loss.

1. General statement as to.

What seems to have been the original limitation of the time to sue, inserted by fire insurance companies in their policies, and to have been originally, in general, if not almost universal, use, was to the effect that no action or suit should be brought or maintained on such policy, or with reference thereto, unless commenced within a designated time (usually one year or six months) after the loss occurs, or after the loss accrues. It still remains in common use, but has been superseded to some extent by other stipulations probably regarded as less elastic, this stipulation having proved susceptible of a construction very favorable to the insured, and the courts having shown a tendency so to construe it. Some of the courts, however, have adopted, and tenaciously clung to, a construction (probably the one intended when the stipulation was adopted) wholly favorable to the insured.

2. The literal construction.

The courts of some of the states have construed limitations in fire-insurance policies of the right to sue thereon to a given period after loss literally, giving them full effect as though they stood alone, and as though the loss and the fire were one and the same thing.

47 L. R. A.

Under the rule adopted by these courts, where a fire-insurance policy provides that an action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, though under other provisions of the policy the cause of action does not accrue thereon until some time after the fire. *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 708.

Thus, where a policy of fire insurance provides that suit must be brought within twelve months next after the loss shall occur, the suit must be brought within that period after the fire, and not after the loss becomes payable by making proper proofs. *Corn City Mut. Ins. Co. v. Schwan*, 1 Ohio C. C. 192.

The words "loss shall occur" contained in such a stipulation in a fire-insurance policy, refer to the happening of the casualty insured against, and not to the time when the loss becomes due and payable under the provisions of the policy, and the period of limitation therefore begins to run from the time of the happening of such casualty. *Humboldt Ins. Co. v. Johnson*, 1 Ill. App. 309, *Affirmed* in 91 Ill. 92, 33 Am. Rep. 47; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7.

And no recovery can be had upon a fire-insurance policy containing a stipulation that no action shall be sustainable thereon, unless commenced within twelve months next after the loss shall occur, where the fire occurred more than twelve months previous to the day on which a writ was issued on the policy. *Hekia Ins. Co. v. Schroeder*, 9 Ill. App. 472; *Ben Franklin Ins. Co. v. Schroeder*, 9 Ill. App. 477.

And the limitation provided for by stipulation in a fire-insurance policy, that payment of loss shall be due in sixty days after the proofs shall have been received at the company's office, and the loss satisfactorily ascertained and proved, and that no suit or action of any kind against the company for the recovery of any claim by virtue of the policy shall be sustainable unless commenced within twelve months next after any loss or damage shall have occurred, begins to run at the time of the fire, and not at the expiration of sixty days from the proof of loss. *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 3; *Carraway v. Merchants' Mut. Ins. Co.* 26 La. Ann. 298; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7.

A loss caused by a fire occurs at the time of the fire, and a limitation created by a clause in a fire-insurance policy stipulating that no suit shall be brought thereon until after an award shall have been obtained, fixing the amount of his claim, nor unless such suit shall

be sustained unless commenced within twelve months next after the fire.

King v. Watertown F. Ins. Co. 47 Hun. 1; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297; *Schroeder v. Keystone Ins. Co.* 2 Phila. 286; *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 14.

Such a condition in a policy of insurance is not obnoxious to the policy of the statutes of limitations, and is valid.

Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386, 19 L. ed. 257; *Little v. Phoenix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96; *Steel v. Phoenix Ins. Co.* 47 Fed. Rep. 863.

Mr. J. William Thurmond, for respondent:

When a policy stipulates that no action shall be brought unless commenced within a

be commenced within twelve months next after the loss shall occur, runs from the time of the fire, and does not wait until twelve months after the award. *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47, Affirming 1 Ill. App. 309.

So, the period of limitation created by a stipulation in a fire-insurance policy that no action shall be brought thereon unless instituted within six months next succeeding the day upon which the loss or damage is alleged to have taken place, must be reckoned from the date of the fire, and not from the end of the period of delay to which the company is entitled in the payment of the loss, under a provision in the policy that the loss should be paid sixty days after the receipt by the company of satisfactory proof of loss. *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 8 S. E. 349.

Such a provision means six months from the date of the loss, and not from the ascertainment of the amount thereof; and this is the case though the policy also contained a stipulation that proof of loss should be made in sixty days after the loss. *Grigsby v. German Ins. Co.* 40 Mo. App. 276.

And under a condition which "absolutely bars" the action unless it is "commenced within the term of six months after the loss or damage occurs," the period of limitation begins to run from the time of the fire, although there is another condition that the loss shall not be payable until sixty days after the completion of the proof of loss, and also a condition that the company, by giving notice, within fifteen days after receipt of proof of loss, of their intention to do so, may rebuild within a reasonable time the property damaged or lost. *Blair v. Sovereign F. Ins. Co.* (1886) 19 N. S. 872, McDonald, J., dissenting. The majority approved *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47, and *Fullam v. New York Union Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462.

So, it has been held that a stipulation limiting the right to sue in an insurance policy to six months or some other period after the loss or damage shall have occurred, does not mean six months after the cause of action accrues, and that such a stipulation is illegal, and will not be upheld where it is accompanied by another condition providing that the company shall have sixty days for payment after completion of proofs of loss. *Peoria Sugar Ref. Co. v. Canada F. & M. Ins. Co.* 12 Ont. App. Rep. 418; *Cornell v. Liverpool & L. Fire & L. Ins. Co.* 14 Lower Can. Jur. 258.

And a replication to a plea on an insurance policy setting up that the policy was subject to a condition that no action should be brought

certain time after loss or damage shall occur, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of loss have been served, the limitation does not attach until after the period within which the company has to pay the loss has expired.

Murdock v. Franklin Ins. Co. 33 W. Va. 407, 7 L. R. A. 572, 10 S. E. 777; *May, Ins.* § 479; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Steen v. Niagara F. Ins. Co.* 61 How. Pr. 144, 89 N. Y. 315, 42 Am. Rep. 297; *Barnum v. Merchants' F. Ins. Co.* 97 N. Y. 188; *Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. Rep. 568; *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Friezen v. Alle-*

thereon unless commenced within six months from the loss, and that the plaintiffs did not sue within that time, setting up that when the loss occurred defendants had not yet issued the policy though the arrangement therefor had been effected, and that they refused to execute it until after the commencement of the action, and because of such refusal prevented the plaintiff from suing within the six months, is improper as constituting a departure from the declaration, and as setting up an equitable cause of action. *Hickey v. Anchor Assur. Co.* 18 U. C. Q. B. 433.

But the term "loss or damage shall occur," in a limitation in an insurance policy prohibiting the commencement of suit thereon unless begun within twelve months next after any loss or damage shall occur when the policy is one of reinsurance, can only be taken to refer to the casualty insured against, so that the limitation runs from that time. It does not refer to the loss or damage suffered by the insured, and the limitation runs only from the time of payment of the loss by the first insurer. *Provincial Ins. Co. v. Etina Ins. Co.* 16 U. C. Q. B. 185.

So, in *Fullam v. New York Union Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462, the court refused to entertain an action upon a fire-insurance policy providing for thirty days in which to furnish proofs of loss, and that the loss should not be payable until ninety days after the filing of proofs of loss, and containing a stipulation that action should not be brought thereon unless commenced within six months next after any loss or damage shall occur, commenced more than six months from the date of the fire. But the question discussed was as to the validity of the limitation, and not as to the time it commenced to run.

See also fire-insurance cases, *infra*, VI., VII.

3. The relative construction.

The possibility, if not probability, however, that requirements stipulated for in fire-insurance policies, of proofs of loss and other acts, and giving the insurance companies time to consider such proofs before claims became payable, might practically, if not wholly, consume the time limited, if limitations stipulated for were construed to run from the time of the fire, thus leaving the insured without remedy, was recognized by a large number of the courts, and, probably with a view of obviating this difficulty, they have adopted the rule that the limitation clause is to be considered in connection with, and as modified by, other clauses in the policy postponing the time within which suit

mania F. Ins. Co. 30 Fed. Rep. 352; *McConnell v. Iowa Mut. Aid Asso.* 79 Iowa, 757, 43 N. W. 190; *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150, 56 N. W. 697; *Suber v. Chandler*, 18 S. C. 527.

Any conduct recognizing the policy as valid after breach of condition, or any act that puts the insured to expense and trouble on the justifiable belief that the company still regards the policy as good, will be sufficient.

May, Ins. § 497; *Ripley v. Astor Ins. Co.* 17 How. Pr. 444; *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420, 6 N. W. 865; *New Orleans Ins. Asso. v. Matthews*, 65 Miss. 301, 4 So. 62; *Charleston Ins. & T. Co. v. Neve*, 2 McMull. L. 237; *Madsen v. Phoenix F. Ins. Co.* 1 S. C. N. S. 24; *Dial v. Valley Mut. Life Asso.* 29 S. C. 583, 8 S. E. 27; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E.

562; *Sample v. London & L. F. Ins. Co.* 42 S. C. 14, 19 S. E. 1020; *Copeland v. Western Assur. Co.* 43 S. C. 26, 20 S. E. 754.

Statutes of limitation relate only to the remedy, and may be altered or repealed before the statutory bar is complete.

Angell, Limitations of Actions, 18; 7 *Wait, Act. & Def.* p. 226; 13 *Am. & Eng. Enc. Law*, pp. 696, 702; *Wardlaw v. Buzzard*, 15 Rich. L. 158, 94 Am. Dec. 148; *Nichols v. Briggs*, 18 S. C. 481; *Campbell v. Holt*, 115 U. S. 625, 29 L. ed. 486, 6 Sup. Ct. Rep. 209; *Power v. Telford*, 60 Miss. 195; *Grigsby v. Peak*, 57 Tex. 142; *Cooley, Const. Lim.* 4th ed. 220, 446, 448; *Hewitt v. Wilcox*, 1 Met. 154; *Wood v. Kennedy*, 19 Ind. 68; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236; *Butler v. Palmer*, 1 Hill, 324; *Sturges v. Crowninshield*, 4 Wheat. 200, 4 L. ed. 549; *Wardlaw v. Buzzard*, 15 Rich. L. 162, 94 Am.

might be brought, and that when so considered the time when the loss occurs is to be deemed to be the time when it becomes due and payable and actionable, within the terms of the policy, and not the time when the fire occurs.

Within this rule, where an insurance policy contains a limitation of the time within which suit may be brought thereon, and also a stipulation that suit shall not be brought within a specified period, the parties will not be presumed to have intended to suspend the remedy and provide for the running of the period of limitation during the same time. *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297.

Such a stipulation will be construed in connection with accompanying stipulations. *Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. Rep. 568.

And a limitation in a fire-insurance policy, created by a stipulation therein, that no action shall be brought thereon unless commenced within a designated period next after the loss shall occur, is held to refer to the time when the loss has become a fixed demand against the company, and the assured has a right to bring action for it, as distinguished from the time when the property was actually destroyed. *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 83 Am. Rep. 607.

The words "after the loss shall occur," in such a stipulation in a fire-insurance policy, refer to the time when the loss shall become a fixed demand, and not to the time of the actual destruction. *Steen v. Niagara F. Ins. Co.* 61 How. Pr. 144.

Thus, under a condition in an insurance policy that suit must be brought within twelve months after the loss or damage shall occur, the assured has twelve months from the time his action accrues in which to commence his action. *De Grove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305.

And the limitation created by a stipulation in a fire-insurance policy that no suit can be sustained thereon unless commenced within one year next after any claim shall occur, does not begin to run until proofs of loss are furnished, as the expression "claims shall occur" means shall arise or accrue, and the giving of notice, and furnishing of satisfactory proofs, are conditions precedent to a claim for the stipulated indemnity. *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385.

And the limitation created by a stipulation in an insurance policy that no action shall be maintained thereon unless commenced within twelve months next after the loss shall occur, but providing also that the loss shall not be payable within sixty days after proof of loss, does not begin to run until the expiration of 47 L. R. A.

sixty days after the proofs of loss are received by the company, provided they are furnished within a reasonable time, as the cause of action does not accrue until then. *Northwestern Mut. Ins. Co. v. Campbell*, 11 Ky. L. Rep. 762; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297, 61 How. Pr. 144; *Mix v. Andes Ins. Co.* 9 Hun, 399; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1084; *Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. Rep. 568; *Lampkin v. Western Assur. Co.* 13 U. C. Q. B. 361.

And where a limitation clause in an insurance policy is not free from doubt on the question as to when it begins to run, the court will construe it most strongly against the company. *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034.

So, a limitation of twelve months within which to sue, contained in a fire-insurance policy, which upon reissue had had a clause fraudulently inserted without the knowledge of the insured, does not begin to run until the entry of a judgment in an action brought by the insured for the reformation of the policy. *Hay v. Star F. Ins. Co.* 13 Hun, 496.

Likewise a limitation in an insurance policy that action shall be commenced within the term of six months after any loss or damage shall occur is to be construed in connection with other conditions of the policy, and must be taken to mean that action shall be commenced within six months after the right to sue the company has accrued. *People v. Liverpool, L. & G. Ins. Co.* 2 Thomp. & C. 268; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 46, 10 Bosw. 537; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 S. W. 411; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711.

And where the policy also contains a provision that payment of loss shall be made in sixty days from the adjustment of the preliminary proofs of loss, the former stipulation will be construed to mean that the action may be brought within six months after the right of action shall have accrued, and the period of limitation will not commence to run before the end of the sixty days. *New York v. Hamilton F. Ins. Co.* 39 N. Y. 46, 10 Bosw. 537; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; *German F. Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711.

And this is especially the case where there are other provisions in the policy from which it might frequently happen that the cause of action would be barred before the right to sue had accrued. *Ellis v. Council Bluffs Ins. Co.* 64

Dec. 148; *Ex parte Lynch*, 16 S. C. 35; *Columbia & G. R. Co. v. Gibbs*, 24 S. C. 60; *State ex rel. George v. Asken*, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 224.

Jones, J., delivered the opinion of the court:

On the 6th day of April, 1891, the defendant company issued to the plaintiff, Mrs. Sample, a fire insurance policy on her dwelling house in Edgefield county. The policy contained a provision that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The requirements to be complied with included the filing of proofs of loss within sixty days after the fire. The

policy also provided that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." The property insured was destroyed by fire on the 23d day of April, 1891. Due proof of loss was received by the company on the 14th day of June, 1891. "On Monday after the third Sabbath in August," following, the adjuster of the defendant company offered to pay the plaintiff \$10 or \$15 in settlement of her claim under the policy, which she declined, wherefore the adjuster "refused to pay the loss." Suit on the policy was commenced July 5, 1892,—more than twelve months after the fire, but within twelve months after the accrual of the right of action under the policy. This

Iowa, 507, 20 N. W. 782; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411.

And where the parties are in good faith and without objection occupied for so long a time in adjusting proofs, that the sixty days from the date of adjustment does not expire within the six months, the policy is not forfeited by the expiration of the six months, and an action brought promptly upon the expiration of sixty days from the adjustment of the loss will not be deemed barred because commenced more than six months after the loss occurred. *New York v. Hamilton F. Ins. Co.* 10 Bosw. 587.

Where a condition in an insurance policy provides for an indefinite period to elapse before suit shall be brought on the policy, and that no suit shall be brought until the thing so provided for is done, to accomplish which may take more than six months without the fault of either of the parties to the contract, and the condition further provides that no suit on the policy shall be maintained unless commenced within six months next after the loss shall occur, the intent of the parties to the contract will be deemed to be that the six months' limitation shall commence to run when the cause of action accrues. *Barber v. Fire & Marine Ins. Co.* 16 W. Va. 658, 87 Am. Rep. 800.

In the above case, *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 38 Am. Rep. 47, *supra*, II. a, 2, was disapproved, the court saying that "the opinion of the court in that case, as we think, loses sight of the fundamental principle in the construction of contracts that all the provisions shall be taken into consideration and reconciled if possible, so that the true intent of the parties to the contract may be ascertained."

So, a cause of action upon a fire-insurance policy does not accrue until the close of negotiations with reference to further proofs of loss, and a limitation in the policy created by a stipulation that no action shall be brought thereon unless commenced within six months next after the date on which any loss or damage shall occur does not begin to run until that time. *Barnum v. Merchants' F. Ins. Co.* 97 N. Y. 188.

And such a limitation will be construed to exclude the day on which such loss or damage occurred, whenever such exclusion will prevent an estoppel or save a forfeiture. *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197, 40 Pac. 1099.

So, a limitation in an insurance policy created by a stipulation that no action should be brought thereon until after an award shall have been obtained fixing the amount of the claim, or unless such suit or action shall have been commenced within six months after the loss shall have occurred, accompanied by a provision mak-

ing the loss payable sixty days after due notice and proof of loss received at the company's office, should be construed so as to give the assured the full term of six months in which to sue after the right to sue has accrued under the provisions of the policy. *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 668.

And a limitation created by a stipulation in a fire-insurance policy that the loss or damage shall be paid sixty days after the proofs of loss have been received at the home office and the loss satisfactorily ascertained and proved, and that it shall be optional with the company to replace the articles lost or destroyed with others of the same kind and quality, or to repair or rebuild the buildings within a reasonable time, and that in case differences shall arise concerning the amount of loss after proof has been received, the matter shall, at the instance of the company, be submitted to the judgment of arbitrators mutually agreed upon, whose award shall be binding, and that no action shall be brought thereon until after an award, or at all, unless within six months next after the loss or damage shall occur, begins to run at the time when the loss becomes due and payable, and not at the time of the physical burning of the property, and an action brought within six months of an award is not too late. *Levy v. Virginia F. & M. Ins. Co.* 9 Ins. L. J. 113, Fed. Cas. No. 8,304.

So, in *Peoria Marine & F. Ins. Co. v. Hall*, 12 Mich. 202, it was said that under a stipulation in an insurance policy that no suit can be brought thereon unless commenced within the term of twelve months next after any loss or damage shall occur, the insured has the whole of the twelve months in which to bring suit; but it was a case of waiver, and not of the running of the limitation.

And in *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 38 Am. Rep. 607, it was held that a clause in a fire-insurance policy providing that no suit or action against the company shall be sustained thereon until after an award shall have been obtained, fixing the amount of such claim in the manner provided for in the policy, inserted without the knowledge or consent of the insured, will be stricken out in an action by the insured for the reformation of the policy as entirely inconsistent with a limitation contained in the policy of the right to bring suit to twelve months after the loss occurs, as a compliance with the clause would ordinarily occupy the whole or greater part of the twelve months, and hence it cannot be supposed that the parties intended the limitation to apply to such case. However, where an insurance policy contains a stipulation limiting the right to sue thereon

cause was first tried at Edgely, before Judge Hudson and a jury, in November, 1893, and he directed a verdict in favor of the defendant company; ruling that the action could not be maintained, the plaintiff having admitted at the trial "that it was stipulated in the policy that no liability should attach to the insurance company, under its policy so issued, unless action was brought within twelve months after the date of the fire, and that the fire occurred in April, 1891, and the action was commenced on the 5th July, 1892." On appeal this court ordered a new trial, holding that the circuit court erred in directing a verdict. The cause came on again for trial in March, 1895, and resulted in a verdict for the plaintiff for \$306.80, for which judgment was duly entered. At the close of the testimony in behalf of the plaintiff the defendant's

counsel moved for a nonsuit on the ground "that the suit was not brought within twelve months next after the fire." The motion for nonsuit was overruled, and defendant now excepts thereto.

The presiding judge charged the jury "that all the conditions of the policy must be considered together as one contract, and that 'one year' does not mean one year from the fire, but one year (twelve months) from the time that plaintiff had the right to bring this action." Defendant excepts to the charge as error. The presiding judge further charged the jury "that even if the insurance company had the right to stand upon that limitation [and that, if], strictly considered, it meant one year from the date of the fire, yet if an adjuster was sent down, who entered into negotiations with the plaintiff, looking to a settlement of the loss, long

to twelve months next after the loss shall occur, and another stipulation providing that the loss shall not be payable until sixty days after proof of loss, and the company refuses to pay the same, it waives the proofs of loss, and causes the action to accrue at once, and suit must be instituted thereon within twelve months after the refusal to pay. *Northwestern Mut. Ins. Co. v. Campbell*, 11 Ky. L. Rep. 762.

And where, under a fire-insurance policy containing a stipulation that no action should be brought thereon unless commenced within six months next after the occurrence of the loss, and that the company shall have sixty days within which to make payment, the company denies any liability, thus entitling the insured to sue at the end of the sixty days after such denial, the limitation begins to run at that time, and in the absence of a waiver the insured will be barred unless suit is brought within six months of that date. *Lentz v. Teutonia F. Ins. Co.* 96 Mich. 445, 55 N. W. 993.

In the above case *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109, *infra*, IV., was distinguished upon the ground that in the case at bar the repudiation of liability by the insurer excused the insured from furnishing proof of loss, thus causing the statute to commence to run at an earlier date.

See also fire-insurance cases *infra*, VI., VII.

b. Limitation for fixed period after fire.

1. General statement as to.

The construction of the limitation by stipulation of the time to sue on fire-insurance policies, above considered (*supra*, II. a. 3), was of course more favorable to the assured than the insurer, and, apparently for the purpose of meeting this difficulty, the stipulation limiting the time to sue to a designated period after loss was superseded to some extent by a stipulation limiting the time to sue on the policy to a designated period after the time of the fire. This form of expression seems to have been adopted with the idea that no later time could be construed to be the "time of the fire," and this view was taken by some courts which had adopted the relative construction of the former limitation, notably those of New York. But it will be seen that a great many, perhaps a majority, of the courts still cling to the construction favorable to the insured, notwithstanding the change of language of the stipulation.

2. The literal construction.

The courts committed to what might be called the doctrine of strict or literal construction with 47 L. R. A.

their ranks augmented by the courts of New York, and perhaps those of Michigan, and of some of the other states where the question had not previously arisen, have construed the stipulation that no action should be brought on a fire-insurance policy unless commenced within a designated period after the fire, in the same way as the limitation of a designated period after loss, upon the theory that the stipulation should be considered as if standing alone, or, at least, as if of controlling importance.

Thus, within this rule a provision that a suit on a fire-insurance policy must be brought within twelve months after the fire requires the twelve months' limitation to be computed from the date of the fire, and not from the time the loss is ascertained and established. *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332.

In the above case it was said that it is noticeable that all of the cases which hold that a limitation from the time of the fire means the time when liability is fixed, rely for authority upon cases which construe the word "loss" as having such meaning, and that no attention seems to have been given to the fact that the word "fire" had been substituted for the word "loss."

And a period of sixty days, given by a fire-insurance policy to the assured within which to make proofs of loss, is not to be deducted from the period of limitation created by a stipulation in the policy that no suit or action should be brought thereon unless commenced within twelve months next ensuing after the fire. *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478.

And the limitation created by such a stipulation in a fire-insurance policy begins to run at the date of the fire, and not at the expiration of sixty days given the company in which to make payments after service of proofs of loss. *King v. Watertown F. Ins. Co.* 47 Hun, 1.

In the above case *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297, *supra*, II. a. 3, was distinguished upon the ground that in that case the language of the stipulation was that actions should be brought within a designated time after the loss or damage shall have occurred.

So, an action cannot be maintained on a fire-insurance policy containing a stipulation that no action should be brought thereon unless commenced within twelve months next after the fire, unless commenced within one year from the time of the fire, where the company promptly denied liability, and returned the proofs of loss immediately upon their receipt, and there is nothing to show any waiver. *Peck v. German F. Ins. Co.* 102 Mich. 52, 60 N. W. 453; *Brooks*

after that time, to wit, some time in the latter part of August, then it amounts to waiver, by conduct, of the right of the insurance company to stand strictly upon its contract; to which charge the defendant excepts.

The decisive point of the controversy in this case is whether the twelve months' limitation for suit under the policy commences to run from the time of the fire, or at the expiration of sixty days after the filing of the proof of loss. On this point there is great conflict of authorities, and an attempt to reconcile them is hopeless. After very careful examination and consideration of the question in the light of the many decided cases from the courts bearing thereon, this court concurs with the circuit court in its construction of the policy of insurance, and holds that the action, having been begun

within twelve months from the expiration of the sixty days after the filing of the proofs of loss with the company, is sustainable, as within the time contemplated by the parties to the contract. Standing alone, the stipulation that "suit shall not be sustainable unless commenced within twelve months next after the fire" is clear, definite, and unambiguous; but it is coupled with the further provision that suit should not be sustainable "until after full compliance with all the foregoing requirements." These requirements are numerous, and, when technical compliance is insisted upon by the company, considerable time may be consumed in meeting them. Then there is the further stipulation that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proofs of the loss herein required have been

v. Georgia Home Ins. Co. 99 Ga. 116, 24 S. E. 869.

And a limitation in a fire-insurance policy, created by stipulation that no suit or action should be brought thereon unless commenced within twelve months next after the date of the fire from which such loss shall occur, begins to run at the date of the fire, though the policy also contains a provision for an arbitration and award, and that a loss arising thereunder should not be payable until proof of loss is furnished. *Thompson v. Phoenix Ins. Co.* 11 Sawy. 276, 25 Fed. Rep. 296.

In the above case *Spare v. Home Mut. Ins. Co.* 9 Sawy. 145, 17 Fed. Rep. 568, *supra*, II. a. 3, was distinguished upon the ground that in that case the limitation was from the time the loss occurred, which was held to mean the time when it became payable, while in the case at bar the limitation is from a date certain, to wit, the date of the fire.

The above case, however, was in effect reversed in subsequent proceedings growing out of the same facts. See *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463, *infra*, II. b. 3.

So, in *Anderson v. Saugeen Mut. F. Ins. Co.* 18 Ont. Rep. 355, it was said by the court that it should suppose that a stipulation that every action or proceeding against an insurance company for the recovery of any claim under it shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs, would oblige a mortgagee whose interest was insured to begin his action within a year from the fire; but it was said not to be necessary to express a decided opinion, as the action was begun within the year.

But a limitation created by a stipulation in a fire-insurance policy that no suit shall be brought thereon until after full compliance by the assured with all the requirements therein contained, nor unless commenced within twelve months after the fire, does not run against an action brought thereon more than twelve months after the fire, where the policy also contained a provision that the loss should not become payable until sixty days after notice, ascertainment, and estimate, and satisfactory proof of the loss therein required had been received by the company, including an award by appraisers, when appraisal had been required and the delay in the commencement of the action resulted from the delayed action of the appraisers. *Austen v. Niagara F. Ins. Co.* 16 App. Div. 86, 45 N. Y. Supp. 106.

So, a limitation created by a stipulation in a fire-insurance policy that no action shall be

sustained thereon unless commenced within six months next after the fire commences to run from the date of the fire, and not from the expiration of the period within which it is provided that the company may pay the loss. *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Egan v. Oakland Ins. Co.* 29 Or. 403, 42 Pac. 990.

And this is the rule though the policy also contained a provision that the loss should not become due and payable until sixty days after satisfactory proofs of loss had been received by the company. *Egan v. Oakland Ins. Co.* 29 Or. 403, 42 Pac. 990.

In the above case the court refused to follow cases in which the phrase "after the loss" had been construed to mean after the loss is ascertained, and the right to sue exists, and proceeded on the assumption that there was no material difference between such a phrase and the phrase "after the fire," and that they should be construed in the same way.

Attention is here called to *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463, *infra*, II. b. 3, which, though in the Federal courts, arose in Oregon, in which a different construction was placed upon such a stipulation.

Where a fire-insurance policy contains a stipulation that no suit shall be brought thereon unless commenced within six months after the time the fire shall have occurred, and other stipulations providing that no action shall be commenced until certain things therein specified shall have been done, the meaning of the whole contract is that no action shall be commenced before the doing of those things, nor in any event after the lapse of six months, and the time of limitation commences to run at the date of the fire, and not at the time when the cause of action accrues. *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77.

And a petition in an action on a fire-insurance policy containing a stipulation that no action shall be brought thereon unless commenced within six months next after the fire shall have occurred, which shows on its face that more than six months had elapsed since the time of the fire, without giving any reason or excuse, states no cause of action. *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928.

The reason upon which this rule of construction is based is that any other construction, or at least the opposite construction, would constitute making a new and different contract for the parties.

Thus, in *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332, the court refused to follow cases holding that a limitation

received by this company, including an award by appraisers, when appraisal has been required." By this provision the company is exempt from suit for sixty days in any event, and for so much longer time as may be required to make satisfactory proof of loss and secure an award from appraisers, if required. No award was required in this case, but under the policy it might have been. Time would necessarily be consumed in securing the appointment, action, and award of appraisers. Proof of loss may be delivered to the company within the sixty days required by the policy, but there may be delay in making the proofs conform strictly with the many requirements of the policy, and the proofs may not be satisfactory to the company until after much correspondence and amendment. Plans and specifications, in the case of a building destroyed,

must be furnished, if required. The insured, if required, must furnish a certificate of the magistrate or notary public living nearest the place of the fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify. It is quite possible, without fault of the insured, and when the doctrines of waiver and estoppel cannot be invoked against the insurer, in an honest effort to make satisfactory proof of an honest loss, that twelve months may expire before full compliance by the insured with all the requirements of the policy. Under an iron-bound rule of construction that suit on such a policy must be brought within twelve months after the fire, the claim might be barred before it accrued. Such a construction, therefore, leads to absurdity.

In an insurance policy of the right of action to a designated time after loss or after the fire runs from the time when liability is fixed therefor, saying that this construction smacks too strongly of making a contract which the parties did not make.

So, in *Egan v. Oakland Ins. Co.* 29 Or. 413, 42 Pac. 990, the court refused to follow *Steel v. Phenix Ins. Co.* 154 U. S. 518, 7 U. S. App. 825, 51 Fed. Rep. 715, 2 C. C. A. 463, *infra*, II. b. 3, on the ground that the construction therein adopted smacks too strongly of making a contract which the parties did not make.

See also fire insurance cases, *infra*, VI., VII.

3. The relative construction.

Notwithstanding the change made in many insurance policies of the limitation of the time to sue from a designated period "after loss" to a designated period "after the fire," many of the courts still cling to the construction that the stipulation should be considered with other stipulations postponing the right to sue, and that the limitation would run from the time the right of action accrued, and other courts before which the question had not previously arisen have joined their ranks.

Thus, under this theory it is a general rule that where a bar is created by contract to an action for breach of its conditions by reason of the lapse of time the plaintiff must have the full time given by the contract in which to commence suit after the cause of action arises. *McConnell v. Iowa Mut. Aid Asso.* 79 Iowa, 757, 43 N. W. 188; *Insurance Cos. v. Scales*, 101 Tenn. 628, 49 S. W. 743.

There is no real or substantial difference in principle with reference to the running of a limitation in an insurance policy between the words "loss" and "fire" as used in a stipulation for limitation therein. And a policy of insurance which contains conditions reducing the statutory time for the commencement of any suit thereon ought to be construed, if reasonable under all its terms, so as to give the full period of time mentioned in the policy, freed from the provisions of all other clauses in the policy, or from the contract of the insurance company limiting or attempting to limit the time actually given in the limitation clause. *Holladay v. Phenix Ins. Co.* 7 U. S. App. 825, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463, *Reversing* 47 Fed. Rep. 868.

And while a limitation created by a stipulation in a fire-insurance policy that no suit or action thereon shall be brought within twelve months next after the fire shall occur, begins to run at the time of the fire unless the clause is

modified by some other clause or clauses of the policy, where another stipulation provides that a loss does not become payable until sixty days after proof of loss, postponing the right to sue on the policy until such time, the limitation upon the right to sue does not commence to run until the time the loss is thus made payable. *Case v. Sun. Ins. Co.* 83 Cal. 473, 8 L. R. A. 48, 23 Pac. 534; *Holladay v. Phenix Ins. Co.* 7 U. S. App. 825, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463. And see *SAMPLE V. LONDON & L. FIRE INS. CO.*

Nor will a limitation created by a stipulation in an insurance policy that no suit shall be brought thereon until appraisal shall be had if demanded by the company, nor unless such suit or action shall be commenced within twelve months next after the fire shall occur, giving the company sixty days after full completion by the assured of all the requirements therein contained to make payment, be deemed to have begun to run at the time of the fire, so as to bar an action brought against the company more than twelve months thereafter, where the company exacted compliance by the assured with all the requirements of the policy, and he complied therewith as rapidly as he could, but was unable to fully comply within the time limited. *Case v. Sun Ins. Co.* 83 Cal. 473, 8 L. R. A. 48, 23 Pac. 534.

So, the period of limitation created by a stipulation in a fire insurance policy that no action shall be brought thereon unless commenced within the term of six months next after the fire shall have occurred, commences to run sixty days after notice and proofs of loss were furnished by the assured, where that is the time of payment fixed by the policy, as to construe it as running from the time of the fire might leave an unreasonably short time within which to bring action. *Read v. State Ins. Co.* 103 Iowa, 307, 72 N. W. 665.

The period of limitation created by such a stipulation begins to run when the cause of action thereon accrues; and where the policy also provides that the loss is not payable until sixty days after the proofs of loss have been received by the company at its home office, the cause of action does not accrue until the expiration of the sixty days after proofs of loss are received. *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb. 150, 56 N. W. 697.

And an action upon a fire-insurance policy containing such stipulations is not barred if commenced within six months after the expiration of the sixty days. *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698.

So, where a policy of fire insurance provides that no suit shall be brought thereon unless be-

There is inconsistency between the clause of the policy compelling the insured to sue within a given time, and the clauses exempting the insurance from suit for an indefinite period within that time. Ordinarily the right to sue within a certain time means that the right may be asserted on any day of that time. Both parties must have intended that the insured should have a reasonable time in which to assert his right, after the accrual of his right, and that time was fixed at twelve months. If the question had arisen under a statute of limitation, the rule undoubtedly would be that the time commenced to run on the accrual of the cause of action. It seems that it is not an unreasonable construction to say that the parties to this contract, by the special limitation therein agreed upon, meant to allow the stipulated time after the accrual of the right of action.

It is a well-settled rule of construction of contracts of insurance that their provisions should be strictly construed against the insurer, and liberally construed in favor of the insured. In *Kratzenstein v. Western Assur. Co.* 116 N. Y. 54, 5 L. R. A. 799, 22 N. E. 221, the court said: "Where an insurance contract is so drawn as to be manifestly ambiguous, so that reasonable and intelligent men, on reading it, would honestly differ as to its meaning, the doubt should be resolved against the company, because it prepared and executed the agreement, and is responsible for the language and the uncertainty thereby created." Mr. Justice Harlan, in *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, said: "The doubt as to the intention of the parties must, according to the settled doctrines of the law of insurance, be recognized in all the

gun within a specified time after the fire, and that no suit shall be brought until after an arbitration shall be had or other act done which extends or may extend indefinitely the time previous to which the suit cannot be brought, the true intent of the parties will be deemed to be that the limitation as to the bringing of suits does not begin to run until the cause of action accrues, unless it is delayed through fault of the insured. *Hong Sling v. Royal Ins. Co.* 8 Utah, 185, 80 Pac. 807.

And a limitation created by a stipulation in a fire-insurance policy that no action shall be brought thereon after the expiration of six months from the date of the fire begins to be effective from the time the right of action accrues, notwithstanding the expression "after the fire," where under the provisions of the policy no suit could be brought until after an arbitration and award, or until after sixty days. *Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. 743.

And a stipulation in a fire-insurance policy requiring suit to be brought thereon within twelve months next after the fire, accompanied by a provision that the insured shall give notice of loss and make the necessary and satisfactory proofs thereof, and allow sixty days after such proof had been received at the home office for payment, and that no suit against the company shall be maintained until after an award shall have been obtained, fixing the amount of the claim, is to be construed to mean twelve full months exclusive of the time when suit was prohibited by the other provisions of the policy. *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 468.

So, a limitation clause in a fire-insurance policy providing that no action should be brought thereon unless commenced within six months next after the fire occurred, should be construed together with other provisions of the policy, and where it also contains provisions allowing examination under oath and the production of books and vouchers and authorizing the company to require an arbitration and award, and giving it sixty days in which to pay after all these things have taken place, it will be deemed to have been the intention of the parties that the assured was to have six months within any part of which he might bring his suit after the loss became due and payable, and that the limitation was to run from that time. *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352.

The courts which hold that the limitation stipulated for in an insurance policy commences to run at the time the loss is ascertained and payable, and not from the date of the happening of the loss, though not agreeing as to the rea-

son for so deciding, seem generally to base their decision upon the ground that the limitation clause, when taken in connection with a stipulation in the policy giving the insurer a certain time after proofs of loss in which to pay, is inconsistent, ambiguous, and uncertain, and therefore should be construed most strongly in favor of the insured. *Egan v. Oakland Ins. Co.* 29 Or. 408, 42 Pac. 990, *dictum*.

And the decisions in cases holding that rule are based upon the assumption that the provision in the policy postponing the right of action until proof of loss is made, or until a certain number of days thereafter, is in conflict with the provisions limiting the time within which an action may be commenced, and these stipulations must therefore be harmonized by judicial construction. *State Ins. Co. v. Meeman*, 2 Wash. 459, 27 Pac. 77.

An argument in support of this view of a limitation in an insurance policy is that because by the terms of the policy the company could not be sued until certain conditions were complied with which would necessarily consume a part of the time limited, and, the loss not being payable until sixty days after proof thereof, it might happen if the limitation clause should be construed according to its language, that the action would be barred before the right to sue actually accrued under other clauses in the policy, and that therefore the parties cannot be deemed to have meant what they expressly said. *Egan v. Oakland Ins. Co.* 29 Or. 413, 42 Pac. 990, *dictum*.

So, in *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352, it was said that to construe a limitation in a fire-insurance policy of a right to sue thereon within six months of the time of the fire to run from the time of the fire instead of the time when the loss was due and payable, where an examination under oath and the production of books and vouchers and an arbitration were allowed, and sixty days given in which to pay after all these things had taken place, would savor too much of cutting off the remedy entirely.

See also fire insurance cases *infra*, VI., VII.

III. Accident-insurance policies.

The same conflict of opinion between the supporters of a literal construction of a limitation clause and those of a relative construction appears with reference to accident-insurance policies as with reference to fire-insurance policies, though it would seem that the language of the clauses used has been different, leaving, perhaps, less room for construction.

Thus, upon the one hand, it is held that the

adjudged cases, be resolved against the party whose language it becomes necessary to interpret." Unquestionably, it is true that "reasonable and intelligent men" not only may differ, but have differed, as to the true construction of such a policy. Numerous and learned courts, construing such a policy, have held that the limitation commences to run from the time of the fire. See *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Tasker v. Kenton Ins. Co.* 58 N. H. 469; *Farmers' Mut. F. Ins. Co. v. Barr*, 94 Pa. 345; also *Universal Mut. F. Ins. Co. v. Weiss*, 106 Pa. 20; *Hocking v. Howard Ins. Co.* 130 Pa. 170, 18 Atl. 614; *King v. Watertown F. Ins. Co.* 47 Hun, 1;

Schroeder v. Keystone Ins. Co. 2 Phila. 286; *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 709; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 14; *Glass v. Walker*, 66 Mo. 32; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; also *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77; *Fullam v. New York Union Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462; *Carraway v. Merchants' Mut. Ins. Co.* 26 La. Ann. 298. This is a formidable array of authorities supporting appellant's contention. But on the other hand, supporting the view of this court, there is equal, if not greater, authority. Indeed, the court, in 28 Mo. App. 16, following 66 Mo. 32, and in *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703, (cases greatly relied upon by appellant),

limitation of time to sue in an accident-insurance policy containing a stipulation that no suit shall be brought thereon, unless within one year from the date of the alleged accident, runs from the time of the accident, and is not extended by the pendency of negotiations for settlement between the parties until a final decision thereof or refusal by the company of demand of payment. *Ritch v. Masons' Fraternal Accl. Asso.* 99 Ga. 112, 25 S. E. 191.

And the time of death by accident, and not the time when the cause of action accrues on a policy of accident insurance, is the time from which is to be computed the period of one year from the date of the happening of the alleged injury within which suit must be brought by the terms of the policy, although the right of action on the policy does not accrue until the expiration of ninety days after proof of injury. *McFarland v. Railway Officials & Employees Accl. Asso.* 5 Wyo. 126, 27 L. R. A. 48, 38 Pac. 347, 677.

And under an accident-insurance policy containing a stipulation that no legal proceedings for recovery thereunder should be brought until the expiration of three months after the receipt by the association of acceptable proofs of loss, and that no suit shall be brought at all unless it is brought within one year from the date of the alleged accident, the limitation of one year begins to run from the date of the accident, and not from a subsequent date upon which the insurance company had paid a part of the claim. *Ritch v. Masons' Fraternal Accl. Asso.* 99 Ga. 112, 25 S. E. 191.

So, the limitation created by a stipulation in an accident insurance policy that the assured should, within four months from the date of the injury, furnish affirmative proof of the injury and duration of the disability, and that no legal proceedings for a recovery under the policy shall be brought within three months after the receipt of such proofs at the office of the society, nor at all unless begun within six months from the date when the society shall have received such proof, begins to run at the date the proofs of injury and duration of disability are received by the society, and not three months after the receipt by the company of such proofs, during which three months it is provided that no suit shall be brought. *Provident Fund Soc. v. Howell*, 110 Ala. 508, 18 So. 311.

And a suit brought more than a year from the date of an alleged accident, upon an accident-insurance policy containing a stipulation that no suit shall be brought thereon, and the association shall not be bound to arbitrate unless the suit is brought or arbitration is demanded in writing within one year from the date of the

alleged accident, and no suit shall be brought at all in any case except to enforce payment of the award of the arbitrators, unless the association should refuse to arbitrate, is too late where no demand for an arbitration was made, as in such case the limitation runs from the date of the accident. *Ritch v. Masons' Fraternal Accl. Asso.* 99 Ga. 112, 25 S. E. 191.

Upon the other hand, however, the rule is stated to be that the parties to an accident-insurance policy containing a stipulation as to a period within which proceedings should not be brought thereon, and also a stipulation limiting the time within which proceedings might be brought, will not be deemed to have intended to suspend the remedy and provide for the running of the period of limitations at the same time. *Standard Life & Accl. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856.

And where, under this rule, one provision of an accident insurance policy prohibits suit during a part of the period limited for its commencement, the two stipulations are to be construed together, and the insurer will not be presumed to have intended to withhold from the insured under one clause a part of the time given him by the other, but, rather that both should stand by making one commence upon the expiration of the other. *Allibone v. Fidelity & C. Co.* (Tex. Civ. App.) 32 S. W. 569.

Thus, the time limited for bringing action by a certificate of membership in a mutual accident association providing that the action shall be begun within one year from the time of the alleged accidental injury begins to run when proofs are completed and the right of action is complete, and not at the time of the accident or at the time death ensued. *Cooper v. United States Mut. Accl. Asso.* 57 Hun, 407, 10 N. Y. Supp. 748.

And the right to bring an action on an accident-insurance policy containing a stipulation that legal proceedings for recovery thereunder should not be brought until after three months from the date of filing proof at the company's office, or brought at all unless within six months from the time when the right of action shall accrue, accrues three months after the time of filing the proofs, and the six months' period of limitation does not begin to run until that time. *Standard Life & Accl. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856.

And where an accident-insurance policy contains a stipulation that legal proceedings for recovery on the policy shall be instituted within one year from the time of the accident on which any claim is based, and gives the company ninety days from the time proofs of death are furnished in which to make payment, the year

concedes that the weight of authority is in support of the view announced by this court. In *Travelers Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 709, 45 N. W. 703, the court said: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued, although more than the limited time has elapsed since the loss occurred." Wood, Fire Ins. § 443, states as follows: "When a policy stipulates that no action shall be brought unless commenced within a certain time after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of loss have been served, the limitation does not attach until after the period which the company has in which to pay the loss has ex-

pired." In May, Ins. § 479, it was stated that "generally the limitation will be construed to run from the time when the loss becomes due and payable, rather than from the time when the loss actually occurs. . . . [Where the loss is not payable until sixty days after proof of loss, and no action can be begun until an award has fixed the amount of damages, nor after six months from the loss, the limitation of suit does not begin to run from loss, but from the time the right of action accrued.]" See also Bacon, Ben. Soc. § 446. So that the text writers sustain our view.

A distinction is attempted to be made, in some cases, to the effect that, if the policy provides that suit must be commenced within twelve months "after the fire," the time begins to run from the time of the fire, whereas, if the policy provides that the suit

in which the suit is required to be commenced does not begin from the date of the death of the insured, but from the expiration of the three months after furnishing proofs of death during which legal proceedings are prohibited. *Allibone v. Fidelity & C. Co.* (Tex. Civ. App.) 32 S. W. 569.

And an insurance company, claiming that proofs of death under a policy providing that action should not be brought thereon until after ninety days from the time proofs of death are furnished, and that no action can be maintained unless brought within one year from the time of the accident, were waived, thus causing the period of limitation to run from the time of the waiver, has the burden of sustaining the defense, and is required both to plead and prove that the suit was not commenced within the time contracted for. *Ibid.*

So, a limitation created by a stipulation in a certificate issued by a mutual benefit association that no suit should be brought thereon unless commenced within one year from the time of the alleged accidental injury, begins to run as against the beneficiary who was the wife of the person injured at the time his death resulted therefrom, and not at the time of the accident, as the injury to her resulted from his death, and not from the accident. *Cooper v. United States Mut. Ben. Assn.* 132 N. Y. 334, 16 L. R. A. 138, 30 N. E. 833.

In the above case *King v. Watertown F. Ins. Co.* 47 Hun, 1, *supra*, II. a. 2, was distinguished upon the ground that in that case the policy provided that no suit or action could be maintained unless commenced within twelve months next after the fire should have occurred.

Nor does a limitation created by a stipulation in a policy of a mutual insurance company that in case any action shall be brought thereon after the expiration of six months next after the loss shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim, begin to run against the cause of action of a policy holder entitled thereunder to a certain sum for every week he might be disabled not to exceed ten weeks, who suffered an accident which disabled him for more than ten weeks, until the cause of action is completed by the expiration of ten weeks after the happening of the accident. *Mutual Accl. & Life Assn. v. Kayser*, 14 W. N. C. 86.

See also *Suggs v. Travelers' Ins. Co.* 71 Tex. 679, 1 L. R. A. 847, 9 S. W. 676; *Law v. New England Mut. Accl. Assn.* 94 Mich. 206, 53 N. W. 1104, *infra*, VI. 47 L. R. A.

IV. Life insurance policies.

The same conflict of opinion appears with reference to limitations in life-insurance policies as exists with reference to fire and accident insurance policies, and the tendency to avoid a limit which might be too short for practical purposes is fully as strong as in either.

Thus, upon the one hand, it is held that under a stipulation in a life-insurance policy that no suit shall be brought thereon until ten days have expired after the filing of proofs of death, nor after six months after the date of the death of the insured, the six months' limitation begins to run at the date of his death, and not from the time when the beneficiary became entitled to sue thereon. *Meyer v. Metropolitan L. Ins. Co.* 6 Ohio N. P. 34.

And this is the rule though another provision of the policy makes the loss payable to the beneficiary within ninety days after receipt by the company of satisfactory proofs of the death of the insured. *Kettenring v. Northwestern Masonic Aid Assn.* 96 Fed. Rep. 177.

In the above case *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, *sub nom.* *Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463, *supra*, II. b. 3, was explained, the court saying that the decision in that case was affirmed by the Supreme Court in 154 U. S. 518, but no opinion was handed down, and in view of the fact that on a previous appeal, reported as *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1010, the Supreme Court had held that the company was estopped by its action in the premises to rely upon the limitation, and refused to pass upon the construction to be given to the limitation clause, the affirmation could be accounted for on the ground of estoppel alone.

So, in *O'Laughlin v. Union Cent. L. Ins. Co.* 11 Fed. Rep. 280, it was said that a stipulation in a life-insurance policy that no suit shall be brought thereon unless within one year after the death of the person whose life is insured, requires the suit to be brought within one year from the time of the death, but the question in the suit was as to the validity, and not the running of the limitation.

And in *Earnshaw v. Sun Mut. Aid Soc.* 68 Md. 466, 12 Atl. 884, it was said that a clause in a certificate of membership of a mutual aid society providing that actions must be commenced within six months from the date of the loss gives the representatives of the assured six months from the date of the death of the assured within which to bring suit; but the question in this case was as to the removal or suspension of the limitation by an injunction.

So, the limitation created by a stipulation in

must be commenced within twelve months "after the loss occurs," or "after the loss or damage accrues," the time begins to run from the accrual of the right of action. But this distinction does not seem to be a sound one, since the loss or damage insured against by a fire insurance policy must occur or accrue, if at all, at the time of the fire. The loss or damage must necessarily precede the proofs of loss.

So far as we have ascertained, the Federal courts hold the rule of construction to be as herein announced. See *Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. Rep. 568; *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, *sub nom. Steel v. Phenix Ins. Co.* 51 Fed. Rep. 715, 2 C. C. A. 463, *Overruling* 47 Fed. Rep. 863. The following cases from

state courts support the same view: *Murdock v. Franklin Ins. Co.* 33 W. Va. 407, 7 L. R. A. 572, 10 S. E. 777; also *Barber v. Fire & Marine Ins. Co.* 16 W. Va. 658; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507, 20 N. W. 782; also *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308, 21 N. W. 652; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Quinn v. Capital Ins. Co.* 71 Iowa, 615, 33 N. W. 130; *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 46 N. W. 857; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034; *Case v. Sun Ins. Co.* 83 Cal. 476, 8 L. R. A. 48, 23 Pac. 534; *Fireman's Fund Ins. Co. v. Buck-*

an insurance policy that no suit or action shall be brought thereon unless commenced within six months next after the decease of the person insured is not prevented from running, or affected by a provision in the same policy that if the insured shall die three or more years after the date thereof, and after all due premiums shall have been received by the company, the policy shall be incontestable, and the fact that three years had elapsed since the making of the policy at the time of the death, and that all premiums were paid, the meaning of such stipulation being that the policy is to be held good and valid according to its terms. *Brady v. Prudential Ins. Co.* 168 Pa. 645, 32 Atl. 102.

Upon the other hand, however, the rule has been laid down that a cause of action on a life-insurance policy containing a stipulation that no action shall be brought thereon unless commenced within one year from the date of the death of the assured, and providing that the death loss shall be payable within ninety days after the first periodical mortality premium-paying day next ensuing the day of acceptance by the insurance company, of satisfactory evidence of the death of the assured, does not accrue earlier than ninety days after the date of death, and the time limited within which an action might be brought does not begin to run until that time. *Kettenbach v. Omaha Life Asso.* 49 Neb. 842, 69 N. W. 135.

Under this rule, a stipulation in a life-insurance policy limiting the right of recovery to one year from the death of the insured only requires the claimant to bring his proceeding to enforce his rights within one year from the time he has power to do so, under a policy requiring proofs of death, and providing that no suit can be begun within ninety days after such proofs are furnished, and permitting calls for additional information which might protract the investigation. *Bloodgood v. Massachusetts Ben. Life Asso.* 19 Misc. 460, 44 N. Y. Supp. 563.

And a cause of action upon a mutual insurance policy containing a stipulation that no action should be maintained thereon unless satisfactory proofs are furnished the association within sixty days, nor unless it is commenced within six months after the happening of the death on account of which the action is brought, matures at the expiration of the sixty days within which proofs are to be furnished, and the limitation begins to run at that time. *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 46 N. W. 857.

Nor does the time limited for the commencement of an action upon a life-insurance policy in which it was stipulated that no action shall be brought thereon unless commenced within nine months of the death of the party insured be-

gin to run until after the cause of action accrues, and the action does not accrue until after the furnishing of the proofs of loss, and where negotiations are pending the law will not compel action until after they have ceased, and that period of time will be excluded from the period of limitation. *Voorhels v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109.

So, a limitation created by a stipulation in a life-insurance policy that no suit or action thereon shall be begun or maintained after the expiration of one year from the death of the member will not be deemed to have run from the date of such death so as to prevent an action thereon, after one year from that date, where the policy also contained a provision requiring that the proofs of death and claims required shall be made upon the blank form furnished by the association, which form could not be had elsewhere and the association failed and refused to furnish it. *Methvin v. Fidelity Mut. Life Asso. (Cal.)* 58 Pac. 887.

And a provision in the by-laws of a mutual life-insurance company that no action shall be brought upon any certificate of membership or policy issued by it, unless commenced within the period of six months next succeeding the date of the death of the person insured, must be construed with a provision in a policy issued by it that all benefits and claims shall become due and payable within ninety days next after the acceptance by the association of proofs of death, and such other facts as shall be required by the association made out on blanks adopted and to be furnished by it for such purpose, and the provision of the by-laws will be held void as unreasonable, where the association delayed its final determination as to whether the claim would or would not be paid until three days before the expiration of the six months. *Magner v. Mutual Life Asso.* 17 App. Div. 18, 44 N. Y. Supp. 802.

And a cause of action on a certificate of membership of a mutual benefit association issued under a constitution, by-laws, rules, and regulations providing for proof of death upon blanks authorized by the association, and that no part of the beneficiary fund could become due or payable until sixty days after such proof of death had been furnished, does not accrue in any event until after the proof of death has been served. *Kelly v. Supreme Council of Catholic Mut. Ben. Asso.* 61 N. Y. Supp. 894.

So, the limitation of the time to sue on a mutual insurance policy containing a stipulation that no action of any kind shall be maintained upon the certificate unless satisfactory proofs are furnished the association within sixty days, nor unless such action is commenced within six

staff, 38 Neb. 150, 56 N. W. 697; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711; *Hong Sling v. Royal Ins. Co.* 8 Utah, 135, 30 Pac. 307.

Construing, therefore, the policy as a whole, and placing on clauses capable of two constructions the interpretation most favorable to the insured, we are constrained to hold that the parties to this contract of insurance contemplated that the insured should have twelve months in which to sue, after the accrual of the right of action. The action was brought in time, and there was no error in the refusal of the motion for non-suit, and in the charge of the circuit judge on this point. Having reached this conclusion, it is unnecessary to consider whether there was error in the charge of the trial justice in the matter of waiver, since if the action was brought in time, under the terms of the policy, there was no need and no room for the application of the doctrine of waiv-

er; and, if there was any error in the charge on this point, it was entirely harmless.

Nor need we pass upon the question raised by respondent to sustain the judgment below, *viz.*, that the act entitled "An Act Relating to the Time for Commencing Actions on Policies of Insurance in This State," approved December 16, 1891, allows six years in which to bring actions on policies notwithstanding stipulations therein to the contrary. It will be noted that the contract of insurance under consideration was made April, 1891, and the loss thereunder was sustained April, 1891, before the passage of this act. At the time when this contract was made, it was unquestionably lawful for the parties to stipulate when suits should be brought. *Wood, Ins. § 460*; *May, Ins. § 478*; *Riddlesberger v. Hartford Ins. Co.* 7 Wall. 386, 19 L. ed. 257.

The judgment of the Circuit Court is affirmed.

months after the happening of the death on account of which the action is brought, is not set running immediately after the death of the assured by the fact that the insurance company then repudiated its obligation to pay anything upon the policy, thus waiving the right to delay payment for the sixty days, where, by another condition of the policy, the company did not become liable to pay the sum insured until the expiration of forty-five days after the filing of proofs of death; the period of limitation would not commence to run until the expiration of such forty-five days from the time of such waiver. *McConnell v. Iowa Mut. Aid Assn.* 79 Iowa, 757, 43 N. W. 188.

And a limitation of the time to sue in a by-law of a mutual insurance company, does not operate to limit a cause of action on a policy issued by the company unless the by-law is made a part of the policy, as the policy, and not the by-law, constitutes the agreement between the parties. *Mutual Acci. & Life Assn. v. Kayser*, 14 W. N. C. 86.

See also *Earnshaw v. Sun Mut. Aid Soc.* 68 Md. 465, 12 Atl. 864; *Shackett v. People's Mut. Ben. Soc.* 107 Mich. 65, 64 N. W. 875,—*infra*, VI.; *Metropolitan L. Ins. Co. v. Dempsey*, 72 Md. 288, 10 Atl. 642, *infra*, VII.

V. Marine and other miscellaneous insurance policies.

The same tendency on the part of the courts to protect policy holders from an unreasonably short limitation appears in cases upon marine and other miscellaneous insurance policies as in those set forth in previous subdivisions of this note with reference to accident, fire and life insurance policies, nearly all the cases upholding the rule that the limitation is to be construed in connection with other stipulations in the policy postponing the time to sue thereon.

Thus, under a marine insurance policy providing that proof of loss shall be furnished to the company within thirty days from the date of the loss and that all claims under it shall be barred unless prosecuted within six months from that date, and that loss shall be paid in sixty days after proof of loss, the six months' limitation begins to run at the close of the sixty days allowed the company for payment, and not from the time of the actual loss. *Murdock v. Franklin Ins. Co.* 33 W. Va. 407, 7 L. R. A. 572, 10 S. E. 777.

And a limitation created by a provision in a marine insurance policy upon a steam tug that the company shall not be liable for any loss or

damage unless the liability of the steam tug for such loss or damage is determined by a suit at law or otherwise as the company may elect, accompanied by a provision that loss shall be payable sixty days after proofs of such loss, and the amount thereof, must be construed in connection with such accompanying clause, and a provision therein that suit must be brought within one year must be read and construed in connection with the other clauses, and the limitation will not commence to run until the time when an action can be brought thereon, which would be sixty days after proofs of the amount of loss are received. *Rogers v. Etina Ins. Co.* 95 Fed. Rep. 103.

And the question of loss on account of the grounding of a vessel does not depend upon the vessel going aground, but upon the expense of getting her off and getting her repaired; and a limitation in a marine insurance policy providing that all claims thereunder shall be void unless prosecuted within one year from the date of loss runs from the time of getting the insured vessel off, and getting her repaired, and not from the time of her going aground. *Harvey v. Detroit F. & M. Ins. Co.* (Mich.) 79 N. W. 898.

So, a limitation in a marine insurance policy not covering any direct damage to the vessel itself, but only such damage to other vessels or cargoes as might result from collisions or stranding, created by a stipulation in the policy that all claims thereunder shall be void unless prosecuted within twelve months from the date of the loss, does not apply to, and will not run against, an action on the policy, as, unless the company elect to admit the fact of loss, a suit is necessary to settle it as a preliminary question; the date of loss from which the limitation will run can only be the date when the insurance company admits the fact of loss, or when it is judicially determined. *Rogers v. Etina Ins. Co.* 76 Fed. Rep. 569.

And a limitation in a policy of insurance upon the goods in a ship, but not on the ship, created by a stipulation that no action shall be brought thereon unless commenced within twelve months next after any loss or damage shall occur, begins to run where the vessel is driven ashore and a part of the goods only perish, and the loss is not in its inception total, but becomes so when by the course of events consequent upon the peril encountered it is found to be impossible to carry the cargo of flour to its place of destination, and to be necessary to sell it, only from the time of such sale. *Browning v. Provincial Ins. Co.* L. R. 5 P. C. 263, 23 L. T. N. S. 853, 21 Week. Rep. 587.

IOWA SUPREME COURT.

George D. HARRISON

v.

HARTFORD FIRE INSURANCE COMPANY, App't.

(102 Iowa, 112.)

1. A judgment on a verdict directed for the defendant is not *res judicata* where the record shows that the verdict was directed because the suit was prematurely brought.
2. A contract limitation in an insurance policy requiring suit to be brought within twelve months after loss is not subject to Code 1873, title 17, chap. 2, providing that after the commencement of an action which falls for any cause except negligence in its prosecution a new suit brought within six months "shall, for the purpose herein contemplated," be a continuation of the first.

(May 12, 1897.)

So, a stipulation in an insurance policy insuring the fidelity of an employee of a national bank, that no suit or proceeding shall be brought thereon unless commenced within twelve months next after the discovery of any fraud or disloyalty, does not begin to run upon the first discovery of the fraudulent acts of the employee, where it appears that the receiver of the bank did not have notice of the character, extent, and details of the fraud, and that he had not made such discovery of the fraud as would have entitled him to make a definite claim or bring a suit; it is only after such a discovery that the limitation begins to run. *Jackson v. Fidelity & C. Co.* 41 U. S. App. 552, 75 Fed. Rep. 359, 21 C. C. A. 394.

But the six months' limitation created by a clause in the policy of a steam-boller insurance company, issued against loss by explosion or accident to steam boilers, providing that no action shall be brought thereon for loss arising from injury to person unless commenced within three years from the date of the explosion or accident, and in case a suit instituted by a third person against the assured for personal injury or loss of life be pending at the termination of the said period of three years, a suit may be brought against the company within six months from the termination of the said suit, runs from the termination of the suit, and not from the date of the payment of the judgment obtained therein. *People v. American Steam Boller Ins. Co.* 89 Hun, 456, 35 N. Y. Supp. 322, 10 App. Div. 9, 41 N. Y. Supp. 631.

In *People v. American Steam Boller Ins. Co.* 89 Hun, 456, 35 N. Y. Supp. 322, *supra*, *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297, *supra*, II, a, 3, was distinguished upon the ground that in that case the right of the assured to bring his action was postponed for sixty days of the time in which it was claimed the limitation would run.

As to limitation in policy of insurance against loss by lightning, see *Cornett v. Phenix Ins. Co.* 67 Iowa, 388, 25 N. W. 673, *infra*, VI. And see *Jackson v. St. Paul F. & M. Ins. Co.* 99 N. Y. 124, 1 N. E. 539, *infra*, VII., as to limitation in fire and marine insurance policy.

VI. What will prevent or delay the running of the limitation.

It is not designed under this head to go into the subject of the waiver or suspension of a 47 L. R. A.

A PPEAL by defendant from a judgment of the District Court for Louisa County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. McVey & McVey, for appellant:

Where a court has once acquired jurisdiction of the subject-matter and parties, the questions decided by that court are binding on every other court in accordance with the principle of *res judicata*.

Peck v. Jenness, 7 How. 624, 12 L. ed. 846; *Stout v. Lye*, 103 U. S. 68, 26 L. ed. 428; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Hackworth v. Zollars*, 30 Iowa, 433; *Bettys v. Chicago, M. & St. P. R. Co.* 43 Iowa, 602; *Kitteringham v. Blair Town Lot & Land Co.* 73 Iowa, 421, 35 N. W. 502; *Dal-ter v. Laue*, 13 Iowa, 538, 542; *Goodnow v.*

limitation in an insurance policy that has commenced to run. This note is confined to the question of when the limitation begins to run, and all that is here intended to be dealt with is the question as to what circumstances and conditions, happening at or previous to the time the limitation would otherwise run, will prevent or delay its running, or otherwise affect the time of its running.

While a limitation will not run if it has at no time been possible to sue, it may be said that no obstacle existing at the time a limitation in an insurance policy would otherwise run will prevent or delay its running, unless it creates an absolute legal impossibility to proceed.

Thus, a stipulation in a fire-insurance policy that suit was not to be commenced within one year from the time of loss, is not a statute of limitation, but a contract which carries with it the implication that no difficulty will be interposed to the due prosecution of a suit, and the limitation thereby created will not begin to run so as to bar a suit where the officers of the company had absconded, and there was no person on whom service could be made. *Taber v. Royal Ins. Co. (Ala.)* 26 So. 252.

And a state of war existing between two states in one of which the insurer resides while the other is the state of the assured, prevents the performance of a condition of the contract that no action should be brought thereon unless commenced within one year, and rebuts the presumption attaching to the nonperformance thereof, and prevents the running of the limitation until the condition of war is ended, and after the limitation is defeated by the war suspending it and preventing suit, the ordinary statute of limitation will alone apply. *Phoenix Ins. Co. v. Underwood*, 12 Helak. 424.

So, in *Semmes v. City F. Ins. Co.* 13 Wall 158, 20 L. ed. 490, *Reversing 6 Blatchf. 445*, 36 Conn. 543, Fed. Cas. No. 12,651, it was held that the disability of the holder of an insurance policy to sue thereon, imposed by a state of war between the relative states or countries of the insurer and insured, relieves him wholly of the consequences of not bringing suit within the time limited by stipulation in the policy. But in this case the limitation had commenced to run before the war commenced, so that it was a case of the suspension of the limitation, rather than of the time when it begins to run.

And the ruling in *Semmes v. City F. Ins. Co.*

Burrois, 74 Iowa, 256, 23 N. W. 253, 37 N. W. 322.

A judgment in a Federal court is conclusive in a state court.

1 Van Vleet, Former Adjudications, p. 86; Wells, Res Adjudicata, 218, §§ 248, 249.

The rule of *res judicata* extends to all the questions arising upon the trial or which might have been raised.

Land v. McConkey, 76 Iowa, 47, 40 N. W. 77; *Gould v. Evansville & C. R. Co.* 91 U. S. 533, 23 L. ed. 418; Wells, Res Adjudicata, 370, § 446; *Coffin v. Knott*, 2 G. Greene, 584, 52 Am. Dec. 537; *Aurora v. West*, 7 Wall. 99, 19 L. ed. 48; *Wilson v. Ray*, 24 Ind. 159; *Hahn v. Miller*, 68 Iowa, 745, 28 N. W. 51; *Gray v. Gray*, 34 Ga. 502.

This action was commenced two years, nine months, and twenty-two days after the fire, and this fact is an absolute bar to the action.

13 Wall. 158, 20 L. ed. 490, *supra*, was sanctioned in *Sands v. New York L. Ins. Co.* 50 N. Y. 626, 10 Am. Rep. 535, the court saying that "war annuls that limitation if necessary, and the action may be brought wholly irrespective of that provision of the policy." But this was a case of the effect of war on the nonpayment of premiums.

But a mistake upon the part of the parties to a fire-insurance policy as to the time when the risk commenced does not prevent or postpone the running of a limitation created by a stipulation in the policy requiring suit to be brought thereon within six months. *Farmers' Mut. F. Ins. Co. v. Barr*, 94 Pa. 345.

And the minority of the beneficiaries in an accident-insurance policy does not exempt them from a stipulation therein requiring any action on the policy to be brought within one year after the right accrues, or prevent or delay the running of the limitation, where the stipulation contains no exception in behalf of minors. *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676.

Nor is a limitation in a fire-insurance policy created by a stipulation that no suit should be brought thereon unless commenced within twelve months after the loss or damage shall occur, prevented from running or suspended by the issuance of an injunction order restraining the insurance company from paying, and the insured from receiving, the loss or damage owing under or by virtue of the policy in question, where the contract contains no saving clause of the right of action after the expiration of the year, and the insurer did not procure the injunction to be issued, and it was not procured with its privity or consent. *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166.

But in *Earnshaw v. Sun Mut. Aid Soc.* 68 Md. 465, 12 Atl. 884, it was held that where the certificate of membership of a mutual aid society provides that suit for the recovery of any claim arising thereunder must be brought within six months from the death of the assured, and that a failure to bring it within such time shall work a forfeiture of all rights and claims thereunder, an injunction enjoining the society from paying a death claim thereunder or any portion thereof to the beneficiaries, and enjoining the beneficiaries from receiving it or any portion thereof, which stands until after the expiration of the six months' limitation, absolutely removes the limitation so that it cannot be revived by a subsequent dissolution of the injunction leaving the subsequent right to sue in full force subject only to the ordinary statute of limitations. But this was clearly a case of 47 L. R. A.

The limitation clause in the policy is valid.

Vore v. Hawkeye Ins. Co. 76 Iowa, 548, 41 N. W. 309; *Heusinkveld v. Capital Ins. Co.* 95 Iowa, 504, 64 N. W. 594; *Heusinkveld v. St. Paul F. & M. Ins. Co.* 96 Iowa, 224, 64 N. W. 769; *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 391, 19 L. ed. 259; *Peoria, M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *Williams v. Vermont Mut. Ins. Co.* 20 Vt. 222; *Portage County Mut. F. Ins. Co. v. West*, 6 Ohio St. 602; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 56 N. W. 332; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77.

The Code is not applicable in case of verdict and judgment.

The limitation clause of the policy rests in contract.

The statute has no application whatever to the case at bar, because of the express contract between the parties.

the removal or suspension of the limitation as distinguished from one as to when it would begin to run.

So, the fact that the owner of property insured against fire died before a loss, and at the time of the loss and afterwards a contest was pending which prevented the appointment of an executor or administrator, does not prevent a limitation of the time to sue in the policy from running, where no application was made for the appointment of a temporary administrator to give the proper notice and bring suit within the period stipulated. *Matthews v. American Cent. Ins. Co.* 164 N. Y. 449, 39 L. R. A. 433, 48 N. E. 751, 9 App. Div. 339, 41 N. Y. Supp. 304.

And the fact that the insured under a fire-insurance policy was arrested on the charge of arson on the night of the fire, and twice tried, and finally discharged, does not prevent a limitation in the insurance policy by stipulation from running from the date of the loss, where he was released from custody several months previous to the expiration of the term within which the condition of the policy required suit to be brought, and there is nothing to show that the company had anything to do with his arrest. *Edson v. Merchants' Mut. Ins. Co.* 35 La. Ann. 353.

Nor does the refusal of an insurance company to pay a loss or recognize its liability under a policy relieve the insured, who insisted that the contract was in full force at the time of the fire, from bringing action thereon within the time limited therefor in the policy, and does not postpone the running of such limitation. *Farmers' Mut. F. Ins. Co. v. Barr*, 94 Pa. 345.

So, mere negotiations for settlement do not postpone the running of the limitation in the policy. See *Ritch v. Masons' Fraternal Acci. Asso.* 99 Ga. 112, 25 S. E. 191, *supra*, III.

And an attempt to settle a claim under a certificate of insurance in a mutual accident association, containing a stipulation that no action or arbitration shall be brought unless the same is commenced within one year from the time of the injury, does not postpone the period of the running of the limitation, where upwards of five months before its expiration the assured was fully advised that the insurer would not pay the same, and all attempts looking toward an arbitration or settlement had ceased. *Law v. New England Mut. Acci. Asso.* 94 Mich. 266, 53 N. W. 1104.

And where on presentation of claims for a loss the insurance company positively denies its legal liability, but, being reinsured for a part of the loss, expresses its willingness to pay if the reinsuring companies will consent, which

Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386, 19 L. ed. 257; *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550; *Key-stone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 8 Atl. 638; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188, 17 N. W. 781; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Howard Ins. Co. v. Hocking*, 115 Pa. 415, 8 Atl. 592; *Hocking v. Howard Ins. Co.* 130 Pa. 170, 18 Atl. 614; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; *Williams v. Vermont Mut. Ins. Co.* 20 Vt. 222; *Cray v. Hartford F. Ins. Co.* 1 Blatchf. 280, Fed. Cas. No. 3,375; *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676; *O'Laughlin v. Union Cent. L. Ins. Co.* 3 McCrary, 545, 11 Fed. Rep. 280; *Brown v. Roger Williams Ins. Co.* 7 R. I. 302; *Wilkinson v. First National F. Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166.

they refuse to do, and all negotiations are broken off nearly two months before the expiration of the period limited in the policy for the prosecution of the claim, an action brought after the expiration of the time limited will be barred. *Blanks v. Hibernia Ins. Co.* 36 La. Ann. 599.

And negotiations for settlement of a claim under a certificate of membership of a mutual benefit society, entered into after the death of the insured, do not extend the period of limitation created by a stipulation in the policy that no action should be brought thereon, unless commenced within nine months next after the death of the insured, or postpone the time when the limitation will commence to run, where the society refused to pay and broke off negotiations a long time before the period of limitations expired. *Shackett v. People's Mut. Ben. Soc.* 107 Mich. 65, 64 N. W. 875.

In the above case *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109, *supra*, IV., was distinguished upon the ground that in that case the parties were negotiating on the subject of an adjustment of the loss during the whole period of limitation.

So, N. Y. Code, § 105, Code Civ. Proc. § 406, saving the rights of parties under the statute of limitations when they are stayed by injunction, applies only where limitation is prescribed by law, and has no application where a limitation is prescribed by the contract of the parties, as in case of a stipulation in an insurance policy limiting the time within which action may be brought thereon. *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166.

And Kan. Code Civ. Proc. § 28, providing that if an action be commenced within due time, and a judgment for the plaintiff therein be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure, does not apply to a limitation made by agreement of the parties, and will not prevent the running from the time of a fire of a limitation created by a stipulation in a fire-insurance policy that no action shall be brought thereon unless commenced within twelve months next ensuing after the fire. *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478.

So, Iowa Laws 1880, chap. 211, Miller's Code, p. 299, does not operate to extend the time or prevent the running of a limitation created by stipulation in a policy of insurance against loss by lightning, providing that no action shall be maintained thereon unless brought within six
47 L. R. A.

Messrs. D. N. Sprague and A. H. Stutsman, for appellee:

Whatever right under the law the defendant may have had to question plaintiff's diligence in the prosecution of his former suit, or to show he was negligent in the prosecution of that action, has been waived, and the liability of defendant is to be determined upon other issues.

Arndt v. Hosford, 82 Iowa, 499, 48 N. W. 981; *McConahey v. Griffey*, 82 Iowa, 504, 48 N. W. 983; *Price v. Baldauf*, 82 Iowa, 670, 46 N. W. 983, 47 N. W. 1079.

The action taken was not an adjudication, and can under no circumstances be pleaded as *res judicata*.

Coa v. Carrell, 6 Iowa, 350; *Clise v. Freeborne*, 27 Iowa, 280; *Boyer v. Austin*, 54 Iowa, 402, 6 N. W. 585; *Atkins v. Anderson*, 63 Iowa, 741, 19 N. W. 323; *Kern v. Wilson*,

months after the loss, where proof of loss is neither made nor waived within the time limited. *Cornett v. Phenix Ins. Co.* 67 Iowa, 388, 25 N. W. 678. And see *HARRISON v. HARTFORD F. INS. CO.*

As to the question of the insurance company setting the limitation to running previous to the time it would otherwise begin to run by refusal to pay, see *Northwestern Mut. Ins. Co. v. Campbell*, 11 Ky. L. Rep. 762; *Lents v. Teutonia F. Ins. Co.* 96 Mich. 445, 55 N. W. 993, *supra*, II. a, 3; *Allibone v. Fidelity & C. Co.* (Tex. Civ. App.) 32 S. W. 569, *supra*, III.; *McConnell v. Iowa Mut. Aid Asso.* 79 Iowa, 757, 43 N. W. 188, *supra*, IV.

VII. To what actions the limitation applies.

To render a limitation in an insurance policy applicable, the action in which it is asserted must have been one on the policy proper to recover for a loss, and not an action on a mere collateral matter growing out of the policy.

Thus, a limitation created by a stipulation in an insurance policy limiting the time within which an action is to be brought thereon does not apply to an action against a stockholder of the insurance company sued on his statutory liability as such stockholder. *Davis v. Stewart*, 26 Ohio St. 643.

And a limitation of twelve months to bring suit, provided for in an insurance policy, is not applicable to, and does not run against, a proceeding to correct a manifest mistake made in announcing and entering a verdict in an action brought within the limitation, as such a proceeding is not an action on the policy. *Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.* 42 U. S. App. 123, 76 Fed. Rep. 479, 22 C. C. A. 283.

Nor does a condition indorsed on an insurance policy, that any proceedings to be taken against the company thereon with respect to any loss sustained by the assured shall be instituted within six months after such loss shall happen, apply to a case where the company refused to complete the policy and a bill was filed to compel them to execute it or pay the amount of the loss sustained by reason of the destruction by fire of the insured property. *Penley v. Beacon Assur. Co.* 7 Grant, Ch. (U. C.) 130.

And a limitation in an insurance policy against bringing suit thereon unless commenced within six months from the happening of the loss does not apply where an action at law was brought within the time limited, to a bill brought in aid thereof for the purpose of reforming the policy, as such a bill is not a suit upon the policy within the meaning of the limi-

82 Iowa, 407, 48 N. W. 919; *Gummer v. Omro*, 50 Wis. 247, 6 N. W. 885; *Gowan v. Hanson*, 55 Wis. 341, 13 N. W. 238; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 258; *Benuware v. Pine Valley*, 53 Wis. 527, 10 N. W. 695; *Roberts v. Hamilton*, 56 Iowa, 683, 10 N. W. 236; *Keokuk & N. W. R. Co. v. Donnell*, 77 Iowa, 221, 42 N. W. 176; *Linton v. Crosby*, 61 Iowa, 401, 16 N. W. 342.

To constitute a good defense on a plea of *res judicata* the judgment must be upon the merits, and not upon mere technicalities.

tation. Rosenbaum v. Council Bluffs Ins. Co. 37 Fed. Rep. 724, 3 L. R. A. 189.

And the limitation in a fire-insurance policy containing a stipulation that no action shall be brought thereon unless commenced within twelve months next after the fire shall occur does not run, and creates no bar in an action at law to recover for money paid as premiums on such policy upon the ground that the assured held but a mortgage interest in the property insured, while the policy was issued to him as the absolute owner, as such action is not based upon the policy, but is founded on the theory that the policy was void and in effect no policy. *Waller v. Northern Assur. Co.* 64 Iowa, 101, 19 N. W. 865.

So, a clause in a fire-insurance policy limiting the time within which an action may be brought thereon is not available as a defense in an action thereon against the insurance company, where the loss has been adjusted and the company has agreed to pay a certain sum in consideration of the surrender by the assured of his policy, as the action is not upon the policy, but upon the independent agreement. *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85.

And the rule is the same where there was a controversy between the insurer and insured as to liability, which was adjusted, as the adjustment is a new and different contract from that contained in the policy, to which the general statute of limitations only would apply. *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631.

Nor is a stipulation in a life-insurance policy that no suit shall be brought thereon after six months from the death of the insured a bar to an action thereon, when it appears from competent evidence that the insured and the superintendent of the insurance company had agreed as to the amount to be paid, and the superintendent had promised that the money should be paid as soon as he could get it from the company, and that the superintendent had the power to make such an agreement. *Metropolitan L. Ins. Co. v. Dempsey*, 72 Md. 288, 19 Atl. 642.

And such a stipulation that no action can be maintained on the policy unless brought within twelve months after the fire does not apply to an action to enforce an agreement for a compromise between the parties, made after the destruction of the property. *Hanover F. Ins. Co. v. Hatton (Ky.)* 55 S. W. 681.

And a by-law of a mutual insurance company, subject to which its policies were made, providing that upon notice of loss the directors shall proceed to determine and pay the amount thereof, but that if the assured should not acquiesce in their determination any action for the loss claimed must be brought within four months after such determination, though creating a limitation against an action on the policy unless commenced within four months, does not prevent the assured from commencing action after that time for the amount determined by the directors; and where action is brought after the expiration of the period of limitation upon the policy, and the company admits the loss and alleges the determination of the amount by the di-

21 Am. & Eng. Enc. Law, p. 132; *Carmory v. Hooper*, 5 Pa. 305.

The defense of the statute of limitation is an affirmative one, and the party pleading it must show facts constituting the bar.

Harlin v. Stevenson, 30 Iowa, 371; *Tredway v. McDonald*, 51 Iowa, 663, 2 N. W. 567.

The election to arbitrate on the part of the company was between October 4 and 15, 1892.

To elect to arbitrate a loss is a waiver of proof of loss.

rectors, relying upon the limitation, the assured may amend by declaring for the amount so determined, and take judgment therefor without further trial. *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596.

So, to be applicable, the limitation asserted must have been in a policy of insurance on the property or thing itself, or an ascertained interest, or one which is readily ascertainable. It will not apply if the policy is on an unascertained interest where it will take a period of time equal to the limitation to ascertain it.

Thus, where an insurance company grants a policy upon the interests of a holder of a mechanic's lien, it does so subject to the unavoidable delay in the judicial ascertainment of the value of that interest if a loss should occur, and a stipulation in such a policy that action shall not be brought thereon unless commenced within the lapse of a certain time, as one year, does not begin to run so as to bar an action until such interest has been ascertained. *Loughurst v. Star Ins. Co.* 19 Iowa, 364.

And a limitation in a fire insurance policy, in which it is stipulated that no action shall be brought thereon unless commenced within twelve months next after the loss, is inoperative, and will not run against the assured, where his interest was a mechanic's lien, and the conditions of the policy were such that he was required before the commencement of his suit on the policy to prove the value of his interest in the building insured, and he pursued his remedy with diligence, but was unable to accomplish it within a year. *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539.

So, a six months' limitation of time to sue, in a fire-insurance policy, cannot be held to apply to a mortgagee, where another provision of the policy is especially made applicable to such mortgagee, requiring him to do an act which would preclude his suing on the policy within the six months. *Dwelling House Ins. Co. v. Kansas Loan & T. Co.* 5 Kan. App. 137, 48 Pac. 801.

And a limitation created by a stipulation in an insurance policy that no suit or action against the company upon the policy shall be sustained unless commenced within six months after the loss or damage shall occur is of no effect, and will not prevent the ordinary statute of limitations from applying, where the policy was issued on the interest of a mortgagee, and it contained a clause requiring the mortgagee to first exhaust the primary security before he could recover the amount of insurance, as it would take him more than the time limited to foreclose his mortgage, the two clauses being therefore inconsistent. *Ibid.*

And a clause in a fire-insurance policy on the interest of a mortgagee, which contemplates the adoption of all the proceedings necessary to obtain from the original security the payment of the debt to which the policy relates, and that the insurance company should be called upon to pay only such sum as cannot be thus collected, is wholly inconsistent with a covenant requiring the commencement of an action within

Home F. Ins. Co. v. Bean, 42 Neb. 537, 66 N. W. 907; *Walker v. German Ins. Co.* 51 Kan. 725, 33 Pac. 597.

Code 1873, § 2537 (McClain's Anno. Code, § 3742), should be made to apply to any case where the party fails in the prosecution through no negligence of his own.

Archer v. Chicago, B. & Q. R. Co. 65 Iowa, 612, 22 N. W. 894; *Kern v. Wilson*, 82 Iowa, 412, 48 N. W. 919; *Gummer v. Omro*, 50 Wis. 247, 6 N. W. 885; *Gowan v. Hanson*, 55 Wis. 341, 13 N. W. 238; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 258; *Jacobs v. St. Paul F. & M. Ins. Co.* 86 Iowa, 145, 53 N. W. 101.

twelve months, as the enforcement of the demand secured by mortgage might involve years of litigation before the defendant's liability would accrue, and does not therefore apply to the case of insurance of the interest of a mortgage. *Hay v. Star F. Ins. Co.* 13 Hun. 496.

And a fire insurance company which has insured mortgaged premises, and which purchases and takes an assignment of a first mortgage thereon within a year after a loss by fire, cannot, in a suit by a purchaser of the premises under a second mortgage, brought to have the first mortgage declared paid and removed as a cloud upon his title on the ground that it was satisfied by the payment due under the policy, set up as a defense that suit was not brought upon the policy within a year in accordance with a limitation therein, as the company has taken the place of the holder of the first mortgage whose duty it was to recover the money due on the policy to the amount of his mortgage. *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811.

See also *Anderson v. Saugeen Mut. F. Ins. Co.* 18 Ont. Rep. 355, *supra*, II. b. 2.

So, the ordinary limitation stipulated for in an insurance policy has been held to be inapplicable to the contract of reinsurance.

Thus a limitation in a fire and marine insurance policy created by a stipulation that no action shall be maintained thereon until after an award made as specified therein, nor unless commenced within twelve months after the loss, is not applicable to, and does not run against, a contract of reinsurance. *Jackson v. St. Paul F. & M. Ins. Co.* 99 N. Y. 124, 1 N. E. 539.

At any rate, under a stipulation in a policy of reinsurance of a fire risk providing that suit cannot be maintained thereon unless commenced within twelve months next after the loss, if it applies at all to such a policy, the twelve months are to be reckoned, not from the time of the loss, but from the time the reinsured company paid the loss under the original policy issued by it, as the loss which the stipulation refers to must be taken to be that which accrued to the party indemnified when it made payment to discharge its liability. *Royal Ins. Co. v. Vanderbilt Ins. Co.* 102 Tenn. 264, 52 S. W. 168.

The term "loss or damage shall occur," in a limitation in an insurance policy prohibiting the commencement of suit thereon unless commenced within twelve months next after any loss or damage shall occur, where the policy is one of reinsurance, can only be taken to refer to the casualty insured against, and runs from that time, and does not refer to the loss or damage suffered by the first insurer, so that the limitation would only run from the time of its payment. *Provincial Ins. Co. v. Aetna Ins. Co.* 16 U. C. Q. B. 135.

See also *Rogers v. Aetna Ins. Co.* 76 Fed. Rep. 596, *supra*, V.

VIII. Summary.

The question in this note is wholly one of the 47 L. R. A.

The application of § 3742 to limitations in insurance contracts is supported both upon principle and reason. The laws of a state enter into and become a part of every contract made in the state.

Rorer, Interstate Law, 45, 48, 52, 53; *Leflingwell v. Warren*, 2 Black, 599, 603, 17 L. ed. 261, 262.

Deemer, J., delivered the opinion of the court:

The policy in suit was issued on the 18th day of June, 1890, and the fire occurred on the 4th day of October, 1892. On the 16th

construction to be placed on the stipulation usually inserted in insurance policies, that no action shall be maintained thereon unless commenced within a designated period after loss or after the casualty. This question has given rise to an irreconcilable conflict of authority. Perhaps a majority of the courts have adopted the rule that as the language of the stipulation is that of the insurance company it is to be construed most favorably to the insured, and that as the policy also usually contains stipulations postponing the right to sue thereon, the parties are not to be deemed to have intended that the limitation of the time to sue should run during the time that suit is prohibited, but that the two classes of stipulations should be construed together so as to fix the time of the beginning to run of the limitation at the point of time at which suit might be brought on the policy, thus giving the insured the whole period limited, during any moment of which he would be entitled to sue.

A large number of well-considered cases, however, have construed stipulations limiting the time to sue on insurance policies literally, giving them full effect without reference to the other stipulations in the policy, holding that in all cases the limitation begins to run at the time of the fire or other casualty insured against. Some of the cases, as, for example, those of New York, have recognized a distinction with reference to fire-insurance policies between limitation of the right to sue to a designated period after loss and to a designated period after the fire, holding in the one case that the time of loss means the time when the loss becomes due and payable and actionable, and in the other case that the time of the fire can mean nothing but the actual date upon which the fire occurred. But most of the courts which have postponed the running of the limitation until the loss becomes due and payable have done so irrespective of whether the limitation was from the time of loss or from the time of the fire, holding that for the purpose in question the two expressions mean the same thing, and that either stipulation is to be construed relatively with the other stipulations in the policy.

With reference to accident, life, and marine, and other insurance policies, while the language of the limitation clause is necessarily somewhat different, and while the cases are not so numerous as with reference to fire insurance, the same conflict exists as between the literal construction of the limitation clause on the one side, and its construction in connection with other stipulations postponing the time when the claim shall become due and payable on the other side, and it would appear generally that the courts adopting one side or the other of the question of literal construction or relative construction with reference to fire insurance, have adopted the same side of the controversy with reference to other insurance.

F. H. B.

day of January, 1893, plaintiff commenced suit on the policy in the district court of the county of Louisa. The defendant removed this action to the Federal court, and on the 27th day of January, 1894, a trial was had, resulting in a directed verdict for the defendant. Thereafter, and on the 29th day of May, 1894, plaintiff commenced another action upon the policy in the Federal court. To the last-named petition, defendant filed a demurrer. This demurrer was sustained on the 5th day of July, 1894. Thereupon plaintiff amended his petition, and on the same day dismissed his action, without prejudice. On the 25th day of July, 1894, plaintiff commenced this action upon the same policy in the district court of Louisa county, Iowa; and at the trial which was had on the 20th day of September, 1895, recovered judgment in the sum of \$1,999, and this appeal followed.

1. The first point relied upon by appellant is that the judgment rendered by the Federal court on the 27th day of January, 1894, is *res judicata*. That case was tried to a jury, and resulted in a directed verdict for the defendant. The record of the judgment rendered upon the verdict is as follows: "This day, this cause coming on to be heard upon the motion of the defendant heretofore filed, come the parties, attorneys, and jury theretofore impaneled; and, the argument of counsel being completed, upon consideration thereof by the court, the court found that the suit was prematurely brought under the statutes of Iowa, and thereupon sustains the said motion, because the action was commenced on the 16th day of January, 1893, contrary to the provisions of the statute of Iowa, § 3, chap. 211, of the Acts of the 18th General Assembly, and thereupon directed the jury to return a verdict for the defendant, which they thereupon did, in words and figures following, to wit: 'We, the jury, by the direction of the court, find for the defendant. [Signed] W. E. Steadman, Foreman.' It is thereupon ordered, considered, and adjudged that the defendant have and recover of the plaintiff the costs of this suit, taxed at \$10.45, and the clerk is directed by consent of parties to tax, as a part of the costs herein, the reporter's fees herein, at \$10. each party to pay one half thereof." Appellee says that the judgment and the verdict, when construed with reference to this record, clearly show that the action in the Federal court was abated, and not tried upon its merits, and that it is no bar to this proceeding. Our Code provides that, "where matter in abatement is plead in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare." Code, § 2851. This section has been given a somewhat liberal interpretation, and we have heretofore held, in effect, that if it fairly and reasonably appears from the record that there was no trial upon the merits, and that the judgment was upon a plea in abatement, it will not be treated as a bar

to another action for the same cause. *Vide Boyer v. Austin*, 54 Iowa, 402, 6 N. W. 585; *Atkins v. Anderson*, 63 Iowa, 741, 19 N. W. 323; *Kern v. Wilson*, 82 Iowa, 407, 48 N. W. 919. It clearly appears from the judgment entry heretofore set out that the court found that the suit was prematurely brought, and for that reason directed the jury to return a verdict for the defendant. The idea that the verdict and judgment were upon the merits is distinctly negatived. No citation of authority is needed to show that a judgment upon a plea in abatement is no bar to another action.

2. The defense of another suit pending is not relied upon here, and we give it no attention.

3. The policy in suit contained this among other provisions: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." Defendant claims that this provision is a bar to plaintiff's action. It will be noticed that this action was commenced two years, nine months, and twenty-one days after the fire, and more than two years and six months after the ninety days in which plaintiff must have given notice and proofs of loss. Such a stipulation as that contained in this policy is valid in every state in the Union save Indiana. See *Carter v. Humboldt F. Ins. Co.* 12 Iowa, 287; *Voss v. Hawkeye Ins. Co.* 76 Iowa, 548, 41 N. W. 309; *Moore v. State Ins. Co.* 72 Iowa, 414, 34 N. W. 183; *Heusinkveld v. Capital Ins. Co.* 95 Iowa, 504, 64 N. W. 594; *Riddlebarger v. Hartford Ins. Co.* 7 Wall. 391, 19 L. ed. 259; *Peoria, M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; and cases cited in 2 Wood, Ins. § 460. There is no claim that this condition has been waived; hence plaintiff's action is barred, unless there be something in his claim that § 2537 of the Code applies. That section is found in chapter 2 of title 17 of the Code of 1873, relating to limitation of actions, and is as follows: "If after the commencement of an action the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." Statutes similar to this exist in many of the states, and the question has frequently arisen whether such a statute is applicable to a contract limitation such as the one in the policy in suit. The general tenor of the authorities is to the effect that it does not, for the reason that the rights of the parties arise out of contract which relieves them from the general limitations of the statute, and as a consequence from its exceptions also. See *Riddlebarger v. Hartford Ins. Co.* 7 Wall. 386, 19 L. ed. 257; *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462, 34 Am. Rep. 550; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. 446, 8 Atl. 638; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 188, 17 N. W.

781; *Hocking v. Howard Ins. Co.* 130 Pa. 170, 18 Atl. 614; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; *May, Ins.* § 483.

These further considerations make it clear to our minds that the statutory exception does not apply. The section quoted says in express terms that the second suit shall, for the purposes (therein) contemplated, be deemed a continuation of the first. What are the purposes therein contemplated? Manifestly, the statutory limitation, not one created by contract of the parties. Again, the statute says that the second suit shall be deemed a continuation of the first. If it is so regarded, and the plaintiff is allowed to recover, we have the strange anomaly of a plaintiff being allowed to recover in an action which was confessedly prematurely brought. Such an effect was not contemplated by the legislature, and such a construction is entirely untenable. We do not think this statute has any application to the contract limitations provided in the policy. Appellee asserts with confidence that we have already committed ourselves to the doctrine that the statute is applicable to contract limitations, and he cites the cases of *Jacobs v. St. Paul F. & M. Ins. Co.* 86 Iowa, 145, 53 N. W. 101, and *Archer v. Chicago, B. & Q. R. Co.* 65 Iowa, 612, 22 N. W. 894. It is true, we said in the *Jacobs Case*, that the condition in the policy and the statute must be construed together; but this statement was made with reference to the peculiar facts of that case. Timely action was brought upon the policy in that case. During the trial, a mistake in the description of the property was discovered, and plaintiff filed a substituted petition, asking reformation. This relief was granted. Thereafter plaintiff commenced a suit in equity, based upon the policy as reformed, and in the petition recited the facts as to the mistake in the policy, the action to reform, and certain other things as an excuse for his delay in commencing his suit. This last action was the one appealed to this court, and the statement we have quoted from the opinion has reference to this state of facts. It differs from the case at bar in two essential particulars. Here the original action was prematurely brought; there the action was timely. Here the defendant did nothing but insist upon its strict legal rights; there it denied the issuance of a policy upon the property destroyed, and compelled plaintiff to resort to

an equitable suit for reformation before he could recover, and suit was brought on the policy as reformed within thirty days after the decree was rendered. Moreover, it affirmatively appears from the opinion that the question as to the inapplicability of § 2537 was not raised; and the statement we have quoted is practically all that is said regarding the matter. The *Archer Case* in no manner decides the question. This statement appearing therein, "This section does not enlarge or extend the statute of limitations but simply provides that another action may be brought and maintained if the original action could have been brought and maintained if commenced at that time," has reference to § 2844 of the Code, and not to § 2537; and what is said regarding § 2537 relates to the ordinary statutes of limitations. In the cases of *Heusinkveld v. Capital Ins. Co.* 95 Iowa, 504, 64 N. W. 594, and *Wilhelmi v. Des Moines Ins. Co.* (Iowa) 68 N. W. 782, we assumed, without deciding, that § 2537 applied to contract limitations, but in each case we held that the statute did not save the action. A rehearing has been granted in the *Wilhelmi Case*, and it is no longer authority. In the *Heusinkveld Case* we said, in effect, that it was unnecessary to decide the question, for plaintiff was guilty of such negligence as barred him of relief. In no case, then, unless it may be in *Jacobs v. St. Paul F. & M. Ins. Co.*, have we squarely decided the question presented by this record; and if it be said that the *Jacobs Case* is in point, and holds to a contrary doctrine from that announced in this opinion, it is to that extent overruled. The record in this case clearly shows that plaintiff failed in his original suit because of negligence in prematurely prosecuting it. No excuse for his haste is shown. In view of these facts, we might well have found that he did not bring himself within the statute, and abstained from deciding the point as to the applicability of the statute relied upon to such cases. We have thought it advisable, in view of the great number of cases which are continually arising, where it is sought to make this statute applicable, to authoritatively decide the question, and thus put it at rest. Our conclusion is that this statute does not apply, as a general rule, to limitations by contract; and it follows that plaintiff's action is barred.

Reversed.

NEW YORK COURT OF APPEALS.

Mary SULLIVAN, Admr., etc., of Annie E. Harten, Deceased, *Respt.*,

v.

Carroll DUNHAM et al., *Appts.*

(161 N. Y. 290.)

One who explodes a blast upon his own land, and thereby causes a piece of wood to

fall upon a person lawfully traveling in a public highway, is liable as a trespasser for the injury thus inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill.

(January 9, 1900.)

NOTE.—As to the duty of a person engaged in blasting with respect to the safety of others, see *Blackwell v. Moorman* (N. C.) 17 L. R. A. 729, and *note*; also *Mitchell v. Prange* (Mich.) 34 L. R. A. 182.

47 L. R. A.

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Westchester County in favor of plaintiff in an action brought to recover damages for the alleged

wrongful killing of plaintiff's intestate. *Affirmed.*

Statement by Vann, J.:

On the 10th of June, 1896, Annie E. Harten, the plaintiff's intestate, a young lady nineteen years of age, while traveling on a public highway near the village of Irvington, in the county of Westchester, was killed by a blow from a section of a tree which fell upon her after it had been hurled more than 400 feet by a blast. The defendants, Dinkel and Jewell, as copartners, had been employed by the defendant Dunham, the owner of a tract of rough land, to blast out certain trees standing upon it. On the south side of the tract, about 300 feet from the nearest point of the highway in question, there was a large living elm tree, from 60 to 70 feet in height, between which and the highway was some woodland. Dynamite was placed under the roots of this tree and exploded, shattering it and throwing a section of the stump over the intervening forest, a distance of 412 feet, to a point in the highway where the plaintiff's intestate was traveling. She was struck by it with such force as to cause her death within a few hours. This action was brought to recover damages for the benefit of the next of kin on account of the death of the plaintiff's intestate, caused, as alleged, by the wrongful act of the defendants. Notwithstanding their objection and exception, the case was submitted to the jury on the theory that it was not essential for the plaintiff to establish negligence in order to make out a cause of action. The judgment rendered in favor of the plaintiff upon the first trial was reversed by the appellate division on account of erroneous rulings (10 App. Div. 438, 41 N. Y. Supp. 1083), but the judgment rendered in her favor upon the second trial was unanimously affirmed; and the defendants, having first obtained leave, now come here.

Messrs. Isaac N. Mills, Henry C. Griffin, and George C. Andrews, for appellants:

The gravamen of this action is negligence. No recovery can be had against any defendant except upon proof of negligence for which each defendant is legally responsible.

Donohue v. Syracuse & E. S. R. Co. 11 App. Div. 526, 42 N. Y. Supp. 808; *Roemer v. Striker*, 142 N. Y. 136, 36 N. E. 808; *Reed v. McConnell*, 133 N. Y. 434, 31 N. E. 22; *Romeyn v. Sickles*, 108 N. Y. 650, 15 N. E. 698; *Martin v. Pettit*, 117 N. Y. 122, 5 L. R. A. 794, 22 N. E. 566; *Southwick v. First Nat. Bank*, 84 N. Y. 421; *Caven v. Troy*, 15 App. Div. 165, 44 N. Y. Supp. 244; *Patterson v. Westchester Electric R. Co.* 26 App. Div. 337, 49 N. Y. Supp. 796; *Maltbie v. Bolting*, 6 Misc. 345, 26 N. Y. Supp. 903; *Woolsey v. Ellenville*, 69 Hun, 489, 23 N. Y. Supp. 410.

The doctrine of nuisance, and of consequent liability irrespective of negligence, is not applicable to blasting; certainly not to blasting carried on temporarily for the purpose of improving one's premises.

47 L. R. A.

Berg v. Parsons, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957; *French v. Via*, 2 Misc. 312, 21 N. Y. Supp. 1016, 143 N. E. 90, 37 N. E. 612; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 182, 19 Am. Rep. 267; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Roemer v. Striker*, 142 N. Y. 136, 36 N. E. 808.

In all cases where the blasting does not constitute a nuisance, and where the doing of injury to or upon adjoining premises is not its necessary result, but results only from the manner of doing the blasting, liability for injuries caused by it to person or property depends upon the question of defendant's negligence.

Berg v. Parsons, 90 Hun, 268, 35 N. Y. Supp. 780, 84 Hun, 60, 31 N. Y. Supp. 1091, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957; *French v. Via*, 2 Misc. 312, 21 N. Y. Supp. 1016, 143 N. Y. 90, 37 N. E. 612; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Rollins v. Farley*, 18 N. Y. Week. Dig. 136, 100 N. Y. 620, 3 N. E. 87; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 173, 19 Am. Rep. 267; *Kelly v. New York*, 11 N. Y. 432; *Pack v. New York*, 8 N. Y. 222; *Newell v. Woolfolk*, 91 Hun, 211, 36 N. Y. Supp. 327; *Driscoll v. Newark & R. Lime & Cement Co.* 37 N. Y. 637, 97 Am. Dec. 761; *Koster v. Noonan*, 8 Daly, 231; *Devlin v. Gallagher*, 6 Daly, 494.

If the *Hay Case*, 2 N. Y. 159, 51 Am. Dec. 279, be regarded as, upon its face, an authority for the proposition that, in case of injury caused by actual impact of a material substance hurled by the blast, liability exists without negligence, that case should be regarded as overruled by the great number of later cases where the injury to person or property has been caused by a material substance in some way propelled from the premises of one person to and upon those of another, or placed upon the premises of another, or upon the highway; or, at least, that it should be regarded as having by those cases been modified or limited to the doctrine that proof of negligence is unnecessary where the circumstances (e. g., the distance) were such that the throwing of rock was the necessary and natural result of the blasting.

Loose v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 25 N. E. 259; *Flinn v. New York C. & H. R. R. Co.* 142 N. Y. 11, 36 N. E. 1046; *Frace v. New York, L. E. & W. E. Co.* 143 N. Y. 182, 38 N. E. 102; *Engel v. Eureka Club*, 137 N. Y. 102, 32 N. E. 1052; *Evans v. Keystone Gas Co.* 148 N. Y. 116, 30 L. R. A. 651, 42 N. E. 513; *Jenney v. Brooklyn*, 120 N. Y. 164, 24 N. E. 274; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 31 N. E. 870; *Wolf v. American Tract Soc.* 25 App. Div. 98, 49 N. Y. Supp. 236; *Morris v. Strobel & W. Co.* 81 Hun, 1, 30 N. Y. Supp. 571; *O'Reilly v. Long Island R. Co.* 4 App.

Div. 139, 38 N. Y. Supp. 779, 15 App. Div. 79, 44 N. Y. Supp. 264; *Dohn v. Dawson*, 90 Hun, 271, 35 N. Y. Supp. 984; *Cross v. Koster*, 17 App. Div. 402, 45 N. Y. Supp. 215; *Hogan v. Manhattan R. Co.* 149 N. Y. 23, 43 N. E. 403; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90, 47 N. E. 971; *Piehl v. Albany R. Co.* 30 App. Div. 166, 51 N. Y. Supp. 755; *Weber v. Buffalo R. Co.* 20 App. Div. 292, 47 N. Y. Supp. 7; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Sheldon v. Sherman*, 42 Barb. 370, 42 N. Y. 486, 1 Am. Rep. 569; *Bailey v. New York*, 3 Hill, 631, 38 Am. Dec. 669; *Smith v. New York*, 66 N. Y. 295; *French v. Vis*, 143 N. Y. 93, 37 N. E. 612.

The doctrine of the *Hay Case* has never, at least in this state, been applied to the case of an injury to person or property received in the highway from substances thrown into it by blasting. In the following cases, under such circumstances, liability was made to depend upon proof of negligence:

Kelly v. New York, 11 N. Y. 432; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Driscoll v. Newark & R. Lime & Cement Co.* 37 N. Y. 637, 97 Am. Dec. 761.

It would not have been a trespass or a wrong for the defendants in this case, while making the improvement, to put temporarily into the highway material, either stones or pieces of wood, or anything else; whereas, for them to have put such substances upon the lands of another without the permission of the owner of such lands would, in any case, be a technical wrong and trespass.

Breil v. Buffalo, 144 N. Y. 165, 38 N. E. 977; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 277, 24 L. R. A. 105, 35 N. E. 592; *Flynn v. Taylor*, 127 N. Y. 599, 14 L. R. A. 556, 28 N. E. 418; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264; *McDonald v. Troy*, 36 N. Y. S. R. 704, 13 N. Y. Supp. 385; *Earl v. Orouch*, 32 N. Y. S. R. 13, 10 N. Y. Supp. 882, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770; *O'Reilly v. Long Island R. Co.* 4 App. Div. 139, 38 N. Y. Supp. 779.

Plaintiff's intestate, if she had survived her injury, could not maintain an action of trespass, because she did not own the premises upon which the root or piece of tree was thrown.

O'Connell v. Jarvis, 13 App. Div. 3, 43 N. Y. Supp. 129.

No liability was established against the defendant, Dr. Dunham, even if the liability of the other defendants, or either of them, was proved. He is not responsible for the negligence or wrongful conduct of them or of their employees in performing the work, because they stood to him in the relation, not of servants, but of independent contractors.

Berg v. Parsons, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957; *French v. Vis*, 2 Misc. 312, 21 N. Y. Supp. 1016, 143 N. Y. 90, 37 N. E. 612; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808; *Wyllie v. Palmer*, 137 N. Y. 257, 19 L. R. A. 285, 33 N. E. 381; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052; *Butler v. Townsend*, 126 N. Y. 105, 47 L. R. A.

26 N. E. 1017; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Hewamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Ketcham v. Newman*, 141 N. Y. 210, 24 L. R. A. 102, 36 N. E. 197; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

This principle of the nonliability of the employer for the negligent or wrongful act of his contractor or of the contractor's employees, in the performance of the contract work, applies to cases of injury from blasting.

Berg v. Parsons, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957; *French v. Vis*, 2 Misc. 312, 21 N. Y. Supp. 1016, 143 N. Y. 90, 37 N. E. 612; *Roemer v. Striker*, 142 N. Y. 136, 36 N. E. 808; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Kelly v. New York*, 11 N. Y. 432; *Pack v. New York*, 8 N. Y. 222.

Messrs. Francis L. Wellman and Sumner B. Stiles, for respondent:

Defendants were clearly liable for causing this direct injury and trespass upon the right of the plaintiff's intestate to pass along the public highway without being molested in her enjoyment of her lawful possession thereof for the purpose of traveling thereon.

Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; *Tremplin v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Jutte v. Hughes*, 67 N. Y. 267; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246.

The complaint was sufficiently broad in its allegations to admit of the evidence of trespass in the case at bar; and as no objection whatever was raised by the defendant upon the trial as to the form of the complaint, it is clear that no such point can be raised upon this appeal.

Hecla Powder Co. v. Sigua Iron Co. 157 N. Y. 437, 52 N. E. 650.

Vann, J., delivered the opinion of the court:

The main question presented by this appeal is whether one who, for a lawful purpose, and without negligence or want of skill, explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable for the injury thus inflicted. The statute authorizes the personal representative of a decedent to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." Code Civ. Proc. § 1902. It covers any action of trespass upon the person which the deceased could have maintained if she had survived the accident. Stated in another

form, therefore, the question before us is whether the defendants are liable as trespassers. This is not a new question, for it has been considered, directly or indirectly, so many times by this court that a reference to the earlier authorities is unnecessary. In the leading case upon the subject the defendant, in order to dig a canal authorized by its charter, necessarily blasted out rocks from its own land with gunpowder, and thus threw fragments against the plaintiff's house, which stood upon the adjoining premises. Although there was no proof of negligence or want of skill, the defendant was held liable for the injury sustained. All the judges concurred in the opinion of Gardiner, J., who said: "The defendants had the right to dig the canal; the plaintiff, the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants, in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property. The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury without regard to its extent or the motives of the aggressor. . . . He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279. This case was followed immediately by *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284,—a similar action against the same defendant,—which offered to show upon the trial "that the work was done in the best and most careful manner." It was held that the evidence was properly excluded, because the manner in which the defendant performed its work was of no consequence, as what it did to the plaintiff's injury was the sole question.

These were cases of trespass upon lands, while the case before us involves trespass upon the person of a human being, when she was where she had the same right to protection from injury as if she had been walking upon her own land. As the safety of the person is more sacred than the safety of prop-

erty, the cases cited should govern our decision, unless they are no longer the law. The *Hay Case* was revived by the commission of appeals in *Losee v. Buchanan*, 51 N. Y. 476, 479, 10 Am. Rep. 623, where it was held that one who without negligence, and with due care and skill, operates a steam boiler upon his own premises, is not liable to his neighbor for the damages caused by the explosion thereof. That was not a case of intentional, but of accidental, explosion. A tremendous force escaped, so to speak, from the owner, but was not voluntarily set free. The court, commenting upon the *Hay Case*, said: "It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land." The *Hay Case*, was expressly approved and made the basis of judgment in *St. Peter v. Dewison*, 58 N. Y. 416, 17 Am. Rep. 258, where a blast, set off by a contractor with the state in the enlargement of the Erie Canal, threw a piece of frozen earth against the plaintiff when he was at work upon the adjoining premises for the owner thereof. In holding the contractor liable, the court said: "Even if it should be conceded that the defendant had the right, from being a contractor with the state, to do all that which the state might do in the progress of the work, I do not think that this would justify him, in the state of facts which this case presents, in casting material upon the premises of a private owner, upon which the plaintiff was lawfully engaged. The state could not intrude upon the lawful possession of a citizen, save in accordance with law. Unless authorized by law so to do, the casting of a stone from the bed of the canal upon the land of an adjoining proprietor, either by the state or an individual, was a trespass." *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279. . . . Nor can the defendant protect himself from liability, for that his act of blasting out the rock with gunpowder was necessary; and hence that the effects of it upon the adjacent premises were an unavoidable result of a necessary act. The case of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279, shows that, unless there is a right to the use of the adjacent lands for the purposes of the work, it matters not that the mode adopted of carrying on the work was necessary. . . . It follows, then, that the defendant having no right to invade the premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or no he made his invasion without negligence. *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284; *Pinley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72."

This case is analogous to the one before us,

because the person injured did not own the land upon which he stood when struck, but he had a right to stand there, the same as the plaintiff's intestate had a right to walk in the highway. We see no distinction in principle between the two cases.

In *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498, 505, the defendant was held liable, without proof of negligence, for making an excavation upon his own land, through which, during a heavy rain, water found its way into the cellar of the adjoining owner, although the excavation was made under a license from the municipal authorities. Rapallo, J., speaking for all the judges, said: "The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 256, and *Jutte v. Hughes*, 67 N. Y. 267, in which it is held that where one is making improvements on his own premises, or, without lawful right, trespasses upon or injures his neighbor's property by casting material therein, he is liable absolutely for damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases."

When the injury is not direct, but consequential, such as is caused by concussion, which, by shaking the earth, injures property, there is no liability, in the absence of negligence. Thus, in *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328, a contractor with the United States government, in doing work required by his contract, injured property by concussion only, and without casting any material upon the premises of the plaintiff. It was held that there could be no recovery without proof of negligence. The second division of this court, in deciding that case, said: "This is not a case of taking private property, or of direct, but is of consequential, injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284, and *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258, and hence no going outside of the authority actually conferred and conferable as in those cases. . . . One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that if, in any given case, they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless." The facts were similar in *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 47 L. R. A.

N. E. 592, where it was "not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot." While it did not appear in what particular way the injury was produced, it was inferred "that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined." It was held that the charge of the trial judge, that "it made no difference whether the work was done carefully or negligently," was erroneous, and the judgment was reversed for that reason. All the judges concurred in saying: "We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.* that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights, the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. . . . The defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. . . . The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think the plaintiff has no legal ground of complaint."

The *Hay Case* has been repeatedly cited by this court, but has never been overruled or even criticised, so far as we have discovered. *Radcliff v. Brooklyn*, 4 N. Y. 195, 199, 53 Am. Dec. 357; *Pixley v. Clark*, 35 N. Y. 520, 523, 91 Am. Dec. 72; *Jutte v. Hughes*, 67 N. Y. 267, 273; *Heeg v. Licht*, 80 N. Y. 579, 583, 36 Am. Rep. 654; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 26, 9 L. R. A. 711, 25 N. E. 246. It has been several times distinguished from cases to which it clearly did not apply,—such as that class where the injury was not direct, but consequential, of which illustrations have already been given. It has also been distinguished (if that word may be used to point out differences between cases which rest upon wholly different principles) in that line of authorities which hold that where the work is not bound to produce injury, and is done

wholly by an independent contractor, with no control by the owner, the former only is liable. We cite as an example of this class *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267, where it was held that the defendant was not chargeable with the negligent acts of another in doing work upon his lands, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him. It is said in the prevailing opinion that "the case of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279, is not an authority, and has never been regarded as an authority, upon the questions involved in this case. It was there assumed that the persons who caused the injuries complained of were the agents and servants of the defendants, and the only question considered in the court of appeals was whether the defendants could be made liable without the proof of negligence. *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808; *French v. Via*, 143 N. Y. 90, 37 N. E. 612; and *Berg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957, —were of like character, and turned upon the liability of an independent contractor, as distinguished from that of the owner; and in some of them, also, the injuries were indirect and consequential, having been caused by concussion or vibration. *Driscoll v. Newark & R. Lime & Cement Co.* 37 N. Y. 637, 97 Am. Dec. 761, was tried and decided on the theory of negligence, and as the recovery was simply sustained on that ground, without considering the subject of trespass, which for some reason was kept out of the case, it has no bearing upon the question before us.

Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322, is also relied upon by the appellants. In that case the plaintiff's grantor had purchased a house standing over a mine, which, with the right to work it, had been reserved. It was held that the plaintiff could not enjoin his grantor from blasting in the mine at night, so as to disturb those sleeping in the house. The *Hay Case* was distinguished, because the plaintiff therein "had the right of undisturbed possession of his property," whereas in the *Marvin Case* his right was subject to that of the defendant to work its mine in the usual way, which was the sole use it could make of its property, and to which use the plaintiff, through his grantor, had expressly assented. When there is a conflict of rights, public policy requires one to give up the right of a particular use, rather than permit him by such use to destroy his neighbor's property altogether. In the case cited, however, the particular use was the only one possible, and the right to that use was imposed as "a serious servitude" upon the surface land which was all that belonged to the plaintiff. 47 L. R. A.

We think that the *Hay Case* has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the state upon the subject, it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure, by preventing such a use of one piece by one man as may injure all his neighbors. It makes human life safer, by tending to prevent a landowner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be. It so applies the maxim of '*sic utere tuo*' as to protect person and property from direct physical violence, which, although accidental, has the same effect as if it were intentional. It lessens the hardship by placing absolute liability upon the one who causes the injury. The accident in question was a misfortune to the defendants, but it was a greater misfortune to the young woman who was killed. The safety of travelers upon the public highway is more important to the state than the improvement of one piece of property by a special method is to its owner. As was said by the supreme court of Indiana, in following the *Hay Case*: "The public travel must not be endangered to accommodate the private rights of an individual." *Wright v. Compton*, 53 Ind. 337. We think the courts below were right in holding the defendants liable as trespassers, regardless of the care they may have used in doing the work. Their action was a direct invasion of the rights of the person injured, who was lawfully in a public highway, which was a safe place until they made it otherwise by throwing into it the section of a tree.

We find no reversible error in the record before us. While the complaint suggests negligence as the gravamen of the action, it was tried upon the theory of trespass, and no ruling was made or exception taken which raised any question as to the scope of the pleadings, or suggested the propriety of a motion for leave to amend. We can consider no objection unless it was taken upon the trial and saved by an exception. *Hecla Powder Co. v. Sigua Iron Co.* 157 N. Y. 437, 52 N. E. 650. Moreover, if every allegation relating to negligence were struck from the complaint, it would still set forth a cause of action in trespass. The question whether the defendants Dinkel & Jewell were independent contractors was settled by the jury, and, after unanimous affirmance by the appellate division, is beyond our power of review. *Szuchy v. Hillside Coal & Iron Co.* 160 N. Y. 219, 44 N. E. 974. There is no exception relating to the admission of evidence, or to the charge of the court, which requires a reversal.

The judgment is right, and should be affirmed, with costs.

All concur, except Gray, J., not voting.

Re Judicial Settlement, etc., of Harriet RUTLEDGE, Exrx., etc., of Walter Heard, Deceased.

(.....N. Y.....)

A discretion in the surrogate to withhold commissions from an executor who has not given proper attention to his duties is not denied by Code Civ. Proc. § 2730, providing that on settlement of the executor's account the surrogate "must allow to him" certain commissions for his services.

(*Parker, Ch. J., and Martin and Werner, JJ., dissent.*)

(February 27, 1900.)

A PPEAL by the executrix and others from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming a decree of the Surrogate's Court for Orleans County which among other things disallowed a claim of the executrix to commissions alleged to have been earned in the settlement of the estate. *Affirmed.*

The facts are stated in the opinions.

Mr. Henry M. Field, for appellant Rutledge:

The surrogate erred in refusing to credit executrix with her legal commissions as fixed by § 2730 of the Code of Civil Procedure.

The section *supra* gives the surrogate no discretion, but is mandatory.

Cook v. Lowry, 95 N. Y. 103.

When an executor has faithfully endeavored to execute a trust it is inequitable to deprive him of his commissions, and the surrogate has no power to disallow them.

It was just as much her duty to resist unlawful claims against the estate as to collect the assets.

The contestant's claim was reduced nearly one half by the defense made.

Story, Eq. Jur. § 1272; Roosevelt v. Roosevelt, 6 Abb. N. C. 447.

Messrs. Wynkoop & Rice also for appellants.

Mr. John Gillette for respondent.

Gray, J., delivered the opinion of the court:

Upon the accounting of this executrix, objections were filed and a hearing had before the surrogate, who rendered his decision, with findings of fact and conclusions of law, upon which a final decree of the surrogate's court for the county of Ontario was duly entered, which judicially stated and settled the account. Upon appeal the decision was unanimously affirmed by the appellate division, in the fourth department, and appeals were taken by the executrix, and by other parties interested in the estate and in its distribution, to this court.

I think no error has been presented which, in view of the unanimous affirmance of the

decree of the surrogate's court, would warrant a reversal of the order, and that it should be affirmed. The only question demanding any consideration by this court arises upon the exception of the executrix to the surrogate's conclusion that she was not entitled to commissions. There had been the finding of fact that she "did not give proper personal attention to the estate she had in charge, but delegated to her counsel duties which were imposed upon her as such executrix, knowing that he represented conflicting interests." The question is whether a surrogate has the power to withhold commissions upon the facts of the case, or whether he is without discretion in the matter, and must in all cases allow commissions at the rate fixed by the statute. It may be that this question is still open to us, but I do not think that it can be said that the question of the right to deny commissions was not deliberately passed upon in *Stevens v. Melcher*, 152 N. Y. 583, 46 N. E. 965. The point was distinctly made by counsel in that case that "the general term erred in affirming the judgment of the special term and referee in refusing to allow commissions to Mrs. Stevens." Mrs. Stevens was the executrix whose commissions were in question, and it was claimed, in answer to the appellants' point, that, under the facts found by the referee, his conclusion, as matter of law, that Mrs. Stevens was not entitled to commissions, necessarily followed. The controversy with respect to commissions was discussed in the opinion, which, after referring to the facts which the referee had found relative to the manner in which Mrs. Stevens had discharged her duties as executrix, held that upon the findings the conclusion of the referee should be sustained. In *Wheelwright v. Rhoades*, 28 Hun, 57, which related to the settlement of the accounts of executors, it was said by Davis, P. J., delivering the opinion of the general term, in the first department, that "it is in the power of the surrogate or court to deny all commissions where there has been misconduct on the part of executors, resulting in losses to the estate greater than the lawful compensation. And executors may be personally charged with losses and injuries prejudicial to their trust, and denied commissions altogether, in the sound discretion of the court, in cases deserving great severity of censure." In *Re Curtiss*, 9 App. Div. 235, 37 N. Y. Supp. 586, 41 N. Y. Supp. 1111, the appellate division, in the second department, affirmed a decree of the surrogate upon his opinion. Surrogate Silkman, in that opinion, used this language: "Under the provisions of the Code as they exist, there is no power to deny such commissions, except for misconduct on the part of the executor or trustee." In *Re Harnett*, 15 N. Y. S. R. 725, Surrogate Ransom held that the administratrix should be denied commissions because she had been grossly delinquent in her administration of the estate.

It is sought to make a distinction between what a court of equity may do and what the surrogate's court (being one of limited jurisdic-

NOTE.—As to the right of executors to commissions, see also *Re Crawford* (N. Y.) 5 L. R. A. 71, and *note*; *Re Ricker* (Mont.) 29 L. R. A. 622; and *Garesche v. Levering Investment Co.* (Mo.) 46 L. R. A. 232.

diction) may do, with respect to executor's commissions. It is said that while a court of equity, with its general powers and jurisdiction, might withhold commissions, in its discretion, a surrogate's court, for the lack of those powers, is under the strict mandate of the statute. The provision of the statute, which is found in § 2730 of the Code, reads: "On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services," etc., and it is argued that in that language there is no room for the suggestion that anything is left to the discretion of the surrogate. I do not feel so confident, however, that the language requires of us that we read it with such strictness. Is there not an implication that services must have been rendered, and, further, that the services must have been beneficial to the estate? If no services were rendered, and the executor or administrator was delinquent in that respect, or if the services were such as were prejudicial to the just and lawful administration of the estate, then were there such services rendered to the estate, for which the surrogate must allow commissions? I doubt it, and I doubt if there be any good reason for our making the distinction which is contended for. I cannot think that, where the authority for commissions to an executor or administrator depends upon one statutory provision, they may be denied if the accounting happens to be in a court of equity, and must under all circumstances be allowed if the accounting happens to be in the surrogate's court. I am of the opinion that the language of the statute is not necessarily exclusive of all discretion in the surrogate, and that its exercise should be left to him upon the facts, in the review of which by the appellate division ample opportunity for correction is afforded. I do not know that there is any public policy involved in this matter, and yet it seems to me that a better policy is subserved by making the allowance of commissions to executors and administrators to depend upon the faithful rendition of services by them, and by giving such a construction to the section of the Code in question as will vest some discretion in the surrogate upon the subject.

The order appealed from should be affirmed, with costs to all parties appearing in this court by counsel and filing briefs, payable out of the estate.

Bartlett, Vann, and Cullen, JJ., concur:

Parker, Ch. J., dissenting:

I dissent from so much of the decision declared by the majority of my associates in this case as affirms the order of the surrogate refusing commissions to the executrix, Harriet Rutledge. As to the other questions, I agree that they are put beyond our reach by the unanimous decision of the appellate division, by which the findings of fact of the surrogate are made conclusive.

The executrix in this case is a woman without much business experience, and she suddenly found herself placed, by the will of

her brother, in charge of an insolvent estate; the situation being complicated by the fact that the testator had received funds as trustee, and had commingled these funds with his own in the matter of making investments. It was impossible in some instances to trace the trust funds into securities found in his possession, and, to advise and aid her in the execution of the trust, she employed an attorney, who seems to have made some serious mistakes,—mistakes for which the surrogate has held the executrix responsible. Not content with that, he concluded further to punish her for having reposed too much confidence in her attorney by imposing upon her a fine in the amount of her commissions. This he had no power to do. The statute fixes the compensation to be allowed by the surrogate to executors and administrators absolutely. It confers no discretion whatever upon that officer, who can neither add to nor take from the amount fixed by the statute. Whether the services performed be little or much, matters not, for the statute declares the basis upon which such amount shall be computed. If the legislature had intended that the surrogates of the state should be vested with the authority to grant or withhold commissions in their discretion, it would have said so, but it did not vest surrogates with any discretion whatever in that direction; and that its action was wise, experience teaches, and this case illustrates. But whether it was wise or otherwise is of no consequence, for the power was vested in the legislature alone to determine whether commissions should be allowed, and upon what basis, and, having allowed commissions in this class of cases, its action is conclusive upon the surrogates of this state.

Our attention has been called to some authorities which, it is suggested, show that this court has held that a surrogate can withhold commissions from an executor or administrator as a punishment for negligent conduct. Those authorities hold no such thing, as I shall point out later; but, if they did, it would be the duty of this court to disregard them, for it is the statute, not the decisions, which constitutes the law of this state upon that subject.

Turning to the provisions of the statute, which may now be found in § 2730 of the Code, we read: "On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses: For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one half per centum. For all sums above eleven thousand dollars at the rate of one per centum." There is no room for the suggestion that in the language quoted above there is anything left to the discretion of the surrogate. He is commanded to allow

the commissions. If the executor squanders any part of the estate, the surrogate must charge him with the diminution; if he loses a part of it through negligence, the surrogate must charge him with the loss; if he commingles the funds with his own, the surrogate may charge him with interest computed with annual rests, so that the estate may be fully protected. But the surrogate cannot do more. He cannot impose fines and penalties because, in his judgment, the conduct of an executor or administrator merits it. The legislature took away from him all opportunity for doing so by its command that he "must" allow commissions at a fixed rate. Now, it is true that there have been a few instances where, in defiance of the statute, commissions to which an executor or administrator were entitled have been disallowed by surrogates who doubtless thought they had the power so to do. But, whatever may have been decided in surrogate's court, there are no decisions in this court holding that a surrogate possesses the power to withhold the commissions of an executor or administrator, either because he thinks the services were not worth the amount fixed by the statute, or because the executor was advised wrongly by his attorney.

My attention has been called to several cases in this court in which the question of commissions of trustees has received consideration, namely, *Cook v. Lowry*, 95 N. Y. 103; *Laytin v. Davidson*, 95 N. Y. 263; *Re Allen*, 96 N. Y. 327; and *Stevens v. Melcher*, 152 N. Y. 551, 40 N. E. 965. Every one of those cases presented the question whether commissions should be allowed to trustees, and in each of them the original decree was not by a surrogate, but by the supreme court on its equity side. In *Laytin's Case* appellant's counsel contended that the statute did authorize the fixing of the rate of compensation of testamentary trustees, and it was said in the opinion that the executors had had a final accounting, and been discharged as such, and that the fund had been exclusively a trust fund under the will, and it was held that the court had jurisdiction to award commissions to testamentary trustees; thus concurring in an opinion on that subject to be found in *Re Roosevelt*, 5 Redf. 601. *Cook v. Lowry* was an action for the construction of a will, and for an accounting of the trustee appointed after the discharge of the executors; and, as he had put the *cestui que trust* to great trouble in determining his rights, the trial court held that the trustee's commissions could be withheld, and that decision was affirmed in this court. *Re Allen* did not involve that question at all. There the testamentary trustee applied to the supreme court to be released from the trust, and the court concluded not to award him compensation, as if he had performed the trust to the end, but, instead, ordered fixed a sum of money which it determined to be reasonable in view of the labor performed; and that order was affirmed in this court, it being held that compensation could not be claimed as of course, because

that rule applies only where the trust created has been fully executed; that the petitioner applied for his discharge, and, it being tendered him, if he saw fit to accept it he had to do so upon the terms and conditions imposed by the court, one of which was that he should accept a certain sum of money in lieu of fees. *Stevens v. Melcher* was an action for an accounting, and presented many questions, one of which was whether the trustee, against whom findings of serious misconduct had been made on the trial, might be disallowed commissions in accordance with the conclusion of the trial court, based upon such findings, and it was decided that they might be withheld.

As I have already said, in not one of these cases was the statute to which I have referred considered. That statute refers to the commissions of executors and administrators only, and governs this case, while in the cases considered *supra* the question related to the compensation of testamentary trustees, for which § 2730 of the Code does not provide. By chapter 115 of the Laws of 1866, trustees were authorized to have their accounts as such trustees finally settled before the surrogate; the act providing a practice the same as where an account is rendered by an executor or administrator, including an appeal from the decree of a surrogate; and it also provides that the surrogate shall allow to the trustee or trustees the same compensation for his or their services, by the way of commissions, as is allowed by law to executors and administrators. Prior to that time testamentary trustees were liable to account to a court of equity in the case of a trust expressly created by any last will or testament. 2 Rev. Stat. p. 94, § 66. It was this section that was amended by chapter 115, Laws 1866. As there was no statute commanding courts of equity to allow any compensation whatever to testamentary trustees, that court was not accustomed to allow any compensation down to the enactment of the act of April, 1817, declaring it to be lawful for the court of chancery to make a reasonable allowance to executors, administrators, and guardians. Prior to that time executors and administrators, like other trustees, were not allowed anything for their services. The first case after the passage of the act of 1817 was *Re Roberts*, 3 Johns. Ch. 43, in which Chancellor Kent considered the case of a committee of a lunatic as coming within the equity of the statute of 1817, and fixed his compensation. Later, in *Meacham v. Starnes*, 9 Paige, 398, which was a case in which the court was asked to fix the compensation for trustees where the deed creating the trust contained no provision as to their compensation, the chancellor said: "The question, therefore, appears to be presented for the decision of the court, whether such a trustee is entitled to compensation for his services, within the equity of the act of April, 1817, and of the provisions of the Revised Statutes as to the allowances to be made to executors, etc. . . . It may therefore be considered the settled rule, so far as the decision of this

court can settle it, that in all cases of trusts of this description, and all other express trusts of a similar nature, where nothing is said in the deed or instrument creating the trust on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance, that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, and to be computed in the same manner. In other words, the court will consider the statutory allowance to executors, administrators, and guardians as the compensation tacitly understood and agreed on by the parties to all trusts of a similar nature, where nothing appears to show a different agreement or understanding on the subject of compensation." As the court was not hampered by statute in that regard, it allowed compensation as a matter of justice, but when it came to a case where the trustee had neglected to perform his duty it withheld compensation. When the legislature came to enact chapter 115 of the Laws of 1866, it recognized this jurisdiction of equity, and did not interfere with the rate of compensation to be allowed by that court in cases where accountings of trustees should be had before it, but simply authorized trustees to account before the surrogate, and commanded the surrogate to allow the same rate of compensation as by statute was allowed to executors and administrators. As originally enacted, the Revised Statutes of 1828 provided that on the settlement of executors or administrators "the surrogate shall allow to them for their services," etc. (2 Rev. Stat. p. 93, § 58),—since that time for "shall" has been substituted "must," a word which, to say the least, does not tend to detract from the forcefulness of the command of the statute,—and shortly thereafter, in the year 1836, a decree of the surrogate of the county of New York came up for review before the chancellor. One of the questions presented was whether the surrogate had the right to withhold the commissions of an administrator because of his gross misconduct of the administration of the intestate's estate. The chancellor said: "The surrogate takes no power by implication, and the direction of the statute is positive that, upon the settlement of the account of executors and administrators in a proceeding before him, the surrogate shall allow them certain specified commissions for their services, over and above their expenses, except in those cases where a specific compensation for such services is allowed by the will of the decedent. 2 Rev. Stat. 93. The appellant therefore had the same right to be credited his legal commissions for receiving and paying out the moneys of the estate as he had to be credited for moneys paid by him for debts and funeral expenses." *Halsey v. Van Amringe*, 6 Paige, 16. In *Dakin v. Demming*, 6 Paige, 95, the chancellor had before him the same question on an appeal from the de-

47 L. R. A.

creed of the surrogate of the county of Oneida, and he said: "Indeed, the statute under which the surrogate supposed he was proceeding to take this account is imperative that he shall allow the personal representatives such commissions, and this court has recently decided that the surrogate has no discretion on the subject;" citing *Halsey v. Van Amringe*, 6 Paige, 12.

The statutes and cases cited together disclose that prior to 1817 executors, administrators, and trustees were not compensated for their services. The act of April 15, 1817, did not fix the rate, or direct the allowance, of compensation. Instead, it declared that it should be lawful for the court of chancery, in the settlement of the accounts of guardians, executors, or administrators, to make a reasonable allowance to them for their services. The chancellor settled the rate of allowance in *Re Roberts*, 3 Johns. Ch. 43, and in the same month a general rule, adopting the basis of the *Roberts Case* for allowances, was passed for all cases. From that date to this the legislature has not attempted to interfere with the practice of courts of equity in such cases, and we need not go far afield to find the reason for it. But, as we are considering the effect of a statute, we pass that by, and note that upon the enactment of the Revised Statutes in 1828 the legislature commanded the surrogates to allow a certain rate of compensation to executors and administrators. It did not provide for the compensation of executors and administrators generally, which would have included accountings in a court of chancery as well as before the surrogate, but the direction was to the surrogate; thus again manifesting the legislative policy to be one of noninterference with the jurisdiction of chancery under that head. The court of chancery continued to exercise exclusive jurisdiction as to the accounts of trustees of express trusts until 1866, during all of which time it was accustomed to compensate trustees on the same basis as executors and administrators, although it occasionally withheld compensation for misconduct. It is noticeable that the act of 1866 (chap. 115), following consistently all previous legislation upon the subject, did not attempt to provide a rate of compensation to testamentary trustees generally, which would have included such accountings in a court of equity, but it commanded the surrogate that, in accountings of testamentary trustees before him, he should allow to them compensation the same as allowed to executors and administrators.

Enough has already been said to make it clear that the persistent insistence that the decisions to which I have referred require this court now to hold that the statute directing surrogates to allow commissions is to be followed, or not, in the discretion of the surrogate, is wholly without foundation; and therefore those decisions do not embarrass this court in giving to the statute that construction which was given to it almost immediately upon its enactment,—a construction required by every rule of stat-

utory construction applicable, and one which does not permit the surrogate's court to set at naught the command of its creator, the legislature, that it "must allow" to an executor or administrator the compensation provided in § 2730.

Martin and Werner, JJ., concur.

Leonard HOWARTH, Receiver of Traders' Bank of Tacoma, *Respt.*,

v.

Charles E. ANGLE, *Appt.*

(.....N. Y.....)

1. Stockholders of a corporation need not be before the court to be bound by a decree appointing a receiver for the corporation and giving him authority to sue for assets, so far as the question of title to the assets is concerned.
2. The statutory liability of a stockholder in a foreign corporation for an unpaid deficiency of assets, which he assumes by the act of becoming a member of the corporation through the purchase of stock, is in fact a contractual liability springing from an implied promise, and, if the statute does not prescribe any remedy, it may be enforced in the state where he resides.
3. A stockholder in a foreign corporation may, when sued by a receiver appointed at the domicile of the corporation to compel contribution to corporate liabilities as provided by the statutes of such domicile, controvert all the essential facts,—such as insolvency, amount of deficiency, and the like,—whether they are established by the judgment appointing the receiver, or not.
4. A receiver of a foreign corporation, who, by the law of the state in which he is appointed, has title to the right of action against stockholders to enforce their statutory liability, may be allowed by comity to enforce such liability in another state where a stockholder resides, when the amount of his liability has been definitely ascertained and is only his proportion of the ascertained deficiency of assets, and it does not appear that there is any other stockholder or any creditor of the corporation in that state, or that injury will be thereby done to any citizen of the state, or any established policy of the state thereby interfered with.
5. The recovery of judgment against a corporation, and the return of execution unsatisfied, as a condition of the maintenance of an action against a stockholder in a domestic corporation, are not necessary before suit by a receiver against a stockholder of a foreign corporation, which is permitted in the exercise of comity, since in such

case service of process in the state could not be had against the corporation.

(February 27, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in favor of plaintiff in an action brought to enforce the statutory liability of a stockholder in a foreign corporation. *Affirmed.*

Statement by Vann, J.:

This action was brought by the plaintiff, as receiver of an insolvent bank in the state of Washington, to recover the equal and ratable proportion of an alleged deficiency claimed to be due from the defendant on account of his ownership of sixty-five shares of the capital stock of said bank. Upon the trial the following facts, among others, were found by the court:

The bank in question, incorporated under the laws of the territory (now state) of Washington, became insolvent in May, 1894, and on the 19th of that month the plaintiff was duly appointed receiver thereof, "and of all its property and assets, real and personal, of whatsoever nature," by a court of general jurisdiction in that state; but the defendant was not a party to the action. The bank had a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each, and prior to the appointment of the plaintiff as receiver, as well as ever since, the defendant owned sixty-five shares. From the organization of said bank the statutes of Washington have provided that the stockholders of every bank incorporated thereunder "should be held individually responsible, equally and ratably, and not one for the other, for all the contracts, debts, and engagements of the bank accruing while they remain such stockholders, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." They further provide for the appointment of a receiver by the superior court whenever a corporation becomes insolvent, with "power, under control of the court, to bring and defend actions, take and keep possession of property, receive rents, collect notes, and generally to do such acts, respecting the property in his hands, as the court should authorize." Said statutes have received judicial construction in the highest court of said state, which established the law "that a receiver of an insolvent corporation, appointed under and in accordance with said laws, and under circum-

NOTE.—As to the enforceability of a stockholder's liability outside of the jurisdiction in which the corporation was created, see note to *Cushing v. Perot* (Pa.) 84 L. R. A. 737, and the later cases of *Ferguson v. Sherman* (Cal.) 87 L. R. A. 622; *Hancock Nat. Bank v. Ellis* (Mass.) 42 L. R. A. 396; *Bell v. Farwell* (Ill.) 42 L. R. A. 804; *Stoddard v. Lum* (N. Y.) 45 L. R. A. 551; and *Crippen, L. & Co. v. Loughton* (N. H.) 46 L. R. A. 467; as well as the recent decisions of the United States Supreme Court in *Whitman v. National Bank*, 176 U. S. 559, 44 47 L. R. A.

L. ed. —, *Adv. S. U. S.* 477, 20 Sup. Ct. Rep. 477, holding that a statutory liability of a stockholder can be enforced in any court of competent jurisdiction, and in *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. —, *Adv. S. U. S.* 506, 20 Sup. Ct. Rep. 506, holding that a judgment against a corporation which by the laws of the state is binding on stockholders must be given the same effect against them in other states that it is entitled to in the state where it was rendered, and is subject to no defenses which could not be set up in that state

stances similar to those under which plaintiff was appointed receiver, as aforesaid, became and was a receiver for all of the creditors of the respective corporation or association of which he was so appointed receiver, and a quasi-assignee, and invested with the title to all rights of action possessed by his principals; and was entitled to bring and defend, in his own name, as such receiver, any and all actions involving the property, funds, and effects in his hands as receiver, or concerning the persons represented by him, including the creditors of such corporations. . . . That the liability of the stockholders of a banking corporation organized under the provisions of the laws of the said state as above quoted was a contingent and secondary liability, to be enforced after all other assets of said bank had been exhausted, and was provided for the benefit of all creditors of said bank, and became a part of and added to the funds and property of such bank in the possession of the receiver thereof, and the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of such creditors; and that such trust funds, including said contingent and secondary liability of the stockholders of such bank, were all assets in the hands of such receiver, and should be adjusted in receivership proceedings; and that such receiver had the right, under the direction of the court, to enforce the said contingent and secondary liabilities and every liability of whatsoever nature which the court might find necessary in order to pay the amount owing to the creditors; and that the receiver of such corporation, and not the individual creditors themselves, was and is the proper person to sue upon and enforce the said liabilities against the stockholders of such insolvent banking corporation."

The trial court further found as follows: "Tenth. That at the time the defendant became the owner and holder of sixty-five shares of stock in the said bank, as aforesaid, the provisions of the laws of the state of Washington, as stated above, as interpreted by the courts of that state, were in full force, and became a part of the said defendant's contract of purchase and ownership of said shares of stock; and said defendant, in and by his purchase and ownership and holding of said sixty-five shares of stock of said bank as aforesaid, contracted and agreed for a valuable consideration that he would be and remain individually responsible, equally and ratably with the other stockholders of said bank, for all contracts, debts, and engagements of said bank accruing while he remained such stockholder, to the extent of the amount of his stock therein at the par value thereof, to wit, to the amount of \$6,500 in addition to the amount invested in said shares; and that it is provided by the laws of the said state of Washington that an action to enforce said liability or any liability under the said contract and obligation is transitory, and may be brought by a receiver as aforesaid in any court of general jurisdiction in any state where personal service can be made upon said stockholder.

47 L. R. A.

Eleventh. That, while the said defendant remained a stockholder of said Traders' Bank of Tacoma, and the owner of sixty-five shares of its stock of the par value of \$100 each, as aforesaid, certain contracts, debts, engagements, and obligations duly accrued against said Traders' Bank of Tacoma, upon which, after exhausting and applying the proceeds of all property and assets of said bank of whatsoever nature, there still remains due and owing the sum of \$131,670.40, and that the equal and ratable proportion of the said deficiency due from said defendant on account of the sixty-five shares of the capital stock of said bank owned by him as aforesaid, and on account of the contract and agreement entered into by him at the time of his purchase and ownership as aforesaid, and in accordance with the provisions of the statutes and laws of the state of Washington, is the sum of \$1,712.10.

Twelfth. That prior to the commencement of this action, and prior to the making of the assessment hereinafter referred to, plaintiff, as receiver of the Traders' Bank of Tacoma, as aforesaid, and acting under orders of the said superior court of the state of Washington for the county of Pierce, had duly and regularly collected in and sold and disposed of all property and assets of said Traders' Bank of Tacoma, real, personal, and mixed, and of whatsoever kind and nature, except the said contingent or secondary liability against the stockholders of said bank, and had distributed the money so collected and the proceeds so realized to the several creditors of the said Traders' Bank of Tacoma entitled thereto, as was duly found and ordered by the said superior court last above named; and that, after so selling and disposing of all of the assets of said bank, and on or about the 17th day of March, 1897, upon a full report and showing to said superior court last above named, and upon full proof of the facts above stated and of the condition of said bank, an order and judgment of said superior court was duly made and entered in said cause No. 11,673 by said superior court of the state of Washington for the county of Pierce, adjusting all the affairs of said receivership and the liabilities of the stockholders of said bank, and finding and adjudging the aggregate amount of the several deficiencies upon the several contracts, debts, and engagements which had accrued against said bank prior thereto to be the sum of \$131,670.40; and further ordering, directing, and adjudging that plaintiff, as receiver as aforesaid, at once levy an assessment upon the several stockholders of said bank equal to 26.34 per cent of the par value of the stock of said bank, which was by said judgment found to be an assessment sufficient and necessary to make up the full amount of said deficiency, and which said judgment directed that said assessment be paid forthwith to said plaintiff, as such receiver, at Tacoma, Pierce county, Washington, in cash, on or before the 24th day of April, 1897; and which said judgment further ordered and directed said plaintiff, as such receiver, to forthwith give notice to

and make demand upon the several stockholders of said bank for the amount of the respective assessments upon them on account of their several proportions of the capital stock of said bank, and authorized and directed him, said plaintiff, as such receiver, to proceed forthwith by suit brought in his own name as such receiver against all stockholders, if any, who refused to pay their respective portions of such assessment, or any portion thereof, according to the said terms and demands. . . . The receiver thereupon levied an assessment on the several stockholders of the bank, in accordance with said judgment, of 26.34 per cent upon the par value of said stock. Before the commencement of this action he gave notice of such assessment to the defendant, as one of said stockholders, and demanded payment of his proportionate amount of the assessment and deficiency, amounting to \$1,712.10. Upon the refusal of the defendant to pay said sum, this action was brought for the recovery thereof, and the trial judge directed a judgment in favor of the plaintiff for the amount, with interest and costs. That judgment was unanimously affirmed by the appellate division, and the defendant now comes here.

Mr. Horace McGuire, for appellant:

Under the rule of interstate comity, the plaintiff should not be permitted to collect this assessment or enforce this liability against a citizen of this state in this action, or upon the facts alleged in his complaint.

If any remedy can be had against stockholders of foreign corporations it is well established that the procedure in such cases, as in others, must be according to the law of the forum.

Drinkwater v. Portland Marine R. Co. 18 Me. 35; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419; *Leucke v. Tredway*, 45 Mo. App. 507; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Lowry v. Inman*, 46 N. Y. 119.

In the state of New York the double liability is not property which passes to the receiver, but is the property of the creditor.

Farnsworth v. Wood, 91 N. Y. 308.

The right of action, if any, according to the law of this forum was in a creditor of the corporation, and the right of action cannot be removed from a creditor to a receiver by an act of the legislature.

The act of 1897 can only apply to such receivers within the state of New York as were appointed after the amendment of 1897.

Therefore the amendment of 1897 should not be considered in the discussion of this case.

All of the other provisions of the statute apply, and must be complied with.

Hirshfeld v. Fitzgerald, 157 N. Y. 185, 46 L. R. A. 839; *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817; *National Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338; *Tucker v. Gilman*, 45 Hun. 193, Affirmed in 121 N. Y. 189, 24 N. E. 302; *Lowry v. Inman*, 46 N. Y. 119.

47 L. R. A.

The interpretation of the Washington statute by its highest court is that an action cannot be maintained against one stockholder alone, but must be a suit in equity against all stockholders where the rights of all may be adjusted.

Wilson v. Book, 13 Wash. 676, 43 Pac. 939; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

The tendency of the decisions in the various state courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in foreign corporations under the statutes of a foreign state.

Bank of North America v. Rindge, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Dearing v. McKinnon Dash & Hardware Co.* 33 App. Div. 40, 53 N. Y. Supp. 513.

The words of the Washington law, "liable for all contracts and engagements," should receive the same interpretation in this forum as like words in our state Constitution,—that the liability is to the person or corporation holding such contract or engagements.

Mr. P. M. French, for respondent:

The plaintiff, who is a statutory receiver appointed by the superior court of Pierce county, in the state of Washington, can maintain this action, and it is properly brought in his name.

Plaintiff is called a receiver, but he is in fact a quasi-assignee.

The liability of stockholders under the Constitution and laws of Washington, as decided by its court of last resort, is an asset which can be reached and distributed only in this manner.

Wilson v. Book, 13 Wash. 676, 43 Pac. 939; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138.

Actions of this kind have been frequently allowed, especially where it appears that the funds sought are properly part of the fund which the foreign court is attempting to administer and properly distribute among the creditors of the corporation, and the good of the greatest number demands it.

Alderson's Beach, Receivers, 730, § 685; *Schultz v. Phenix Ins. Co.* 77 Fed. Rep. 375, Affirmed in 42 U. S. App. 483, 80 Fed. Rep. 337, 25 C. C. A. 453; *Avery v. Boston Safe-Deposit & T. Co.* 72 Fed. Rep. 700; *Failey v. Talbee*, 55 Fed. Rep. 892; *Sheafe v. Larimer*, 79 Fed. Rep. 921; *Howarth v. Ellwanger*, 86 Fed. Rep. 54.

Even if the legal title to the cause of action be not in the receiver, the property is certainly in *custodia legis*, and the title is in the court to such an extent that it could authorize the receiver to use his own name in bringing actions.

Alderson's Beach, Receivers, 1897, pp. 728-747, §§ 683-697.

The action given to enforce the liability of stockholders was intended to be a transitory action of such a nature that it might be brought in any court of general jurisdiction over similar actions, in any state or country where service according to the laws of

that state or country could be made upon a stockholder.

Hancock Nat. Bank v. Ellis, 166 Mass. 414, 44 N. E. 349, 51 N. E. 207; *Cushing v. Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Patterson v. Stewart*, 41 Minn. 84, 4 L. R. A. 745, 42 N. W. 926; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Dyer v. Power*, 39 N. Y. S. R. 136, 14 N. Y. Supp. 873; *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254; *Wilkinson v. Rutherford*, 49 N. J. L. 241, 8 Atl. 507; *Gluck & B. Receivers*, 11, 179, 189; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 131.

The liability imposed upon the defendant as a stockholder of the Tacoma Bank by the Constitution and statutes of Washington is contractual, therefore transitory, and can be maintained in any jurisdiction where defendant can be found.

Beach, Priv. Corp. § 148; *Rorer, Interstate Law*, 384; *Morawetz, Priv. Corp.* 2d ed. § 875; *Cook, Stock & Stockholders*, 2d ed. § 223; *Whitman v. National Bank*, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404; *Sheafe v. Larimer*, 79 Fed. Rep. 921; *United States v. Knao*, 102 U. S. 422, 26 L. ed. 216; *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; *Robinson v. Turrentine*, 59 Fed. Rep. 554; *Richmond v. Irons*, 121 U. S. 55, 30 L. ed. 873, 7 Sup. Ct. Rep. 788; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Bailey v. Sawyer*, 4 Dill. 463, Fed. Cas. No. 744; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Cole v. Satsop R. Co.* 9 Wash. 487, 37 Pac. 700; *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Waterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041.

This liability is in no sense penal or in the nature of a penalty.

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Huntington v. At-trill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419.

The statutory liability of a stockholder in a corporation can be enforced outside of the state where the corporation was organized.

Guykendall v. Miles, 10 Fed. Rep. 342; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *McVickar v. Jones*, 70 Fed. Rep. 754; *Rhodes v. United States Nat. Bank*, 24 U. S. App. 607, 66 Fed. Rep. 512, 13 C. C. A. 612, 34 L. R. A. 742; *National Bank v. Whitman*, 76 Fed. Rep. 697; *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. Rep. 951, 82 Fed. Rep. 269; *Rhode Island Mortg. & T. Co. v. Moulton*, 82 Fed. Rep. 979; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023; *Guernsey v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Howarth v. Ellwanger*, 86 Fed. Rep. 54.

The decree of assessment granted by the superior court of Pierce county, Washington, March 17, 1897, not being directly attacked and set aside by appropriate judicial proceedings, is conclusive evidence of the necessity for making such assessments, and binds the defendant in this action.
47 L. R. A.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914.

As against creditors, there is no difference between unpaid stock and any other assets which may form a part of the property and effects of the corporation.

Morgan County v. Allen, 103 U. S. 498, 26 L. ed. 498; *Glenn v. McAllister*, 46 Fed. Rep. 883; *Glenn v. Liggett*, 47 Fed. Rep. 472; *Bennett v. Glenn*, 55 Fed. Rep. 957; *Glenn v. Williams*, 60 Md. 93; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Parker v. Stoughton Mill Co.* 91 Wis. 174, 64 N. W. 751.

As to the stockholders, the liability is fixed and determined by the decree fixing the per cent, and by the Constitution and laws of Washington as interpreted by the decisions of its courts.

Cushing v. Perot, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 170, 34 L. R. A. 694, 66 N. W. 1095; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023.

The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always in comity be enforced, if not against the public policy or the laws of the former.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Dayton v. Borst*, 31 N. Y. 435; *Re Waite*, 99 N. Y. 433, 2 N. E. 440; *Phelps v. Borland*, 103 N. Y. 409, 57 Am. Rep. 755, 9 N. E. 307; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 47, 25 N. E. 198; *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388.

VANN, J., delivered the opinion of the court:

The appeal book contains but three exceptions, two of which relate to findings of fact, and cannot be here considered, because the affirmance was unanimous. The third relates to the conclusion of law, and hence the sole question presented is whether the facts found authorize the judgment directed. None of the evidence is returned, except certain extracts from the Constitution and statutes of Washington, and an abstract of the testimony of a lawyer practising in that state, relating to the construction placed by its highest court upon them. The findings show that the judgment of the trial court is not founded simply upon the judgment of the Washington court appointing a receiver, and the assessment made pursuant thereto, for the organization and insolvency of the Tacoma bank, the amount of the deficiency, and defendant's proportion thereof, are found as independent facts, which are presumed, from the state of the record before us, to have been established by common-law evidence. The defendant's liability and the amount thereof do not depend upon the Washington judgment, the only necessary function of which, in this action, was to establish the title of the plaintiff and his right

to sue. While the plaintiff is called a receiver, the name does not measure his power, for he represents all the creditors and stockholders of the insolvent corporation, and is authorized to maintain such actions as are necessary to recover the assets, among which is included the cause of action set forth in the complaint. He is not a mere custodian, but "a quasi-assignee, . . . invested with the title to all rights of action possessed by his principals," and entitled to bring "any and all actions involving the property, funds, and effects in his hands as receiver, or concerning the persons represented by him, including the creditors of such corporation." The statutory liability of stockholders is an asset of the insolvent bank, "the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of" creditors. While a foreign receiver cannot sue in this state as a matter of right, "still our courts uphold the title of a foreign assignee or receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors; but if it depends on a foreign statute or judgment, it is sustained against all except domestic creditors. . . . Every remedy to gather in the assets is afforded, unless it would interfere with the policy of the state, or impair the rights of its own citizens." *Mabon v. Ongley Electric Co.* 156 N. Y. 196, 201, 50 N. E. 805. This is made very plain by the learned opinion of the appellate division which leaves nothing to be said upon the subject. *Howarth v. Angle*, 39 App. Div. 151, 57 N. Y. Supp. 187.

It was not necessary that all the stockholders should be before the Washington court when the order was made appointing the plaintiff receiver, and giving him authority to sue, any more than when a decree in bankruptcy is made, which binds all who are not parties the same as those who are. *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220. That judgment may be regarded as a proceeding *in rem*, binding upon all the world, so far as title to the assets of the corporation is concerned; and, according to the decisions of the highest court of the state where it was made, the so-called "statutory liability" of stockholders is part of the assets. The defendant took stock in the Tacoma bank subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise have become a stockholder. *Lowry v. Inman*, 46 N. Y. 119. That burden is an asset, vested in the receiver, and can be enforced in this state the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. As was said in the case last cited: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as vol-

untarily assumed by the act of becoming a stockholder. . . . It is like other obligations assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation, and effect are to be determined by the *lex loci*; but the remedy is governed by the *lex fori*." While the liability is, for convenience, frequently called "statutory," because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is in fact contractual, and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it (*Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A. 551, 53 N. E. 1108), and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned (*Richmond v. Irons*, 121 U. S. 27, 55, 30 L. ed. 864, 873, 7 Sup. Ct. Rep. 788). The fact that the former is the promise of a principal, and the latter of a surety, does not affect the question. The express promise runs to the corporation, and may be enforced by it; while the implied promise runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs. The latter promise is not a part of the capital stock of the bank, but is a substitute, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors. The stockholders, however, may controvert in our courts all the essential facts, such as insolvency, the amount of the deficiency, and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common-law proof as to all the facts upon which the deficiency is based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the courts of this state, and the united action of the courts below has conclusively determined them against him.

If the statute, upon which the personal liability of the stockholders is founded, had also provided a remedy for that liability, such remedy would have been exclusive, and could not have been enforced in the courts of this state. It was said in *Pollard v. Bailey*, 20 Wall. 520, 527, 22 L. ed. 376, 378: "The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action." The statute of Washington, however, provided no remedy, but left that subject to the courts, to be worked out according to the common law.

The learned counsel for the appellant recognizes the distinction between foreign statutes, which create a liability and provide a remedy, and those which create a liability but do not provide a remedy. He admits that, according to the law of this state, in the former class only the remedy provided by the foreign statute can be pursued, while in the latter it depends upon interstate comity. He insists, however, that the procedure against resident stockholders of a foreign corporation must be in substantial accordance with the practice established in the state where the action is brought, and this is true to the extent that no departure from that practice is permitted, which results in injustice to the citizens of that state, or is against the public policy thereof. He relies upon the case of *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 42 N. E. 419, where the action was not brought by a receiver, but by a creditor of an insolvent bank in Kansas, to recover the amount of a deposit after a receiver had been appointed in that state. The action was founded upon a local statute, which not only created the liability, but also provided a peculiar and complicated remedy unknown to our courts, and which could not be entirely enforced in this state. *Lovory v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 103, 60 Am. Rep. 429, 12 N. E. 648. The liability was neither contractual, in the general sense, nor penal, but the statute charged the property of the stockholder with the debts of the insolvent corporation to the extent of the stock held by him. It was the case so aptly described by Judge Allen in *Lovory v. Inman*, 46 N. Y. 119, where the intent of the legislature "was, not to create a general personal or property liability, but to charge the property of the stockholders, and that not generally, or by the usual and ordinary process, but conditionally, and by a peculiar and unusual procedure, only available in the courts of that state, not only limiting and prescribing the security and rights of the creditor, and the obligation and liability of the stockholder, but prescribing the remedy going with it, and as a part of the right." The assets had not been marshaled or appropriated for the benefit of creditors, and there was no way to determine, with any degree of accuracy, the amount of the deficiency, or how much the defendant ought to pay. The action, if it had not been arrested by the demurrer interposed to the complaint, would naturally have resulted in the appropriation by one creditor, alone, of that which belonged to others equally with himself. Under these circumstances we declared that "when the courts of this state are asked to administer the statutes of Kansas, and we can see that the case is surrounded by such complications, and the circumstances are such that it cannot be done without injustice to our own citizens, or that it will be impossible to do full and complete justice to all the parties in interest, it is reasonable and just to decline to administer them at all." In that case the amount of the deficiency was not ascertained in any way, by a court or

otherwise. The action was not brought by a receiver. The remedy sought was that provided by the foreign statute, which created the liability. That remedy could not be wholly enforced in this state, and to the extent that it could be enforced might result in injustice to our citizens. In this case the action is brought by a receiver, who, according to the decisions of the Washington courts has the title to the right of action, and the amount of the deficiency has been definitely ascertained both by the courts of that state and of this. It does not appear that there is any other stockholder or any creditor in this state, or that injustice will be done to any citizen of this state by sustaining the judgment appealed from. The reasons given by the court for denying relief in *Marshall v. Sherman* are met by the facts of this case, which distinguish it in many essential respects, and permit a recovery under the principles sanctioned, but not applied, in that case, because the necessary facts were wanting.

It is not necessary that the procedure to enforce the liability in question should be that required by statute in this state in the case of domestic corporations, as that would frequently be impossible, and would withhold the right of comity altogether. Any provision of our statutes which makes the recovery of judgment against the corporation and return of execution unsatisfied essential to the maintenance of an action against a stockholder cannot ordinarily be complied with in the case of a foreign corporation, because service of process cannot be had. Laws 1890, chap. 564, § 58; *Hirschfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817. However, the provision of the stock corporation law, above cited, did not apply, even to a domestic banking corporation, on the 18th of May, 1897, when this action was commenced, because, on the day before, § 52 of the banking law was so amended as to require the enforcement of liability against stockholders by action in the name of the receiver. Laws 1892, chap. 689, § 52; Laws 1897, chap. 441, § 1. Said amendment also answers the criticism of the appellant that, if the right of action was in a creditor, instead of the receiver, the defendant would have had the benefit of the statute of limitations. Code Civ. Proc. § 394. It is sufficient if the method of procedure in our courts is such that no injustice is done to the defendant, or to any citizen of this state, and the established policy of the state is not interfered with. *Willits v. Waite*, 25 N. Y. 577, 585. No injustice was done the defendant by the judgments below, because he was only required to pay his exact proportion of the deficiency, as duly ascertained by the courts of this state. The fact that the deficiency had also been ascertained by the courts in Washington, and the same amount found to exist, did no harm. There is no inequality, for one creditor is not paid in full, while other get less, but all are benefited equally, and no one gets more than his due. Justice is done to all and injustice to none. While only a single stockholder was

made a party to the action, he was the only stockholder, so far as appears, who could be served in this state.

If some of the stockholders should prove insolvent, the defendant cannot be affected by it, or his liability increased thereby. Under the Federal banking law, which contains the same provision as to the liability of stockholders, in the same words as the statute in question, it was held that there was no power to direct a second assessment to supply the deficit caused by the inability of the receiver to enforce payment from such stockholders as were insolvent or beyond the jurisdiction. It was also held that the effect of the words "equally and ratably, and not one for another," was to make the liability several, and not joint, and to protect each stockholder from liability for the default of another. It was distinctly announced "that the shareholders were not intended to be put in the relation of guarantors or sureties, 'one for another,' as to the amount which each might be required to pay," and that "the insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another." *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216. See also *Re Hollister Bank*, 27 N. Y. 393, 84 Am. Dec. 292; *Crease v. Babcock*, 10 Met. 525; and *Morse, Banks & Banking*, 503. The defendant, therefore, cannot be made to pay more than once, nor more than his share, whether others pay or not. No resident of this state is affected, except the defendant, from whom nothing is required except what he impliedly contracted to pay. The policy of the state is not contravened, for that policy requires the enforcement of the statutory liability of stockholders of insolvent corporations by an action in the name of a receiver to recover the proper proportion of the deficiency from each stockholder for the benefit of all the creditors. As was said in *Stoddard v. Lum*, 159 N. Y. 265, 45 L. R. A.

551, 53 N. E. 1108: "The plaintiff does not come here seeking to remove assets from this state, to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction." When an action by a foreign receiver to collect assets, under the authority of the court which appointed him, works no detriment to any citizen of this state, and is not repugnant to its policy, it would be a provincial and narrow view for our courts to refuse to extend the usual state comity. There is a close business connection between the citizens of the different states of the Union. Investments are freely made in other states by the citizens of this state, who need the aid of the courts of the jurisdiction where the investments are made. The comity which we expect to have extended to citizens of our state, we cannot, in justice, refuse to citizens of other states. State lines should not prevent justice from being done. Our courts should not close their doors to a receiver from another state, who comes here, armed with the title to a just claim against a citizen of this state, and offers to establish by common-law evidence the liability of that citizen. While we should keep control of the subject, so as to see that no discrimination is practised against our citizens, or injustice done them either as to the substance of the liability or the method of procedure, when the same result is attained in practically the same way as, under similar circumstances, would be attained in the case of a domestic corporation, there is no reason for withholding that aid which is now afforded by the courts of almost all enlightened countries.

The judgment should be affirmed, with costs.

Parker, Ch. J., and Bartlett, Haight, Martin, and Landon, JJ., concur; O'Brien, J., not voting.

ILLINOIS SUPREME COURT.

John GRAHAM, alias Jim Wheeler, Plff. in Err.,
v.

PEOPLE of the State of Illinois.

(181 Ill. 477.)

1. An indictment charging an attempt to obtain money by the use of the confidence game is not insufficient, although it fails to state all the acts constituting the offense with which the accused is charged,

NOTE.—For jurisdiction of crime begun in one state and consummated in another, see *Es parte McNeely* (W. Va.) 15 L. R. A. 226.

As to locality of crime committed through agency of mails or of carrier, see *State v. Hudson* (Mont.) 19 L. R. A. 775.

As to crime committed by shooting across state boundary, see *State v. Hall* (N. C.) 28 L. R. A. 59, and *note*.
47 L. R. A.

where the statutes provide for punishment of those who attempt to obtain money by the use of the confidence game, and provide that an indictment shall be sufficient which charges the attempt to obtain money by such game, and that every indictment shall be deemed sufficiently technical which states the offense in the language of the statute creating the offense.

2. A statute making an indictment for obtaining money by the use of the confidence game sufficient which charges felonious obtaining of money from a certain person by means and by the use of the confidence game is not unconstitutional.
3. One who is successful in obtaining money by means of the confidence game cannot be convicted of an attempt, although the act was not consummated in the county where the indictment was found.
4. Evidence showing commission of a crime will not sustain an indictment charging an attempt to commit it, where the stat-

utes make the consummated crime and the attempt different offenses.

2. A prosecution for obtaining money by the use of the confidence game should be instituted in the county where the offense was consummated, and not in that where preliminary acts were done, under a statute providing that local jurisdiction of all offenses shall be in the county where the offense is committed.

(October 19, 1899.)

ERROR to the Circuit Court for Perry County to review a judgment convicting defendant upon an indictment charging him with attempting to obtain money by means of the confidence game. *Reversed.*

Statement by Magruder, J.:

At the May term, 1898, of the Perry county circuit court, the grand jury returned in to open court an indictment against plaintiff in error containing two counts. The first count presents that "John Graham, alias Jim Wheeler, late of the county of Perry, and state of Illinois, on the 7th day of November, in the year of our Lord 1896, at and in the county aforesaid, unlawfully and feloniously did attempt to obtain from John A. Bowlin his money by means and by use of the confidence game, contrary," etc. The second count presents that "the said John Graham, alias Jim Wheeler, alias James Wheeler, alias John Snearly, late of the county of Perry, and state aforesaid, in the year of our Lord 1896, at and in the county aforesaid, unlawfully and feloniously did attempt to obtain from John A. Bowlin \$1,500 good and lawful money of the United States, and of the value of \$1,500, the property of the said John A. Bowlin, by means and by the use of the confidence game, contrary," etc. A motion was made to quash the indictment for reasons stated in the opinion of the court. This motion was overruled, and exception was taken by plaintiff in error. Plaintiff in error entered a plea of not guilty, and was tried before a jury, who found him guilty as charged in the indictment, and found his age to be forty-one years. Motions for new trial and in arrest of judgment were made, and overruled, and exceptions were taken. Judgment was entered upon the verdict, and the plaintiff in error was sentenced to the penitentiary, to be there confined until discharged by due process of law.

The material facts developed by the testimony are as follows: On November 6, 1896, a stranger approached John A. Bowlin on the streets of Duquoin, in Perry county, introducing himself to Bowlin as Jim Wheeler, and informing Bowlin that he had come to Duquoin to see the latter to learn if he was related to Andrew Bowlin. John A. Bowlin stated that he had no relative by that name. Wheeler, or the man calling himself Wheeler, then proceeded to tell John A. Bowlin that he had had a partner by the name of Andrew Bowlin; that said Andrew Bowlin

had recently died at a town in Central Illinois; that he was looking for someone who could fill his place; that he (Wheeler), and said Andrew Bowlin, and a certain Indian, who was stated to be then in the woods near Cairo, Illinois, owned a valuable gold mine in Arizona; that they had taken from said mine a large quantity of gold, and started to Washington, District of Columbia, for the purpose of disposing of the gold at the government mint, and securing a patent or title from the government to the land, upon which the mine was located; but that, upon their arrival in Illinois, Andrew Bowlin sickened and died; and that he (Wheeler) and the Indian were both ignorant, and uneducated, and in need of someone to assist them in their enterprise. Wheeler then produced from his pockets specimens of ore, which he stated were gold of great value, and had been taken from his mine in Arizona; and that the Indian near Cairo had in his possession a large bulk of the gold in the form of two gold bricks or bars. Bowlin then invited Wheeler to take dinner with him at the residence of his daughter, Mrs. Fishback, living in Duquoin, where they both went. There, in the presence of Mrs. Fishback, Wheeler repeated his story of the gold mine in Arizona, the death of his partner, the presence of the Indian with the gold bars in the woods near Cairo, and again displayed the specimens of gold ore taken from the mine. Wheeler then and there offered to give Bowlin an interest in the mine and gold bricks upon such terms as the Indian would agree to, if Bowlin would go on to Washington with him, and attend to the business of securing the patent, etc. It was then arranged that Bowlin should go with Wheeler that night, to wit, the night of November 6, 1896, to Cairo. Accordingly, they left Duquoin at 8 o'clock in the evening, arrived in Cairo, and stayed all night at the Halliday House, Wheeler requesting Bowlin to register his name as Jim Wheeler, claiming that he (Wheeler) could not read or write. Bowlin did so. The next morning—November 6, 1896—Bowlin and Wheeler took a buggy, and went out on the Mississippi river in the woods above Cairo, and found the Indian with the bricks, which the latter produced. Wheeler produced an instrument with which they bored the bricks, and took the borings, whereupon Wheeler and Bowlin returned to Cairo. When they arrived at Cairo, they went to a jewelry store. Wheeler alighted from the buggy, Bowlin holding the horse, and went into the store. He returned with a card, which, as he claimed, had been handed to him by the jeweler, and he handed the card to Bowlin to read. The card bore the name of a man, stated to be a government assayer, at the Halliday House. Together they went there, and found the man, claiming to be an assayer, and he tested, or pretended to test, the borings from the bricks, and pronounced them pure gold. Bowlin and Wheeler then returned to Duquoin on the evening of November 6, and

went out to Bowlin's home in the country, and remained during the night. The next morning they returned to Duquoin together, and went to the First National Bank, where Bowlin drew from the bank \$1,500. Bowlin and Wheeler then returned to Cairo, and Bowlin took the money with him to the woods in Alexander county, and there delivered the same to Wheeler in exchange for the bricks, Bowlin to have one-third interest in the bricks, which were valued at about \$35,000, and one-third interest in the mine, for the \$1,500 paid and his services to be rendered in getting title to the land on which the mine was located. Bowlin and Wheeler then returned to Cairo, where Wheeler left Bowlin, in order, as he said, to take the Indian as far as New Orleans on his return to Arizona. Wheeler was to join Bowlin at Bowlin's home in a few days. Upon his return to Duquoin, Bowlin became uneasy, and told certain parties of his transaction with Wheeler, and had his bricks examined, and learned that he had been deceived. Bowlin then saw nothing more of Wheeler until November, 1897, when he went to Keokuk, Iowa, to see a man who had been arrested, charged with a similar offense. Arriving at Keokuk, he found the plaintiff in error in jail under the name of John Graham. Bowlin identified him as the same man whom he had known as Jim Wheeler, and who had obtained his money, as above stated, in 1896, just one year before. The present writ of error is sued out for the purpose of reviewing the judgment so entered by the circuit court.

Messrs. William S. Forrest and Benjamin O. Bachrach for plaintiff in error.

Messrs. C. A. Hill, B. D. Monroe, and C. R. Hawkins, with Mr. Edward O. Akin, Attorney General, for defendants in error:

An indictment charging that money was obtained by means and by use of the confidence game sufficiently describes the offense defined in § 98 of the Criminal Code, by virtue of the express provisions in § 99, that such description shall be sufficient, as well as by the general provision in division 11, § 6, making it sufficient to state an offense in the language of the statute, or so that its nature may be easily understood by the jury.

Maxwell v. People, 158 Ill. 248, 41 N. E. 995; *Morton v. People*, 47 Ill. 468; *Miller v. People*, 3 Ill. 233; *Cannady v. People*, 17 Ill. 158; *Lyons v. People*, 68 Ill. 271; *McCutcheon v. People*, 69 Ill. 601; *Warriner v. People*, 74 Ill. 346; *Cole v. People*, 84 Ill. 216; *Fuller v. People*, 92 Ill. 182; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *Loehr v. People*, 132 Ill. 504, 24 N. E. 68; *West v. People*, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254.

It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the

acts on which he intends to rely, and to suspend the trial until this can be done.

Coffin v. United States, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394; *Com. v. Sherman*, 13 Allen, 248; *Williams v. Com.* 91 Pa. 493.

Attempts to commit crimes are cognizable in the place of the attempt.

1 Wharton, *Crim. Law*, § 288; 1 Bishop, *Crim. Proc.* § 57.

At common law an attempt to commit a felony is a misdemeanor; but where the common law is superseded by a complete criminal code, an attempt to commit a felony is punishable only when made so by statute.

1 McClain, *Crim. Law*, § 221.

To constitute an attempt there must be the intent to commit a crime, and some act done toward its consummation.

Griffin v. State, 26 Ga. 493.

The "confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler."

Maxwell v. People, 158 Ill. 248, 41 N. E. 995.

Magruder, J., delivered the opinion of the court:

This prosecution is based upon § 98 of the Criminal Code, which reads as follows: "Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument, or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years." The indictment was framed under § 99 of the Criminal Code, which is as follows: "In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense, to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain (as the case may be), from A. B. (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money), by means and by use of the confidence game." The motions made by the plaintiff in error to quash the indictment and in arrest of judgment were based upon two grounds. In the first place, it is alleged that the indictment is insufficient, as not expressly stating all the acts constituting the offense with which the prisoner is charged, and as thereby failing to inform the prisoner of the nature and cause of the accusation against him. We are of the opinion, however, that the indictment is not invalid for the reason thus urged against it. This court has held in a number of cases that, where an indictment charges that money was obtained by means and by use of the confidence game, such indictment sufficiently describes the offense defined in § 98 of the Criminal Code, because of the express provisions of § 99, above quoted, and also because of the general provisions contained in § 6

of division 11 of the Criminal Code. Said § 6 provides that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." Said § 6 then gives a form for the commencement of an indictment. Section 98 of division 1 and § 6 of division 11 of the Criminal Code justify the framing of the indictment in the present case in the language in which it is above set forth. *Morton v. People*, 47 Ill. 468; *Maaswell v. People*, 158 Ill. 248, 41 N. E. 995; *Loehr v. People*, 132 Ill. 504, 24 N. E. 68; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194; *West v. People*, 137 Ill. 189, 27 N. E. 34, and 34 N. E. 254; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

The second ground upon which the indictment is claimed to be invalid is that said § 99 is unconstitutional. The constitutionality of this act was considered in *Morton v. People*, 47 Ill. 468, and it was there held that the act defining, creating, and punishing the confidence game was not in violation of the Constitution of the state. Its constitutionality has been recognized by this court in a number of cases decided since the case of *Morton v. People* was decided. We see no reason for changing the conclusion reached in *Morton v. People*, 47 Ill. 468, and decline to reconsider the grounds upon which the conclusion arrived at in that case is based. We are therefore of the opinion that the court below committed no error in refusing to quash the indictment because of the insufficiency of its allegations, or because of the alleged unconstitutionality of the statute under which it was framed.

At the close of the evidence for the state, and again at the close of all the evidence, the plaintiff in error requested the court to give to the jury a written instruction to find defendant not guilty. The court refused to give the instruction so asked, and exception was duly taken. The instruction No. 23, asked by the plaintiff in error, the defendant below, was refused as asked, but was modified, and given as modified. To the giving of the instruction as modified exception was duly taken. Instruction No. 23, as asked, was as follows: "The court instructs the jury that an attempt to obtain money by means of the confidence game consists of the following three elements: First, an intention to obtain money by means of the confidence game; second, the doing of some act toward the obtaining of money by means of the confidence game; third, the failure so to obtain the money. Unless said three elements have been each and all established by the evidence beyond a reasonable doubt, there has been a failure to prove the commission of the crime charged in the indictment." Instruction 23, as modified and given, is as follows: "The court instructs the jury that an attempt to obtain money by means of the

confidence game consists of the following three elements: First, an intention to obtain money by means of the confidence game; second, the doing of some act toward the obtaining of money by means of the confidence game; third, the failure to so obtain the money in Perry county. Unless the said three elements have been each and all established by the evidence beyond a reasonable doubt, there has been a failure to prove the commission of the crime charged in the indictment." The modification made by the court was the insertion of the words "in Perry county" after the word "money" in the third of the designated elements, constituting an attempt to obtain money by means of the confidence game. The instruction, as asked by the plaintiff in error, correctly defined an attempt to obtain money by means of the confidence game. Evidently § 98 provides for the commission of two separate crimes. One is the crime of obtaining money by means of the confidence game, and the other is the crime of an attempt to obtain money by means of the confidence game. The words are, "every person, who shall obtain or attempt to obtain," etc. The use of the word "or" indicates that two offenses are described. *United States v. Quincy*, 6 Pet. 464, 8 L. ed. 465. All the authorities to which we have been referred describe an attempt to commit a crime as consisting of three elements, to wit, the intent to commit the crime, performance of some act towards the commission of the crime, and the failure to consummate its commission. In 3 Am. & Eng. Enc. Law, 2d ed. p. 250, an attempt to commit a crime is defined to be "an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime." It is also stated in the same text-book that the common elements of every attempt to commit a crime are "a criminal intent, coupled with an overt act apparently adapted to effect that intent." *Id.* p. 254. Bishop, in his *New Criminal Law* (vol. 1, § 435), says: "Whenever a man, intending to commit a particular crime, does an act toward it, but is interrupted, or some accident intervenes, so that he fails to accomplish what he meant, he is still punishable. This is called a criminal attempt." In 3 Enc. Pl. & Pr. p. 97, it is said: "An attempt in criminal law is an effort or endeavor to accomplish a crime, amounting to more than a mere preparation or planning for it, and which, if not prevented, would result in the full consummation of the act attempted, but which in fact does not bring to pass the party's ultimate design." In *Patrick v. People*, 132 Ill. 529, 24 N. E. 619, we quoted with approval Bouvier's definition, which is as follows: "An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the execution of the ultimate purpose in any part of it." In *Scott v. People*, 141 Ill. 195,

30 N. E. 320, it was said: "An attempt is an intent to do a particular thing with an act toward it falling short of the thing intended. When we say that a man attempted to do a thing, we mean that he intended to do specifically it, and proceeded a certain way in the doing." See also *Cox v. People*, 82 Ill. 191; *Thompson v. People*, 96 Ill. 158.

It will be observed that a failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission. In *United States v. Quinoy*, 6 Pet. 404, 8 L. ed. 465, the Supreme Court of the United States says: "To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it." Wharton, in his work on Criminal Law (vol. 1, § 173), says: "An attempt is an intended apparent unfinished crime. . . . It must be unfinished, as otherwise the indictment would be for the complete crime." Again, in 3 Am. & Eng. Enc. Law, 2d ed. p. 265, it is said: "The act must fall short of the completed crime." It is also well settled that mere solicitations do not prove an attempt. *Cox v. People*, 82 Ill. 191; *Thompson v. People*, 96 Ill. 158. The plaintiff in error in this case was indicted, not for obtaining money from the prosecuting witness, John A. Bowlin, but for an attempt to obtain the same. The testimony shows that the plaintiff in error succeeded in obtaining \$1,500 in money from the prosecuting witness. Plaintiff in error did not merely attempt to obtain money by means of the confidence game, but he did actually obtain money by means thereof. Here the indictment charges the plaintiff in error with one offense, to wit, an attempt to commit a crime, but the proof shows conclusively the completed and consummated commission of the crime, which is another and different offense. Can a party who is indicted for an attempt to commit a crime be convicted under evidence which shows that he did commit it? This is a question about which the authorities seem to differ, so far as there are any authorities upon the subject. The general rule at common law was that, when an indictment charged an offense which included within it any less offense, or one of a lesser degree, the defendant, though acquitted of the higher offense, might be convicted of the less. 1 Bishop, New Crim. Law, § 1054; *Hanna v. People*, 19 Mich. 316; *State v. Jarvis*, 21 Iowa, 44; *Carpenter v. People*, 5 Ill. 197; *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213; *Clifford v. State*, 10 Ga. 422. Thus, in *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213, where one was indicted for an assault with a deadly weapon with intent to inflict bodily injury, it was held that he might be convicted of a simple assault. Here, however, the indictment is not for obtaining money by means of the confidence game, such obtaining being the greater offense, and therefore the question is not whether, under an indictment for so obtaining money, a con-

viction could be had for an attempt to obtain it, the attempt being the less offense. The question here is whether, where the indictment is for the less offense, proof of the greater will justify a conviction. In *Reg. v. Nicholls*, 2 Cox, C. C. 182, which was an indictment for an assault with an intent to commit rape, and where the proof showed that the rape was committed, the court held that the prisoner should be acquitted of the attempt to commit the rape. Roscoe, Crim. Ev. 3d ed. p. 66; *Harmwood's Case*, 1 East, P. C. 411; Archbold, Pr. & Pl. 10th ed. 486; *Sullivan v. People*, 14 N. Y. Week. Dig. 239; *Darrow v. Family Fund Soc.* 42 Hun, 245. In *State v. Shepard*, 7 Conn. 54, it was held that proof of a rape would sustain an indictment for an attempt to commit a rape. The case of *State v. Shepard* was based mainly upon the case of *Com. v. Cooper*, 15 Mass. 187. The latter case, however, was disapproved of by Chief Justice Shaw in the subsequent case of *Com. v. Roby*, 12 Pick. 496, and was virtually overruled by the latter case. The case of *State v. Shepard*, 7 Conn. 54, appears also to be opposed to other authorities, as will appear by a reference to 1 Bishop, New Crim. Law, §§ 788, 804, 809. Inasmuch as our statute clearly defines the offense of an attempt to obtain money by means of the confidence game as being different and distinct from the offense of obtaining money by means of the confidence game, some force must be given to the provisions of the statute. It would appear to be logical that, when a man is indicted for a particular offense, he must be proved guilty of that offense, and not of some other. It seems to follow that, if a man can be indicted for an attempt to commit an offense, and, under such indictment, be proved to have been guilty of the consummated offense, it would be unnecessary to make the latter a distinct crime. If proof that a man obtained money by means of the confidence game is proper under an indictment against him for an attempt to obtain money by means of the confidence game, then it would seem to be unnecessary in any case to indict him for the offense of obtaining money by means of the confidence game.

But, even if we are wrong in the views above expressed, the modification made of this instruction was erroneous. Instruction No. 23 attempted to define, in general language, an attempt to obtain money by means of the confidence game. The insertion of the words "in Perry county" in the manner in which they were inserted in the instruction makes it absurd. The words are not inserted after the word "attempt," nor after the first and second elements in which an attempt is stated to consist. The jury may have believed that the plaintiff in error had the intention of obtaining Bowlin's money by means of the confidence game in Alexander county, where Cairo is located, and that he did an act towards obtaining money by means of the confidence game in Alexander county, but that his failure only was in

Perry county. The proof shows that the crime was consummated in Alexander county. The crime of which the plaintiff in error was guilty, if he was guilty at all, was the obtaining of Bowlin's money; and he obtained it in Alexander county, and not in Perry county. The state cannot split up one crime, and prosecute it in parts. *Jackson v. State*, 14 Ind. 327. A consummated crime may involve an attempt—a successful attempt—to commit it, but such attempt is merely a part of the completed offense. Section 9 of article 2 of the Constitution says that in all criminal prosecutions the accused shall have the right to “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.” Section 4 of division 10 of the Criminal Code provides that “the local jurisdiction of all offenses, not otherwise provided for by law, shall be in the county where the offense was committed.” The crime of larceny is made an exception, and the offender may be tried in any county to which he carries the stolen property, as well as in the county in which the property was first taken. This rule, however, has no application to any crime other than larceny. Id. div. 10, § 8; *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621. The statutory offense of doing an act in attempting to commit a crime is punishable in the county where the crime, unless prevented, would have been committed. 28 Am. & Eng. Enc. Law, p. 234. An attempt to commit a crime “is cognizable in the place where, if not interrupted, it would have been executed; and, from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed.” 1 Wharton, Crim. Law, § 195. Instruction 23, as modified, virtually told the jury that a part of the preliminary overt acts constituting the attempt might be committed elsewhere than in Perry county, where the indictment was found, and the trial was had. “The offense of ‘attempt’ is complete in the county where the offense, if perpetrated, must have been committed.” *Griffin v. State*, 26 Ga. 493. It is not only clearly shown by the proof in this case, that the crime of obtaining the money by means of the confidence game was perpetrated in Alexander county, and not in Perry county, but also that most, if not all, the acts constituting the preparation for the crime, and going to make up the attempt to commit it, were performed in Alexander county. The prosecuting witness was taken to Alexander county; and in that county were found the Indian, and the pretended assayer, and the gold bricks. The act of assaying the ore was done in Alexander county. It is well settled that false representations amounting to

47 L. R. A.

false pretenses within the meaning of the statute do not constitute the crime unless the property has been actually obtained. It is therefore generally held that the crime of false pretenses is complete where the goods or moneys are obtained, and that, if the pretenses are made within one jurisdiction, and the property or money is obtained in another jurisdiction, the person making the representations must be indicted within the latter jurisdiction. 7 Am. & Eng. Enc. Law, p. 758. In *State v. Shaeffer*, 89 Mo. 271, 1 S. W. 293, it was held that the crime, which consists in making use of false pretenses, is committed where the money or property is received; and that in a prosecution for obtaining money or property by means of false pretenses the place where the money or property is obtained, without regard to where the representations were made, is the place where the party should be prosecuted. In *Connor v. State*, 29 Fla. 455, 10 So. 891, it was held that the receipt of property obtained under false pretenses is the consummation of the offense, and, when the pretenses are made in one jurisdiction, and the property is obtained by the offender in another jurisdiction, the prosecution should be instituted only in the latter jurisdiction, unless there is a valid statute permitting it elsewhere. See also *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739; *State v. House*, 55 Iowa, 466, 8 N. W. 307; *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291. We see no reason why the same rule which is applicable to the obtaining of money by false pretenses is not applicable to the obtaining of money by means of the confidence game. If this is so, then this prosecution should have been instituted in Alexander county, and not in Perry county. If the words, “in Perry county,” had not been inserted in instruction No. 23, the jury could not have found the plaintiff in error guilty of an attempt to obtain money by means of the confidence game, because, to do so, they would have been obliged to find that his attempt was a failure, whereas the proof shows that the attempt was not a failure. The instruction virtually told the jury that it made no difference whether the money was obtained by means of the confidence game in Alexander county or not, if there was a failure to obtain it in Perry county. In this respect the instruction was clearly erroneous. The law defines an attempt to commit a crime as including the failure to consummate it, as well as the other elements above mentioned, and the law does not necessarily limit such failure to any particular county.

The judgment of the Circuit Court is reversed, and the cause remanded to the latter court for further proceedings in accordance with the views here expressed.

MONTANA SUPREME COURT.

MERCHANTS' & MINERS' NATIONAL
BANK, Appt.,
v.

Frank E. BARNES, Resp't.

(18 Mont. 335.)

1. An order to pay money to become due under a contract for services to a third person will constitute a valid assignment which equity may enforce.
2. A constable is not liable to an assignee for money which he collected by garnishment, and paid over to the attaching creditor with notice that the title to the fund had been assigned by the attachment debtor before the garnishment was levied, if the garnishee acknowledged that it owed the fund, and paid it over as the property of the debtor.

(June 8, 1896.)

NOTE.—*Sheriff's duty as to adverse claims to proceeds of judgments in his hands, except in case of rival executions.*

The case of MERCHANTS' & MINERS' NAT. BANK v. BARNES holds that an officer is not liable in an action of assumpsit to an assignee of a fund collected by the officer from a garnishee admitting the debt and paid on the judgment, although the garnishee and officer both had notice of the assignment of the claim. This is on the ground that the officer was not bound, under the circumstances of the admission, to disregard the acknowledgment of the garnishee, and to desist from further proceedings.

The question does not seem to have been so authoritatively settled in other courts as to establish a clear rule of law. The cases differ in facts, and the decisions do not agree, and the courts do not distinguish cases that apparently conflict. It seems that a sheriff is bound to recognize an assignment of the judgment where he has notice. The weight of authority seems to be that a sheriff is liable to an assignee of the debt where he has notice of the assignment. Some cases hold that a notice by a general creditor, or by a stranger, of a claim to the proceeds will not excuse delay by the sheriff in paying the plaintiff. The sheriff may relieve himself by reporting to the court the conflicting claimants to the proceeds in his hands, and requiring them to interplead and settle their respective rights.

Where the assignee of a *f. fa.* ruled the sheriff to pay over money thereon, and the sheriff returned that *M.*, one of the defendants, told him that the *f. fa.* was settled so far as he was concerned, and the plaintiff in the *f. fa.* confirmed this statement and that the *f. fa.* was to be transferred without recourse on *M.*, but that the sheriff had neglected to insert it in the transfer, this was held to be no defense, because it was done after the *f. fa.* had been assigned, and after the sheriff had notice by the attorney for the assignee to make the money out of *M.* Gregory v. Waters, 19 Ga. 71.

And an officer who pays the proceeds to the nominal plaintiff is liable to the assignee for costs, where he receives an execution with notice that the claim on which the judgment is recovered has been assigned to another person, and is prosecuted at his costs. Riley v. Taber, 9 Gray, 372.

And if after notice the sheriff ignores the rights of the assignee of a judgment, and pays
47 I. R. A.

A PPEAL by plaintiff from a judgment of the District Court for Deer Lodge County in favor of defendant and from an order denying a motion for a new trial in an action brought to recover money alleged to have been received by defendant for plaintiff's use. *Affirmed.*

Statement by Hunt, J.:

Action for money had and received. The plaintiff bank alleges that the defendant and respondent, Barnes, received from the Granite Mountain Mining Company the sum of \$226.18, to and for the use of the plaintiff bank. The case was tried to the court without a jury. The evidence showed the following facts: About January 31, 1894, one A. Tyler made a contract for hauling wood with the Granite Mountain Mining Company, for which the company was to pay him (Tyler)

the money collected to other parties merely because of executions in their favor against the plaintiff, he does this at the peril of having to account to the assignee of the judgment, unless he can show that the claim of the assignee is unfounded, or else that the parties to whom he has paid it have a superior and better right. McClane v. Rogers, 42 Tex. 214.

In Wilson v. Broder, 10 Cal. 486, the court said that the assignee can assert his title in an appropriate action, and may be entitled to a summary proceeding in the name of the plaintiff for a wilful refusal to pay money collected on the demand of the plaintiff or his lawfully authorized attorney.

In this case it was held that an assignee of a judgment is not entitled to a summary proceeding in his own name against the sheriff for failure to pay over the proceeds of an execution, under Cal. Stat. Wood's Dig. 196, providing that the sheriff shall execute the writ by levying and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment.

Where part of a judgment is assigned, and the sheriff refuses to pay the proceeds of the execution into court, upon due notice on behalf of the assignees, the court will compel him to do so. Brown v. Dunn, 50 N. J. L. 111, 11 Atl. 149. In this case the court said, if a notice thus given to the sheriff came from persons who had an interest in the proceeds raised on execution, which the court would take notice of and protect, the payment of the money, not into court, but to the plaintiff, was made at the peril of the sheriff, and at the risk of being compelled to pay that sum into court.

But in Lovins v. Humphries, 67 Ala. 437, it was held that where one of several plaintiffs in an execution assigned his interest in the judgment, the assignee could not maintain a separate action against the sheriff for failing to pay over the money collected on the execution, unless such action was based on the express promise of the sheriff to pay such assignee his share, as the sheriff cannot be subjected to separate actions by the parties in a joint judgment.

Where a defendant in a *f. fa.* conveyed land, and subsequent judgments were rendered, and the land sold under the senior execution, the owner of the land could assert his title on a rule against the sheriff to distribute the fund. Crawford v. Williams, 76 Ga. 792. In this case it was insisted that as the moving party held no lien as a judgment creditor a notice from

on the completion of the contract. About March 15, 1894, the contract was completed. About the time the contract was executed, Tyler borrowed \$300 from the plaintiff bank. To secure the payment of this sum, Tyler gave the following order on the mining company:

Philipsburg, Mont., Jan. 31, 1894.

To James H. Henley, Superintendent Granite Mountain Mining Co., Granite, Montana.

Dear Sir:—

Please deliver to Merchants' and Miners' National Bank the check due me, March 15th, for hauling wood from Cleveland shaft to Bimetallic hoist.

[Signed]

A. Tyler.

This order was immediately presented by the plaintiff bank to the mining company for acceptance, but it was not accepted at that time, as there was no money yet due Tyler; but it was agreed that, if Tyler would indorse his check to be given him in payment of the contract for hauling wood by the mining company on completion of this contract, the mining company would deliver the indorsed check to the bank. Afterwards, about March 1st, the amount due to Tyler was

garnished in the hands of the mining company, in a suit brought by Merrell & Co. in a justice's court of Granite county; and on March 17th the sum of \$226.18, the amount of money sued for by plaintiff in this action, was paid to the defendant, Barnes, the constable who served the papers on an execution from the justice's court in the aforesaid suit of Merrell & Co. against Tyler. Before the mining company paid the money to Barnes, the constable, the plaintiff bank demanded payment of the same, to wit, from the mining company, and also notified Barnes of its claim to said money. A subsequent demand was likewise made by plaintiff bank for the money, upon Barnes, after its receipt by him from the mining company. The money was applied by Barnes, the said constable, in satisfaction of the judgment against Tyler in favor of Merrell & Co. At the conclusion of plaintiff's testimony the defendant moved for a nonsuit, but the court concluded to hear the evidence of the defense, and reserved its decision on the motion. Subsequently judgment was rendered in favor of the defendant upon the questions of law involved. A motion for a new trial was made and overruled. The plaintiff appeals from the judgment and the order overruling the motion for a new trial.

him to the sheriff to hold up the money would be unavailing to charge him. The court said, generally speaking, this is a correct position.

It was also said that in *Strickland v. Smith*, 53 Ga. 79, and *Cumming v. Wright*, 72 Ga. 767, it was held that a notice to the sheriff to hold up money would be unavailing to charge him, but that those cases differ from the case at bar, as in neither of them was there more than enough money to satisfy the process under which the sale was made. That in the first case the party making the motion had but an inchoate lien created by levying an attachment upon which he had obtained no judgment, and that in the other the party had a laborer's lien without judgment. In this case the unsuccessful claimant had a title to the land which was older than the judgment under which his adversary claimed the fund, and the vendor was insolvent.

After a rule is made absolute for the sheriff to pay money into court, he cannot then be heard to say that the applicants for the rule, when they gave notice, were not judgment creditors, and were then without lien upon the property sold or its proceeds, so that their notice afforded no authority or excuse for withholding payment to the plaintiff, and such payment was made before the order of the court came. This would have been pertinent at an earlier state of the proceedings. *Wandling v. Thompson*, 41 N. J. L. 142.

Where the sheriff paid over money collected on an arrest, to the nominal instead of the real plaintiff, though indorsement for the use, etc., was on the writ, an attachment was awarded against the sheriff. *Zantsinger v. Old*, 2 Dall. 265, 1 L. ed. 375.

In *Guthrie v. Bashline*, 25 Pa. 80, it was held that the payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another is not payment to the proper person, and information calculated to arrest the attention of the debtor is sufficient notice. This was not a controversy with the sheriff, but arose on a motion of the assignee to set aside the record of satisfaction.

47 L. R. A.

On the other hand, some cases hold that a notice by a general creditor, or by a stranger, will not excuse delay by the sheriff in holding back money from the plaintiff.

So, a sheriff is not excused from paying over money collected on *fi. fa.* against B. because some six months prior he had been notified by one claiming to be a creditor of B. & L. not to apply the fund to the *fi. fa.* against B. as it would be claimed by the creditors of the firm. *Hooks v. Byrd*, 10 Rich. L. 120.

In *Wallace v. Graham*, 13 Rich. L. 322, it was said that a notice by a stranger to the judgment that he claims the money and intends to maintain his claim by proper proceedings, not followed promptly by the institution and diligent prosecution of such proceedings, or such a notice succeeded by five years of delay, is not a sufficient cause for the failure of the sheriff to apply the money according to the priority of the liens as appearing in his office.

A mere notice to a sheriff to retain money in his hands collected by him under legal process unless such notice is accompanied by the lien claiming it will not justify the sheriff in doing so, or excuse him from paying 20 per cent if the money should be demanded of him by the plaintiff in *fi. fa.* under the statute. *Strickland v. Smith*, 53 Ga. 79.

Where the sheriff has no notice of claim, he should not withhold the payment of the money.

So, a sheriff is not liable to an heir for paying the surplus of money in his hands remaining after satisfying an execution against the administrator which had been levied on real estate, where the heir did not make any application to the court, or give notice to the sheriff not to pay to the administrator. *Com. use of Moore v. Rahm*, 2 Serg. & R. 375.

A payment by a sheriff to the plaintiff's attorney of record, of money collected on execution, will discharge the sheriff unless he has been notified by the plaintiff not to pay it to such person. *Butler v. Jones*, 7 How. (Miss.) 557, 40 Am. Dec. 82.

Where the sheriff paid the money collected on execution to the attorneys for the plaintiff, and

Mr. H. R. Whitehill, for appellant:

In an action for money had and received there need be no privity of contract alleged or proved, other than such as arises out of the fact that the defendant has received the plaintiff's money, which in equity and good conscience he ought not to retain.

Walker v. Conant, 65 Mich. 194, 31 N. W. 786; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 41, note; *Kreutz v. Livingston*, 15 Cal. 344; *Stamwood v. Sage*, 22 Cal. 519; *Dashaway Assn. v. Rogers*, 79 Cal. 211, 21 Pac. 742.

Under the common law, that which was a tort in its inception could not by any subsequent transaction be made the basis of an action of assumpsit; but this rule has been greatly relaxed, even under the laws of those states which still adhere to the common-law system. Under the Code system the general rule is, when property has been taken wrongfully and converted into money, that the owner of the property may waive the tort and bring his action directly for the money received by the wrongdoers; and this is upon the principle that the owner of property wrongfully taken has a right to follow it, and adopt any act done to it, and treat the proceeds as money had and received to his use.

the sheriff denied the plaintiff had notified him not to pay the money over to any person except himself when the execution was placed in his hands, it was held that the summary proceedings would not lie, but that the plaintiff's remedy against the sheriff, who had returned that he had paid the money to plaintiff's attorney, must be an action at law. *Carter v. Agnew*, 83 Ill. 194.

A notice to the sheriff from the debtor not to pay, is unavailing.

It was held no defense to an action against a constable for failing to pay over money on demand and for statutory damages, that the defendant requested him to retain the money to be appropriated to some other debt, where there was no other judgment or decree. *Mackey v. Smith* (Miss.) 7 So. 222.

Where a constable is ruled on attachment to pay over money, a notice by him to the constable collecting it, to hold up the money, will not justify him in holding it. *Smith v. Wade*, 64 Ga. 116.

The pendency of a suit by claimant will justify sheriff in holding moneys collected, or the sheriff may require the contesting claimants to interplead and litigate their right to the proceeds.

So, a sheriff cannot be compelled to pay over money to a judgment creditor who appears by the writ to be entitled to it, while a bill in chancery is pending filed by a third party claiming this fund. *Howard v. Proskauer*, 57 Miss. 247.

And where a sheriff seeks to justify his refusal to pay over to the plaintiff money collected under execution, on the ground that there is a controversy respecting the title to the money, which he asks the court to determine, he must plead and state the facts so that their sufficiency may be determined. *Trotter v. Parker*, 38 Miss. 473.

A sheriff who on the return day of the writ brings the money into court and prays advice to whom he should pay it over, having been notified not to do so by a motion spread upon its record, is not liable to the penalty of 5 per cent a month, until the disposition of the motion. *Conway v. Campbell*, 11 Mo. 71.

47 L. R. A.

Cooley, Torts, 1st ed. 91-93; *Bishop*, Non-Cont. Law, §§ 72-78; 1 Am. & Eng. Enc. Law, p. 888, note 5; *Young v. Marshall*, 8 Bing. 43; *Putnam v. Wise*, 1 Hill, 234, note 1, L. ed. p. 113, 37 Am. Dec. 309; *Berly v. Taylor*, 5 Hill, 582; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782; *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57; *Sawyer v. Robertson*, 11 Mont. 420, 28 Pac. 456; *Fratl v. Clark*, 12 Cal. 89; *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 242, note; *Merchants' Bank v. Rauls*, 7 Ga. 191, 50 Am. Dec. 394; *Bradley v. Root*, 5 Paige, 632.

Trover is a proper remedy for the conversion of every species of personal property. It is not necessary that there should be a manual taking, or that the party take the property for his own use to make conversion. If he has exercised dominion over it in defiance of the owner's right, that is conversion, whether it be for his own or another's use. Any act of a party which is hostile to the ownership and possession of such property is in law a conversion.

4 Am. & Eng. Enc. Law, pp. 106-108; *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Ayres v. French*, 41 Conn. 151; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 616.

Trover is a proper action against a sheriff or other officer in every case where, by vir-

And a rule against the sheriff to compel the payment of money in his hands will be discharged, where he makes a showing that the fund is claimed by different parties, and it is doubtful which of them is entitled to it; and the parties will be left to litigate their claim by an action. *Dawkins v. Pearson*, 2 Bail. L. 619. In this case the sheriff had been notified by K. not to pay the money to the plaintiff in the execution until a suit pending by K. against the defendant in the execution to try title to the land levied on had been determined.

In *Thomas v. Yates*, 1 McMill. L. 179, it was said that where there are adverse claims to money in the hands of the sheriff collected on execution it has always been the practice for him to hold it subject to the order of the court, and it has not been unfrequently the fact that the money was ultimately paid over, not to the plaintiff in execution, but to another having the right to it.

So, where a motion is made by the plaintiff against the sheriff for failure to pay over money collected under execution, the sheriff may withdraw his plea and make an affidavit for the substitution of a claimant of the fund as the real party in interest. *Kohlman v. First Nat. Bank*, 71 Miss. 843, 15 So. 131.

Where a sheriff acts in good faith and requires an interpleader by contesting claimants to a fund in his hand, he is entitled to counsel fees. *McCall v. Walter*, 71 Ga. 287.

An attachment against the sheriff will be refused where he fails to pay over money to the plaintiff in execution because he is notified of pendency of proceedings to set aside the judgment as fraudulent. The plaintiff may recover the money by action if he is entitled to the same. *Thomas v. Aitken*, Dud. L. 292.

And where a trustee recovered a judgment, and was removed from office of trustee, and a bill against him for account was pending, he could not obtain an attachment to compel the sheriff to pay over the money collected on the judgment. *Brown v. Furze*, 2 Rich. L. 330.

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tue of or under an execution, he seizes property of a person other than the judgment debtor.

Freeman, Executions, 1st ed. §§ 272, 273; *Merrill v. Near*, 5 Wend. 237; *Manning v. Keenan*, 73 N. Y. 45; *Ledley v. Hays*, 1 Cal. 160; *Rhodes v. Patterson*, 3 Cal. 469; *Boulware v. Craddock*, 30 Cal. 190; *Bohm v. Dunphy*, 1 Mont. 333; *Griswold v. Boley*, 1 Mont. 561; *Ford v. McMaster*, 6 Mont. 240, 11 Pac. 669; *Palmer v. McMasters*, 6 Mont. 170, 9 Pac. 898; *Lammon v. Feussler*, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 615.

An order, whether accepted or not, operates as an equitable assignment; and the debt in this case would be liable to garnishment in the possession of the mining company as the property of the bank, rather than as the property of Tyler.

Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

Messrs. Durfee & Brown, for respondent:

When the debt has not yet accrued, but depends for its existence upon the completion of an executory contract of which the contemplated indebtedness is the consideration, its assignability is not a matter of course.

2 Wade, *Attachm.* 285, § 470.

Such assignments are sometimes upheld in equity, but resort must always be had to the court of equity to enforce them.

Hassie v. God Is With Us Congregation, 35 Cal. 378; 2 Story, *Eq. Jur.* § 1040; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

The only thing the appellant bank acquired, if it acquired anything, was an equity, which cannot be enforced in an action at law.

Stott v. Francy, 20 Or. 410, 26 Pac. 271; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936; *Skipper v. Stokes*, 42 Atl. 255, 94 Am. Dec. 649.

Even if the debt owing to Tyler by the Granite Mountain Company, paid to the officer, was the property of the appellant bank, and the company had notice of its claim and voluntarily paid it over to another, then the company is liable to the appellant bank.

Bolling v. Kirby, 90 Ala. 215, 7 So. 914; 2 Wade, *Attachm.* § 471; *Patrick v. Metcalf*, 37 N. Y. 335; *Butterworth v. Gould*, 41 N. Y. 450; *Decker v. Saltzman*, 59 N. Y. 279; *Seaman v. Whitney*, 24 Wend. 260, 35 Am. Dec. 618; *Hall v. Carpen*, 27 Ill. 386, 81 Am. Dec. 234; *Sergeant v. Stryker*, 16 N. J. L. 464, 32 Am. Dec. 404; *Rouse v. Bank of Auburn*, 51 N. Y. 674; *Hathaway v. Homer*, 54 N. Y. 655; *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392.

Hunt, J., delivered the opinion of the court:

An action of assumpsit, for money had and received, is a remedy equitable in its nature, existing in favor of one person against another, when that other person has received money, either from plaintiff or a third person, under such circumstances that, in equity and good conscience, he ought not to retain the same, and which, *ex æquo et bono*, belongs to plaintiff.

Buel v. Boughton, 2 Denio, 91; *McFadden v. Wilson*, 96 Ind. 253; *Lockwood v. Kelsea*, 41 N. H. 185; *Laport v. Bacon*, 48 Vt. 176. The old doctrine of the common law, that no action of contract can be maintained unless there is privity of contract between plaintiff and defendant, no longer generally prevails. Thus, under the common law, as illustrated by the facts of this case, the mining company being indebted to Tyler, and Tyler having given an order to the bank for moneys due on such debt to this plaintiff bank, the bank could maintain no common-law action against the mining company to recover the amount, unless the mining company had assented to the appropriation, and promised, either expressly or by implication, to pay the money; and in such case the action would not be based upon any property or interest in the fund acquired by the bank through the order, but upon the mining company's promise to pay. But the equitable rule is different. By it an interest in the fund is recognized, and this interest arises through the order, which operates as an assignment, and generally permits such interest to be enforced by suit, even where the debtor upon whom the order had been drawn has not assented to the transfer. In this case, therefore, if the mining company, as a debtor of Tyler, held money which it was bound to pay to Tyler, and if Tyler agreed with the plaintiff bank that the money should be paid to the bank, and gave to the bank an order upon the mining company for the money, this order creates an equitable interest or property in the fund, in favor of the assignee, the plaintiff bank; and it was not necessary that the mining company should consent or promise to hold the money for, or pay it to, the plaintiff bank. This doctrine is applied in cases where the debt actually exists, or where it exists in *futuro*. As stated by Pomeroy (*Pom. Eq. Jur.* § 1283): "The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being. If it exists potentially,—that is, if it will, in due course of things, arise from a contract or arrangement already made or entered into when the order is given,—the order will operate as an equitable assignment of such fund as soon as it is acquired, and will create an interest in it which a court of equity will enforce." *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *McFadden v. Wilson*, 96 Ind. 253; *Macomber v. Doane*, 2 Allen, 541; *Tripp v. Brownell*, 12 Cush. 376. The order given, therefore, by Tyler to the plaintiff bank upon the mining company was a valid assignment of property to be acquired in the future, and created in the bank an interest in the fund to be acquired, which equity may enforce.

Nor do we doubt the general doctrine contended for by appellant, that a plaintiff may waive an action in tort, and sue in assumpsit, where the property has been wrongfully taken, and converted into money. "If a man," says Addison on Torts, "has taken

possession of property, and sold or disposed of it, without lawful authority, the owner may either disaffirm his act, and treat him as a wrongdoer, and sue him [for a trespass or for a conversion of property], or he may affirm his acts, and treat him as his agent, and claim the benefit of the transaction.

But if he has once affirmed the acts, . . . and treated him as an agent, he cannot afterwards treat him as a wrongdoer; nor can he affirm his acts in part, and avoid them as to the rest." If, therefore, goods have been sold by a wrongdoer, and the owner thinks fit to receive a price therefor, "he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong." [p. 52.] But it is unnecessary to enter into any discussion of this doctrine in this particular action, because, under the facts, we do not think that the remedy pursued by the plaintiff is correct. If the case were one where specific property in the hands of the mining company had been levied upon by the constable under his writ, and he had levied with notice of the assignment by Tyler to the plaintiff bank, and had sold the specific property claimed by the bank, doubtless the action would lie, and the case of *Young v. Marshall*, 8 Bing. 43, would control, upon the principle that the sheriff having sold particular goods under a writ of *fi. fa.* with notice of a previous assignment by the defendant, and having paid over the proceeds of the sale to the plaintiff, an action for money had and received might be maintained to recover the proceeds of the sale of the specific property. In that case it was urged that the property was changed by the sale, but it was held by Alderson, J., that while the property was changed by the sale, as between a purchaser and the party against whom the execution has issued, yet it was not changed as against a party whose goods had been wrongfully taken. The same rule is sustained in *Notley v. Buck*, 8 Barn. & C. 130. But the case at bar is different. Here Merrell & Co. placed a writ in the hands of the defendant, as constable, commanding him to attach the debts due to Tyler by the Granite Mountain Mining Company. Acting strictly in pursuance of the authority of this writ, the constable served the necessary notices upon the mining company, telling them that all funds in their hands, due to Tyler, were attached to satisfy the claim of Merrell & Co. The mining company, although it knew of the assignment or order of Tyler, responded by confessing that it had money in its hands belonging to Tyler. The officer was not obliged, under such circumstances, to disregard the acknowledgment of the company, and to desist from further proceedings under his writ. When the execution was levied the company, although notified of the bank's claim, without objection or protest of any kind on its part, paid the officer the amount of the claim of Merrell & Co. It thus again admitted an indebtedness to Tyler. These acknowledgments and acts were sufficient to protect the officer from liability in this suit. Under such circumstances the answer of the garnishee was properly taken

as true by the officer, and in the absence of any mistake, fraud, collusion, or deception, the constable who proceeded under his writ of execution was not obliged to decline the money which the mining company confessed it owed to Tyler, even though he was notified by the bank of the assignment by Tyler to the plaintiff. *Haase v. Corbin*, 2 Mont. 409; *Kelley v. Tibbals*, 53 Pa. 408; *Coombs v. Davis*, 2 Wash. Terr. 406, 7 Pac. 860; *Shinn, Attachm.* § 640; *Drake, Attachm.* §§ 651 *et seq.* Of course, this confession of the mining company and payment to the constable in no way discharged its debt to the plaintiff bank in this case, under the order executed in favor of the bank by Tyler. *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896; *Freeman, Executions*, § 170. But, after the money collected under the execution has been paid to the creditors of Tyler, we cannot see how the conduct of the officer renders him liable to the bank, in equity and good conscience, for the payment of the sum so collected. He proceeded under the strict command of his writ, and knowledge obtained in legal manner. *St. Johns v. Charles*, 105 Mass. 262, in some respects resembles this case. There *St. Johns* made a contract with Charles to cut brush for \$100 in money and the loose wood on the lot. Afterwards *St. Johns* had begun the job, but, before it was accepted by Charles, *St. Johns*, for a consideration, signed and gave to Taft an order on Charles for all the money belonging to him for cutting the brush. Charles had notice of the order, and the contract was performed. Thereafter Charles was requested to pay the order to Taft, but neglected to do so. After suit was brought by *St. Johns*, Charles, without giving Taft any notice of it, paid *St. Johns* \$25 in money, and took his receipt in full for the contract. On the trial Charles contended that he was discharged by reason of the receipt in settlement, and that the same was a complete defense, notwithstanding the order of *St. Johns*. But the court held that the settlement made between *St. Johns* and Charles was no bar or defense to the right of Taft to prosecute suit for his own benefit, that the effect of the order was to assign to Taft all the money that should be earned under the existing contract, and that the rights of Taft under the assignment after notice could not be defeated by a payment and discharge from the assignor. It seems clear that the plaintiff's action lies against the mining company, but, after full consideration, we think that it would not be safe to hold an officer liable who proceeds, under proper mandate, to satisfy a judgment by accepting money acknowledged, as in this case, to be due from a garnishee to the defendant in the suit wherein the execution has issued, and where the money is paid, in accordance with such acknowledgment, and without objection, to the official.

The judgment and the order denying a new trial are affirmed.

Femberton, Ch. J., concurs. De Witt, J., not sitting.

ALABAMA SUPREME COURT.

FIRST NATIONAL BANK OF ANNISTON,
Appt.,
v.

May R. ELLIOTT et al.

(.....Ala.....)

1. The balance of a mortgage debt after deducting the amount for which the property was bought by the mortgagee on foreclosure is not a "lawful charge," within the meaning of Code 1896, §§ 3507-3510, which require a creditor of the mortgagor, on redeeming from the foreclosure sale, to pay the purchase money and all "lawful charges."
2. The husband of a mortgagee who bought land on foreclosure may be joined as defendant in a suit to redeem the land, when he has joined with her in a subsequent conveyance thereof, although by Code, § 2527, the husband is not a proper party to a suit on her contract or engagement.

(Tyson, J., dissents.)

(December 1, 1899.)

APPEAL by plaintiff from a decree of the Anniston City Court in favor of defendants in a proceeding to redeem certain real estate from a foreclosure sale. *Reversed.*

The facts are stated in the opinion.

Mr. A. P. Agee, for appellant:

There can be, and is, no question that the appellant has the right to redeem.

Ala. Code 1896, § 3510.

The provisions of the redemption statutes are unquestionably primarily for the benefit of the debtor, to prevent the sacrifice of his real estate, and to give him the advantage of any rise in value within the next two years. They are only for the benefit of the creditors incidentally; i. e., the statutes benefit the creditor only as the debtor's property sold at forced sales may, by virtue of the statutes, be made to settle as much of the debtor's indebtedness as possible.

Poscy v. Pressley, 60 Ala. 243.

As to any unsatisfied balance on the mortgage, when the mortgagee became the purchaser, she became a creditor on exactly the same footing as appellant and all judgment creditors of the debtor, who, without fraud or collusion, had obtained such judgment before the sale, or within two years thereafter, except by confession of the debtor.

A lawful charge is every lien or encumbrance or claim the purchaser may have on the premises, and for which in law or equity he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them.

Harris v. Miller, 71 Ala. 29; *Lehman v. Collins*, 69 Ala. 127; *Couthway v. Berghaus*, 25 Ala. 393.

NOTE.—For necessity of paying balance of mortgage debt on redeeming from foreclosure sale, see also *McGough v. Sweetser* (redemption by mortgagor's widow) (Ala.) 19 L. R. A. 470.

As to redemption by creditors, see also *Curtis v. Cutler* (C. C. App. 8th C.) 87 L. R. A. 737. 47 L. R. A.

It seems utterly inconsistent to say, when a mortgagee has purchased at her own sale, and a redemption is sought by a creditor whose judgment is as meritorious, under this § 3514, as the unsatisfied balance of the mortgage debt, that before obtaining the benefit of the redemption statutes the judgment creditor must pay off the balance of the mortgage debt.

If it must be paid, then why? Did not the mortgagee, when she foreclosed her mortgage, foreclose her lien on the premises, and is she not now absolute owner of the property?

Cramer v. Watson, 73 Ala. 127; *Spoor v. Phillips*, 27 Ala. 193.

When a mortgage has been foreclosed, the contract is executed.

Gamble v. Caldwell, 98 Ala. 579, 12 So. 424.

The foreclosure and sale of mortgaged premises for part of the mortgage debt exhausts the lien of mortgage.

Curtis v. Cutler, 40 U. S. App. 233, 76 Fed. Rep. 16, 22 C. C. A. 16, 37 L. R. A. 737; *Black, Judgm.* § 479; *Walker v. Ball*, 39 Ala. 298; *Willis v. Miller*, 23 Or. 352, 31 Pac. 827; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Clayton v. Ellis*, 50 Iowa, 590; *Eacher v. Simmons*, 54 Iowa, 269, 6 N. W. 274.

Messrs. Blackwell & Keith for appellees.

Dowdell, J., delivered the opinion of the court:

The present appeal is prosecuted from the decree of the city court sustaining respondents' demurrers to the complainant's bill. The facts pertinent to the question involved, as stated in the bill, are substantially as follows: On the 16th day of May, 1890, J. R. Robinson loaned to Algernon Culberson and E. J. Cobb \$3,500 for three years, and took as security a mortgage on a lot in the city of Anniston, Alabama, on the corner of Tenth street and Quintard avenue,—fronting 30 feet on Tenth street, and running back 85 feet; said real estate being a part of lots 5 and 6 in block 16. On October 24, 1890, said Robinson transferred this debt and mortgage to May R. Elliott, one of the appellees in this case. Some time prior to the 13th of July, 1893, the Corning Land, Industrial, & Trust Company assumed the payment of said debt: the property embraced in said mortgage having been conveyed to it. On that day, desiring an extension of said debt to the 16th of May, 1894, the said Corning Land, Industrial, & Trust Company mortgaged to said Elliott a lot adjoining that above described on the west side; fronting 28 feet on Tenth street, and running back 85 feet. On the 1st of April, 1895, said company, again desiring an extension of said debt, mortgaged to said Elliott a part of lots 7, 8, 9, and 10, in block 16, with the livery stable thereon. The Corning Land, Industrial, & Trust Company having made default in the payment of said debt, and said Elliott, having duly advertised the lands embraced in said several mortgages,

sold the same at public auction to the highest bidder for cash on the 7th of April, 1897; and at said sale said May R. Elliott, being authorized under the terms of the mortgage to bid and purchase at the foreclosure sale, became the purchaser of the property in the first-described mortgage for \$500, in the second mortgage for \$15, and in the third mortgage for \$1,100. Since the foreclosure she has sold the property mentioned in said mortgages to A. G. Donahoo for \$4,000, one fifth cash, and the balance in equal instalments in one, two, three, and four years, executing to said Donahoo her bonds for title; and said Donahoo has sold the property mentioned in the mortgage first described to A. H. Smith for \$1,000, one fifth cash, and the balance in equal instalments in one, two, three, and four years, the said Donahoo executing to said Smith his bond for title. On the 8th of October, 1896, appellant, the First National Bank, obtained a judgment against said Corning Land, Industrial, & Trust Company for \$6,080.98 and costs, \$9.20, upon which execution was issued October 19, 1896, and returned December 7, 1896, "No property found." Under this judgment the appellant has filed the bill in this case, asking to redeem all of said property embraced in all of said mortgages foreclosed and bought in by May R. Elliott as aforesaid; offering to pay the amounts bid for said several lots, with 10 per cent interest per annum, and lawful charges, and the cost of permanent improvements, but expressly declining to pay the balance due on the mortgage debt to May R. Elliott after crediting the amounts of said purchases. Appellee filed demurrers to said bill, based upon the ground that appellant did not offer to pay the balance of her mortgage debt, which, as she insists, was a lawful charge upon the land.

Thus, it will be seen that the question presented by the record for our determination is as to what, within the language of §§ 3507-3510 of the Code of 1896, constitutes a "lawful charge." While cognate questions have been passed upon and decided by this court, yet the exact question as presented by the facts in this case has never been decided, and it may be said that up to this time the question is *res integra*. There is no difference between counsel in this case as to the real issue. That issue is whether the unsatisfied balance of the mortgage debt is a "lawful charge" against a judgment creditor seeking to redeem from the mortgagee, who purchased at his own foreclosure sale. If it is a lawful charge, then this case, as to that proposition, should be affirmed. If it is not, it should be reversed. Generally lawful charges, such as the party coming in to redeem must pay or offer to pay, may be divided into two classes: (1) All liens, legal or equitable, which the purchaser at the foreclosure sale may have upon the premises, and for which, either at law or in equity, he would be entitled to hold them as security; (2) all claims of any kind to which a court of equity would condemn the premises in the hands of the person redeeming after he had acquired the title. In *Grigg v. Banks*, 59 Ala. 311, it was said by this

court: "The word 'charge' is of very large signification, and in the statute its proper signification is, every lien or encumbrance or claim the purchaser may have upon the premises, and for which, at law or in equity, he would be entitled to hold the lands as security, and to the satisfaction of which a court of equity would condemn them." Again, in *Lehman v. Collins*, 69 Ala. 127, it was said: "Every lien or encumbrance or claim for which the purchaser would be entitled to hold the lands as security, and to which a court of equity would subject them, whoever comes to redeem is bound to satisfy. . . . But it is only liens, legal or equitable,—claims capable of enforcement,—the creditor coming to redeem can be required to satisfy." In *Cramer v. Watson*, 73 Ala. 127, the same definition of "lawful charges" is given as quoted above from *Grigg v. Banks*. In *Parmer v. Parmer*, 74 Ala. 285, in an opinion by Somerville, J., wherein it was decided that the ordinary debts not covered by the mortgage were not lawful charges against the mortgagor seeking to redeem from the mortgagee, it was said: "Lawful charges embrace 'only such claims or demands as are in the nature of an encumbrance or lien for which the purchaser would be entitled to hold the land as security;' citing *Lehman v. Collins*, 69 Ala. 127; *Grigg v. Banks*, 59 Ala. 311; *Walker v. Ball*, 30 Ala. 298; and *Couthway v. Berghaus*, 25 Ala. 393. Judge Somerville then adds: "It is manifest that, if the set-offs claimed by the mortgagees before the register had been allowed, the legal effect would have been indirectly to create them liens upon the mortgaged property, in the face of the fact that there was no agreement between the parties to this effect." In *Gresham v. Ware*, 79 Ala. 192, Clopton, J., in deciding that statutory damages and protest fees on a bill of exchange were "lawful charges," says: "The statutory damages accruing on the protest of a bill of exchange constitute part of the debt, and are recoverable in an action on the bill. It is true, the acceptor is not personally liable for them. They are, however, secured by the mortgage, so far as respects the property of Robert Ware, equally with the principal and interest; and in ascertaining the amount to be paid by the complainant on redemption, and the extent to which his property shall be applied in exoneration of hers, all claims and demands having by the mortgage a valid lien on his property must be taken into the estimate." In *Harris v. Miller*, 71 Ala. 26, in an opinion by Judge Brickell, who also delivered the opinion in the cases of *Grigg v. Banks*, *Lehman v. Collins*, and *Cramer v. Watson*, after defining "lawful charges" in almost the same language as used in *Grigg v. Banks*, he then adds: "The charge may and will vary with different purchasers."

Under subdivision 1 the lien discharged by the purchaser must not only be an existing, valid lien, but such that its satisfaction and removal is necessary to the full and absolute ownership and enjoyment of the property by the purchaser. It makes no difference whether the purchaser be the mortgagee himself or a stranger; such lien or encumbrance,

when paid off by the purchaser, constitutes a "lawful charge," within the meaning of the statute. The measure of the amount of the "lawful charge" which the redemptioner is required to pay is not determined by the sum or amount originally secured by the lien, but by the amount actually paid by the purchaser for its discharge and removal. It is to this extent that the purchaser, in a sense, becomes subrogated to the rights of the original lienor, and no further. It is therefore not an unimportant inquiry as to whether, upon the foreclosure of her mortgage by the appellee, Mrs. Elliott, the mortgage lien became thereby extinguished. When Mrs. Elliott foreclosed her mortgage, buying in the property at the foreclosure sale, as she was authorized to do under the mortgage contract, she went into the possession of the property as absolute owner, discharged of all lien which existed under the mortgage before foreclosure. *Cramer v. Watson*, 73 Ala. 127; *Spoor v. Phillips*, 27 Ala. 193. We think the proposition too well settled to admit of doubt that the sale of land under execution or by foreclosure of a mortgage extinguishes the lien, and this is true whether the entire debt secured be satisfied or not. *Black, Judgm.* § 479; *Curtis v. Outler*, 40 U. S. App. 233, 76 Fed. Rep. 16, 22 C. C. A. 16, 37 L. R. A. 737; *Willis v. Miller*, 23 Or. 352, 31 Pac. 827; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Clayton v. Ellis*, 50 Iowa, 590; and *Tuttle v. Dewey*, 44 Iowa, 306. In *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, it was said: "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure, and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien; and when the lien has been once enforced, by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it. When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage; but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all the property of a debtor to the payment of his debts until they are satisfied in full. But, where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property cannot be subjected a second time to the satisfaction of the same lien." The principle here laid down is in harmony with the proposition laid down in *Harris v. Miller*, 71 Ala. 26, that the "lawful charge" may and will vary with different purchasers. It would not for a moment be contended that the unpaid balance of the mortgage debt after foreclosure sale would constitute a "lawful charge" against a creditor offering to redeem from a stranger

who purchased at the foreclosure sale. In *Harris v. Miller*, 71 Ala. 26, which was the case of a mortgagor seeking to redeem from the mortgagee, who purchased at the foreclosure sale, it was decided that the unsatisfied balance of the mortgage debt was a "lawful charge," which the mortgagor must pay before his redemption could be effected; but it must not be overlooked that this conclusion was put upon the distinct proposition that the title acquired by the mortgagor upon redemption would at once inure to the benefit of the mortgagee, and for that reason, as to the unpaid balance of the mortgage debt, the mortgage would be a valid and operative security. It is not pretended that a lien would still exist under the mortgage upon the property after a valid foreclosure sale; but a different and distinct principle of equity is involved, growing out of the relation existing between the purchaser, who is the mortgagee, and the mortgagor seeking to redeem, and would be inapplicable to a different purchaser than the mortgagee, or a different person seeking to redeem than the mortgagor, or one claiming under him.

In the discussion of this phase of the case, which might properly fall under subdivision 2, as stated above (i. e., all claims of any kind to which a court of equity would condemn the premises in the hands of the person redeeming after he had acquired the title), it will be well to take into consideration the object and purpose of the enactment of this statute of redemption. The first act on the subject of redemption was passed January 1, 1842, and was entitled "An Act to Prevent the Sacrifice of Real Estate." Clay's Dig. pp. 502, 503. There have been some changes in the terms of this original statute since 1842, but no substantial or material change has occurred. Code 1852, §§ 2118-2120; Code 1867, §§ 2511-2513; Code 1876, §§ 2879-2881; Code 1886, §§ 1881-1883; Code 1896, §§ 3507-3510. All of these sections of the various Codes are the same, and in effect are the same as the act of 1842, in so far as the principle involved in this case is concerned. They all have the same purpose as the original act; the primary object being to prevent a sacrifice of the real estate of the debtor, and thereby enable the debtor to pay with his property his indebtedness to the fullest extent of its value, as well as to afford to his other creditors an opportunity to collect their debts by bidding at its full value. In determining whether the unsatisfied balance of the mortgage debt constitutes a "lawful charge," within the meaning of the statute, the primary purpose of the statute should be borne in mind. The present case arises under § 3510 of the Code of 1896, which provides for redemption by the creditor. This section contains the same phrase, "lawful charge," as contained in § 3507, which provides for redemption by the mortgagor, debtor, or person holding under him. It is a general rule of construction that words or phrases twice used in the same statute are presumptively used in the same sense, and ordinarily should receive such construction; but the rule is not an unbending one or without exception. Without doing violence to

any cardinal rule of construction, when possible the statute should receive that interpretation which tends to promote the ends for which it was created, and not one which would render it possible to pervert it into a means of oppression of that class for whose benefit it was passed. Where the statute is open to a construction that is in harmony with its spirit, and promotive of its manifest aim and object, in order to attain the ends for which it was enacted such construction should always be given it by the courts. It would be difficult to give the phrase "lawful charges" an absolute meaning, alike applicable to all cases. That the very language itself leaves it open to interpretation by the court seems clear, and it can be safely asserted, from the decisions of this court, that, in giving this phrase interpretation, the situation of the parties must be taken into consideration.

Conceding that the primary object of the statute was for the benefit of the debtor, it is urged by counsel for appellee, in argument, that to require the mortgagor, offering to redeem from the mortgagee, purchaser under the foreclosure sale of the mortgage, to pay the unsatisfied balance of the mortgage debt, as a "lawful charge," and not to require the creditor, seeking to redeem, to pay such unsatisfied balance, would be conferring a greater benefit upon the creditor than upon the debtor, for whose protection the statute was enacted. This contention, however plausible it may appear upon a casual consideration, is superficial, and not supported by sound reasoning. An example may here serve to illustrate the fallacy of the position taken: A mortgages to B his land for \$10,000, that being the value of his property. C is also a creditor of A for \$1,000. A makes default in the payment of the mortgage debt, and the same is foreclosed by the mortgagee; and at such sale the mortgagee becomes the purchaser for \$5,000, one half of the actual value of the property. Under the equitable principle growing out of the relation between mortgagor and mortgagee, as laid down in *Harris v. Miller*, *supra*, the mortgagor A, coming in to redeem, must pay the balance of the mortgage debt. This he is unable to do, and the result of his inability is a loss to him of one half the value of the property, which is sacrificed by his misfortune, without lessening his debt to his other creditor, C. Upon the creditor, C, coming in to redeem, under § 3510, in addition to the payment of the purchase price bid, with 10 per cent per annum thereon, together with all other lawful charges, he is further required to credit his judgment against the debtor with an amount not less than 10 per cent of the price bid. It is evident that if the creditor be required to pay the unpaid balance of the mortgage debt, as a "lawful charge," and in addition give to the debtor the credit imposed by the statute, such creditor would be required to pay more than the value of the property in order to redeem the same. And it is hardly reasonable to suppose that any creditor in the given case would undertake such redemption; nor

is it reasonable to conclude that it was the intention of the lawmaking power, in giving the creditor the right to redeem, at the same time to make such right a practical failure. It is equally clear that giving to the creditor the right to redeem, without requiring the payment of the unpaid balance of the mortgage debt, operates to the benefit of the debtor, and without working any prejudice or injustice to the mortgagee purchaser. It should not be overlooked that under § 3514 of the Code of 1896, which forms part of the chapter relating to redemption, the mortgagee, as to the unpaid balance of the mortgage debt after foreclosure sale, is himself a creditor, within the meaning of the statute; and, as such creditor, upon the offer of another creditor to redeem he has a right to avail himself of the provisions contained in §§ 3511 and 3512, which also form a part of this chapter upon redemptions, and which provide that the offer to redeem may be met by a responsive offer to credit the debtor with a like sum offered to be credited by the proposed redemptioner, which responsive offers may be alternately repeated until one or the other declines to further credit, thereby securing to the debtor the fullest benefits intended by the statute.

It is, however, insisted by counsel for appellee, in argument, that the case of *Grigg v. Banks*, 59 Ala. 311, is a parallel case with the one at bar, and conclusive of the question here involved. In this conclusion counsel has evidently fallen into error. In that case Mrs. Grigg, who was a judgment creditor of the common debtor, Gilmer, sought to redeem by merely paying off the amount for which the property had been sold at execution sale. The facts were: The property had been levied upon by attachment at the suit of Goldthwaite and Holmes against Gilmer, in which suit they obtained a judgment. Banks, who held a mortgage against the property,—which, however, was subsequent in time to the levy of the attachment,—took a transfer of the judgment of Holmes and Goldthwaite to himself, and had the property sold under execution on this judgment; he (Banks) becoming the purchaser at the execution sale. Subsequent to this sale, Banks foreclosed his mortgage upon the property, to which he had acquired title under the execution sale, and became the purchaser at the foreclosure sale. Mrs. Grigg, as above stated, sought to redeem the property from Banks under the execution sale, insisting that the mortgage debt did not constitute a lawful charge. The question of an unpaid balance on the mortgage debt after foreclosure did not arise in the case. There was no question that if Banks had sold under his mortgage, after having first entered satisfaction of the judgment which he purchased, he would have been entitled to be reimbursed what he paid in the extinguishment of the prior execution lien. It was observed by the court in that case that such course should have been pursued by Banks, and the fact that he had made a mistake in selling under the execution, instead of entering satisfaction of the judgment, would not be visited upon him, but that a court of

chancery would relieve him of such mistake, and require the redemptioner to pay all the mortgage debt.

From what we have said, it is our conclusion that as against the judgment creditor, offering to redeem from the mortgagee who purchased at her own foreclosure sale, the unpaid balance of the mortgage debt, within the meaning of the statute, does not constitute a lawful charge which the judgment creditor, offering to redeem, is required to satisfy. As we have stated, this being the first time that the exact question involved in this case has been presented for a decision by this court, no rule of property has been established; and the doctrine of *stare decisis*, insisted upon by counsel, is without application, and we therefore consider it unnecessary to discuss that proposition.

The only other question presented by the demurrer to the bill is that of a misjoinder of John M. Elliott, the husband of May R. Elliott, as a party defendant. It is shown in the bill that John M. Elliott and his wife both entered into the contract of sale with Donahoo. The bill prays that the equities of all the parties be adjusted; that John M. Elliott be required to join in a deed with his said wife upon redemption. This is not a suit upon any contract made by the wife, or upon any engagement into which she has entered, within the meaning of § 2527 of the Code. But whether John M. Elliott, the husband, was a necessary party or not, we think it clear that he was not an improper party, to the bill.

The decree of the City Court must be reversed, and the cause remanded.

Tyson, J., dissenting:

The theory upon which the justice delivering the opinion predicates the right of a judgment creditor to redeem from a mortgagee, as purchaser at a sale under a power contained in a mortgage authorizing him to do so, without being required to pay the balance due by the mortgagor upon the mortgage debt, is based upon two propositions: (1) That the mortgagee after foreclosure has no lien, legal or equitable, for this balance; (2) that the balance due by the mortgagor upon the debt is not such a claim for which a court of equity would condemn the lands in the hands of a judgment creditor after he had acquired the title by redemption. These two propositions he deduces from the cases of *Grigg v. Banks*, 59 Ala. 311; *Lehman v. Collins*, 69 Ala. 127; *Cramer v. Watson*, 73 Ala. 127; *Parmer v. Parmer*, 74 Ala. 285; *Gresham v. Ware*, 79 Ala. 192; and *Harris v. Miller*, 71 Ala. 26. The proposition numbered 2, I insist, is not a correct deduction from the principles announced in those cases, as will be made to appear later in this opinion, from a careful analysis of them. The right of redemption here sought to be enforced "is purely the creature of legislation, and can only be exercised by the persons named in the statute, in the mode, within the time, and upon the conditions there prescribed." This right cannot be enlarged by the courts for the purpose of enforcing some supposed equitable claim residing in

the party invoking the aid of the statute. Nor can the courts adopt a construction of the statute for the purpose of enlarging or narrowing the right conferred by it, by dispensing with a compliance with its terms. *Beebe v. Buxton*, 99 Ala. 117, 12 So. 567; *Powers v. Andrews*, 84 Ala. 289, 4 So. 263; *Nelms v. Kennon*, 88 Ala. 329, 6 So. 744.

It is admitted in the majority opinion that when the redemption is sought by the mortgagor debtor from the mortgagee, as purchaser, he must pay the balance remaining unsatisfied upon the mortgage debt, "as lawful charges," before he will be permitted to redeem. But it is held that what are "lawful charges" against the debtor are not "lawful charges" against his judgment creditor. And this conclusion is reached solely upon the idea that the statute was enacted for the benefit of the debtor, in order to prevent a sacrifice of his lands; overlooking the fact that the statute, by its terms, also protects the purchaser as well. The party seeking redemption, whoever he may be,—whether debtor or judgment creditor,—is required to pay, among other things, all "lawful charges." Lawful charges against the debtor? No; but lawful charges upon the lands, without regard to the status of the title established by a sale under the mortgage. Section 3507 of the Code confers on the debtor or his vendee the right to redeem upon paying or tendering to the purchaser or his vendee the purchase money, with 10 per cent per annum thereon, and all other lawful charges. Section 3510 provides: "All judgment creditors of the debtor . . . may in like manner redeem the land from such purchaser or anyone claiming under him, by paying or tendering the amount bid for such land at the sale thereof and ten per cent per annum thereon, together with all lawful charges; and by further offering to credit the debtor upon a subsisting judgment with a sum at least equal to ten per cent of the amount originally bid for the land." The different construction placed upon the two statutes as to what the words "lawful charges" mean in each finds no justification in any change of phraseology; for it is clear that the judgment creditor is required to do what the debtor is required to do, and more, to wit, by offering to credit the debtor upon his judgment at least 10 per cent of the amount originally bid by the purchaser for the land,—thus conclusively showing that the policy of the statute is to favor the debtor, rather than the redeeming creditor. As said in *Posey v. Pressley*, 60 Ala. 249: "Personal benefit to the creditor is not intended, except so far as it is in relief of the debtor." This being the adjudged policy of the statute, and there being no justification on account of any change in phraseology requiring a different construction, it cannot be that the words "lawful charges," when used in fixing the terms upon which a debtor may redeem, shall be given a more enlarged meaning, imposing upon him greater burdens, than is given to them when used in conferring the same right upon his judgment creditor. Such a construction not only does violence to the policy of the stat-

ute as declared by this court, but is unsound as a rule of construction. In *Lehman v. Robinson*, 59 Ala. 235, the court quoted approvingly from Potter's Dwarrr. Stat. p. 194, this language: "If the same words occur in different parts of a statute or will, they must be taken to have been everywhere used in the same sense." This same authority [Potter's Dwarrr. Stat. p. 195], quoting from Lord Denman, says: "We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament, on the ground of a supposed general intention in the act. We think it necessary to give a fair and reasonable construction to the language used by the legislature, but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own." In *Harris v. Miller*, 71 Ala. 26, after adopting the general definition given to the word "charge" in *Grigg v. Banks* and *Lehman v. Collins*, and other cases, that it evinces "every lien or encumbrance or claim the purchaser may have on the premises, and for which, at law or in equity, he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them," the court says: "It is a just and plain principle of the law of mortgages that payment of the mortgage debt is a condition precedent to redemption.—*Gliddon v. Andrews*, 14 Ala. 733. This principle the statute of redemption was not intended to disturb or change. And, if the statute extends to sales at which the mortgagee becomes the purchaser, the mortgagor cannot redeem without paying the entire debt. The debt, so far as it is not extinguished by the bid at the mortgage sale, is a lawful charge on the land. . . . The statute and the statutory right of redemption cannot be perverted into an instrumentality by which the mortgagor may deprive the mortgagee of the security for the debt which the mortgage affords. The offer to redeem made by the mortgagor did not vary his relation to the mortgagee." In that case the argument was made that by foreclosure the mortgage lien was extinguished, and therefore any unsatisfied balance upon the mortgage debt could not be a lawful charge upon the land. The court held that notwithstanding the foreclosure it was a lawful charge; distinctly recognizing the principle announced in *Parmer v. Parmer*, 74 Ala. 288, where it is said that the policy of the statute of redemption and of the equity of redemption at common law is "essentially the same," and the principle above quoted, "The statute of redemption was not intended to disturb or change" the "plain principle of the law of mortgages, that payment of the mortgage debt is a condition precedent to redemption." Surely, if the statute placed the mortgagor and mortgagee upon the same footing, as to the matter of redemption, as a redemption of the equity at common law, the person, whether he be the debtor or a judgment creditor, offering to redeem, must pay the entire mortgage debt. In support of this principle, where the party offering to redeem was not

precluded by the foreclosure proceedings, see *Gliddon v. Andrews*, 14 Ala. 733; *Doxier v. Mitchell*, 65 Ala. 511; *Beach*, Modern Eq. Jur. § 475; *Pom. Eq. Jur.* § 1220; 2 *Jones*, *Mortg.* § 1070; *Collins v. Riggs*, 14 Wall. 491, 20 L. ed. 723; *Benedict v. Gilman*, 4 Paige, 58; 20 *Am. & Eng. Enc. Law*, p. 620.

If I am correct,—and my assertion to this effect finds support in the language used in *Harris v. Miller*,—that the policy of redemption under the statute is the same as at common law, it is beyond the pale of controversy that a judgment creditor coming in to redeem from the mortgagee, as purchaser, is bound to pay the balance due upon the mortgage debt, as "lawful charges." As accentuating the correctness of the proposition that such is the policy of the statute, no conveyance is required by the purchaser to the redemptioner, upon redemption by a debtor, to convey the title to him, acquired by such purchaser. Code, § 3507. In my opinion, this principle has been expressly applied to redemption under the statute by judgment creditors in the cases of *Grigg v. Banks* and *Cramer v. Watson*; and the words "lawful charges" were clearly held in each of these cases to mean the same thing when applied to rights of a debtor offering to redeem from his mortgagee, as purchaser, and of a judgment creditor offering to redeem from a mortgagee, as purchaser. It is said in the majority opinion that the case of *Grigg v. Banks* is not conclusive of the question, for the reason that "if Banks had sold under his mortgage, after having first entered satisfaction of the judgment which he purchased, he would have been entitled to be reimbursed what he paid in the extinguishment of the prior execution lien, . . . and the fact that he had made a mistake in selling under the execution instead of entering satisfaction of the judgment, would not be visited upon him, but that a court of chancery would relieve him of such mistake, and require the redemptioner to pay all the mortgage debt." The fact is (and this is shown in the statement of facts set out in the majority opinion) that Banks did foreclose his mortgages upon the lands after he had acquired the title as purchaser at an execution sale, which execution was a prior lien upon the lands; and it was with his status as purchaser under execution sale, and as purchaser of his own lands under the mortgages, that the court was compelled to, and did, deal. The real question presented, and the real question decided, was not whether the judgment and execution created a lawful charge, but whether the mortgages constituted such a charge. While Chief Justice Brickell, in the opinion delivered by him, held that the purchase by Banks at the sheriff's sale "had no other effect than to remove the lien of attachment as a charge or encumbrance on the premises," and "clothed him with no other right or interest than that of demanding compensation for the moneys properly expended in its removal," and that though "in a court of equity he holds that estate as a trustee for the mortgagor, without right to derive from it any personal benefit, or a title antagonistic to that of the mortgagor," yet

it is equally true that as against Grigg, the judgment creditor, the title acquired under the execution sale was absolute, both at law and in equity,—a sale from which Grigg could redeem under the statute, and under the statute alone; and from that sale, and not from the mortgages, redemption was sought. It appears from the record that Grigg expressly declined to recognize Banks's right to require the mortgage debt to be paid, and, as I have said, this was the real question in the case. The chief justice, in the conclusion of his opinion, stated the doctrine (which is sound and equitable, and applicable to the facts of the case in hand) to be: "It is a principle too well settled to be matter of controversy, and of very general, if not universal, application, that a party fairly acquiring the legal estate will not be compelled to part with it until all charges or claims thereon to which he is entitled in law or equity are satisfied." Justice Manning, delivering an opinion in the case, adding, as he says, to the views expressed by the chief justice, said: "It is clear that if, instead of having the land sold under the judgment and mortgages, both,—Banks had merely entered satisfaction of the judgment, and had caused the land to be sold, and had purchased it under the mortgages only, appellant [Grigg], before she could redeem, as a judgment creditor under the statute, from him, would have had to reimburse to him, as a part of the 'lawful charges,' what the judgment of Holmes and Goldthwaite (an encumbrance on his title as mortgagee) had cost him, and that he could also have interposed, and required her to pay the entire mortgage debt. . . . Certainly nothing could be more contrary to some of the universally accepted and best established maxims of equity law than for a court of equity to interfere, in a case like the present, to set aside the legal rights and superior equities of a party in possession, and elevate above them a claim resting upon considerations which must be regarded as very much less meritorious. This, of course, does not refer to the claim of Mrs. Grigg against Gilmer, but to the contention between her and Banks." This last quotation is a distinct announcement that whether a claim is a "lawful charge" upon the lands is not, as said by my brothers, dependent upon the question as to whether a court of equity would condemn the lands in the hands of a judgment creditor after he had acquired the title by redemption, but whether the claim is an equitable charge upon the lands as against the debtor.

In *Cramer v. Watson* the facts were these: Steele executed a mortgage to Patton, and then a second mortgage to Cramer and Cohen. Upon default, Patton foreclosed his mortgage by sale under the power contained in it, and Cramer and Cohen purchased at the sale at and for the amount due upon the mortgage debt. Watson, having obtained a judgment against Steele, sought to redeem from Cramer and Cohen, and for that purpose tendered to them the amount of their bid, and 10 per cent per annum thereon; failing, however, to include in the tender the

amount due Cramer and Cohen on their mortgage debt. This tender was refused by them because, among other things, it did not include their mortgage debt; and Watson filed his bill, which was treated by this court as a bill to redeem under the statute. One of the questions involved was whether Watson should be required to pay the mortgage held by Cramer and Cohen. On this point the court said: "The payment of lawful charges upon the lands which have accrued to the purchaser is as essential, is as clear and distinct a right of the purchaser, and as clear and distinct a duty of the party offering to redeem, as is the payment of the purchase money and the statutory interest;" and that "the tender of the purchase money and interest, withholding or not including a tender of lawful charges, may rightfully be rejected by the purchaser." The offer to redeem by the appellee [Watson] did not include the payment of the mortgage debt due to the appellants. . . . The offer of payment of the mortgage debt seems to have been omitted upon the supposition that the appellants were bound to apply the rents accruing while they were in possession to its payment, and these would operate its extinguishment. The mortgage debt due the appellants was a lawful charge upon the lands, to the payment of which whoever came to redeem under the statute was bound. The words of the statute are 'lawful charges,' and their proper signification is, 'every lien or encumbrance or claim the purchaser may have upon the premises, and for which, at law or in equity, he is entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them.'" It may be said that Cramer and Cohen held a second mortgage, instead of an unpaid balance on a first mortgage. Upon principle, this can make no difference, for the reason that as holders of the second mortgage they were merely the assignees of the equity of redemption, and that equity had been as effectually foreclosed by the sale under the first mortgage as it would have been by a strict foreclosure, or by sale under a decree of foreclosure in a proceeding had for that purpose, to which they had been made parties. *Powers v. Andrews*, 84 Ala. 289, 4 So. 263; *Childress v. Monette*, 54 Ala. 317; *Otis v. McMillan*, 70 Ala. 59; *Aiken v. Bridgeford*, 84 Ala. 295, 4 So. 266; *Harris v. Miller*, 71 Ala. 26. The second mortgage created a lien or encumbrance only upon the equity of redemption, and the equity of redemption having been destroyed by the sale under the power in the first mortgage, Cramer's and Cohen's rights as lienholders were destroyed, also. So, manifestly, their right to have this mortgage debt paid them, as a condition precedent to the right of the judgment creditor, Watson, to redeem from them, must rest, not upon the principle as announced in the majority opinion, but upon the broad principle of equity which I contend for, and which was distinctly enforced by the court in that case,—that the lands were an equitable security in their hands for this debt. It is but the application of the well-known and often-applied equitable principle that a court of equity

will keep alive a superior equity as against a junior encumbrancer, notwithstanding, as between the original parties, the contractual lien out of which the equity arose has been extinguished; for, says Justice Somerville in *Fouche v. Swain*, 80 Ala. 153, in speaking of a first mortgage given by Prior, which had been extinguished by the execution of a deed by him to Mrs. Swain to the lands conveyed by the mortgage, which deed was subsequent to the execution and recordation of Prior's mortgage held by Fouche: "It may have satisfied it as between her [Mrs. Swain] and Prior. . . . But, as to any junior encumbrancer, her superior equity would still be preserved in its full force and vitality. There would be but a poor show of logic in holding that this strengthening of her title by Mrs. Swain has, after all, but served to weaken it. It is common practice for courts of chancery to keep alive equitable liens and encumbrances, as against strangers or third parties. Equity could often be badly administered without it." In *Mitchell v. Brown*, 6 Coldw. 505, which was cited with approval in *Grigg v. Banks*, the supreme court of Tennessee, speaking of redemption in that state under a similar statute, said: "It is a well-settled principle that a party who has the legal title will not be forced to part with it until the debts he has against the party are satisfied, growing out of the transaction. The rule is, the party holding the legal title cannot be forced to a conveyance until the debts are paid."

The only case cited in the majority opinion on the point here in question is *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, which is wholly unlike this case. In that case there had been a foreclosure of the senior mortgage, and the mortgaged property had been purchased by the senior mortgagee for less than the debt. The junior mortgagee or his assignee had redeemed the land from him, and after redemption the senior mortgagee sought to subject the lands again to the lien of his mortgage. From this statement, it is apparent that the question was, not what the junior mortgagee should pay to redeem, but what was the effect of such redemption in the statutes of Illinois. Besides, the statute of redemption of that state is unlike ours, in that the redemptioner was only required to pay the sum bid, and statutory interest, and did not contain the additional requirement of the payment of "all lawful charges." Rev. Stat. 1874, chap. 77, §§ 18-20. But, whatever may be the decisions of other states as to the policy of their statutes of redemption, this court, in my opinion, is unalterably committed to the construction of our statute by the decisions we have quoted from, and the policy of the statute as there declared cannot be departed from. Adopting the language of the court in *Matheson v. Hearin*, 29 Ala. 210: "We think the presumption a fair one that the opinion delivered in those cases [*Harris v. Miller*, *Cramer v. Watson*, and *Grigg v. Banks*] have been acted on as a rule of property. And therefore the reasons which impel the courts to uphold every settled rule of property require

us to reaffirm and maintain those cases, not only as to the points necessarily involved in and decided by them, but also as to the principles which are declared in" them.

It is also said in the majority opinion that a mortgagee, for the unpaid balance of the mortgage debt after foreclosure sale, is a creditor, within the meaning of § 3514, and, as such creditor, upon the offer of another creditor to redeem he has a right to avail himself of the provisions of §§ 3511 and 3512. This is in direct conflict with the principles declared in the opinion in the case of *Owen v. Kilpatrick*, 96 Ala. 421, 11 So. 476, which, in my opinion, is a correct construction of the several sections of the Code providing the right of redemption, and also with principles announced in *Freeman v. Jordan*, 17 Ala. 500, and *Thomason v. Scales*, 12 Ala. 309. The whole field of operation of § 3514 is to confer upon the class of persons therein named the right of redemption as to lands of the debtor other than those involved in the purchase. The result of the holding of my brothers is not only to strike down the policy of the statute as declared in *Harris v. Miller*, *Grigg v. Banks*, and *Cramer v. Watson*, but to confer a special privilege upon the judgment creditor, to the exclusion, not only of the debtor himself, but to the exclusion of the debtor's vendee, junior mortgagee, or assignee of the equity of redemption. To elevate his rights above those of these classes, by relieving him from the payment of "lawful charges" which are "lawful charges" upon the lands as against them, notwithstanding he could have, under his judgment, only condemned to its satisfaction before foreclosure such interest as the debtor himself had in the land, which was, after foreclosure, as we have shown, the right to redeem upon the payment of the entire mortgage debt. For by § 3505 of the Code the right of redemption is conferred, not only upon the debtor and his vendee, but upon a junior mortgagee or assignee of the equity of redemption, and by § 3515 conferred upon a child of the debtor to whom a conveyance has been made, which must be exercised and enforced in the same manner as the right of the debtor or his vendee is exercised under § 3507, and, of necessity, laden with the same burdens. This right of redemption is conferred by the statute upon various classes of persons, including the judgment creditor, because of their relation to the debtor, and depends for its exercise upon the existence of such relation. The conferring of this valuable privilege upon these various classes of persons, other than the debtor, was not only for the purpose of preventing a sacrifice of the debtor's property, but to enable them to protect, if possible, their claims, either as owners of the equity of redemption or as creditors. And just why they are not upon the same footing, in this sort of case, I am unable to see. Certainly it cannot be said, with any show of equity or good conscience, that a judgment creditor should not bear the same burden as a junior mortgagee, who is, not only an owner of the equity of redemption, but a credit-

or as well. The illustration made use of in the opinion does not serve to defeat the invidious preference which I have pointed out, given the judgment creditor over a junior mortgagee, the debtor's vendee, assignee of the equity of redemption, or child to whom a conveyance has been made by him. Nor does it serve to illustrate that the debtor's property is not sacrificed. On the contrary, it demonstrates conclusively that the policy of the statute, as declared in the opinion, is exclusively for the benefit of the judgment creditor, converting the statute into an instrumentality by which a profit of \$5,000, less \$500, which he is bound to credit the debtor with on his judgment, is secured to him; and this, too, by depriving the superior encumbrancer or claimant of it, and giving it to him who is the holder of an inferior claim. This process of taking the profit from one creditor and bestowing it upon another is certainly of no personal benefit to the debtor, beyond the 10 per cent required to be credited on the judgment. He is still a debtor to the mortgagee in the sum of \$5,000, the unsatisfied balance upon the mortgage debt, and the balance remaining due upon the judgment after deducting the credit of \$500, entailing a loss upon him of \$4,500, which confessedly has gone into the pocket of the judgment creditor. It is not an answer that the debtor can regain this \$4,500 by redeeming from the judgment creditor; for this he cannot do, as this right is conferred by the statute only upon another judgment creditor. *Owen v. Kilpatrick*, 96 Ala. 421, 11 So. 476. Nor is it an answer that the debtor should not have permitted his lands sold in the first instance under the mortgage, or that he should have redeemed from the mortgagee before the judgment creditor did. Had he been pecuniarily able to have prevented the sale under the mortgage, he would never have had any need for the statute, and for the same reason he would have had no judgment creditor. Indeed, it was on account of his impecunious condition, and for the purpose of relieving it as far as possible, that the statute was enacted. Under my contention, the judgment creditor being required to pay the entire mortgage debt, the debtor is entirely relieved of the balance, thereby saving the \$4,500 which the judgment creditor is permitted to make, and in addition gets a credit of \$1,000. instead of \$500, upon the judgment.

It is no answer that this construction yields no profit to the judgment creditor. Suffice it to say that the statute was not enacted for the purpose of enabling him to reap a profit out of the unfortunate financial condition of his insolvent debtor, but, as I have repeatedly said, to protect the debtor, and at the same time to secure to the purchaser, from whom the redemption is sought, his right, also. Nor is the position tenable that the unsatisfied balance is not a lawful charge, because, if the judgment creditor is required to pay it, together with 10 per cent upon the whole debt to the mortgagee, and in addition give to the debtor the credit imposed by the statute, he would thereby be required to pay more than the value of the property, thereby making the right to redeem a practical failure. The answer to this position is that the unfortunate debtor or his vendee, junior mortgagee, and assignee of the equity of redemption, and a child of the debtor to whom he has executed a conveyance, is required to pay to the mortgagee this 10 per cent in addition to the whole debt; and if the legislature, in imposing this penalty upon them, did not regard it a hardship, certainly it cannot be so regarded by the courts in the case of a judgment creditor, and that to such an extent as to relieve him from complying with the plain mandate of the statute requiring him to pay "all lawful charges."

Great stress is placed upon the language used in *Harris v. Miller*, that "the charge may and will vary with different purchasers." No one doubts this; for, if a stranger becomes the purchaser at a mortgage sale of lands, he would not be entitled to have paid to him more than the amount of his bid, taxes, value of improvements, and 10 per cent thereon, by any redemptioner, whether he be the mortgagor or his vendee, a junior mortgagee, an assignee of the equity of redemption, or a judgment creditor of the mortgagor. But, because this is true, it does not follow, as a logical sequence, that the charges may and will vary with different redemptioners from the same purchaser. On the contrary, it may be said that no such conclusion can be logically deduced. Such a conclusion inevitably confers a special privilege upon the judgment creditor,—an invidious distinction, which I do not believe was intended to be conferred by the legislature.

CONNECTICUT SUPREME COURT OF ERRORS.

Lella A. TIRRELL, Appt.,

v.

Louie R. TIRRELL.

(.....Conn.....)

Merely paying an allowance to one's wife in compliance with an order of

court after abandoning her, without furnishing her any other support, is not sufficient to prevent granting her a divorce under a statute authorizing a divorce for "wilful desertion for three years, with total neglect of duty."

(January 19, 1900.)

NOTE.—As to divorce for desertion, see also *Herold v. Herold* (N. J. Eq.) 9 L. R. A. 696, and note.

As to what constitutes desertion as ground for divorce, see also *Doolittle v. Doolittle* (Iowa) 6 L. R. A. 187; *Williams v. Williams* 47 L. R. A.

(N. Y.) 14 L. R. A. 220; *Fritts v. Fritts* (Ill.) 14 L. R. A. 685, and note; *Jones v. Jones* (Ala.) 18 L. R. A. 95; *Hardie v. Hardie* (Pa.) 25 L. R. A. 697; and *Danforth v. Danforth* (Me.) 31 L. R. A. 608.

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendant in an action for a divorce. *Reversed.*

Statement by **Andrews, Ch. J.:**

The finding of facts is this: "(1) The plaintiff and defendant were married at Unionville, in this state, on December 20, 1893. The defendant was in the livery business at Unionville. They resided with the defendant's parents until May, 1895, when the defendant closed his business, left the plaintiff, and went to Hartford, telling her that he would not live with her any longer, and would do nothing for her; she must support herself. (2) The plaintiff, being without means of support, went to Hartford in October, 1895, and commenced to learn the millinery trade. The defendant, on being threatened with complaint for nonsupport, promised to and did pay the plaintiff \$3 a week from October, 1895, to January 14, 1896. On January 14 the defendant called at the plaintiff's boarding place, and offered her a room with him on Church street, stating that he was only obliged to furnish her with shelter and food, and, if she did not accept this offer, she would have no claim on him. (3) The plaintiff went to Church street with the defendant, and remained there until March 21, 1896. (4) In March, 1896, the defendant, with the other tenants, received notice to quit possession of the building for repairs. The plaintiff was forced to vacate on March 21, 1896. The defendant refused to furnish any other place of residence for his wife, and to furnish her any support. (5) On September 17, 1896, the defendant was found guilty of nonsupport by the jury of the superior court, and an order was issued by the court directing him to pay his wife a weekly allowance for six months from that date. The defendant complied with this order until on or about the 17th of March, 1897. (6) From said March 21, 1896, the defendant abandoned the plaintiff, and refused to furnish her any support, except as he did so in compliance with said order of the superior court. (7) The plaintiff made the following claims of law respecting the judgment to be rendered, upon which the court ruled as hereafter stated: First. That, upon the facts proved, the defendant had wilfully deserted the plaintiff for more than three years prior to the beginning of this complaint. Second. The payment of the allowance by order of the court, within the three years, was not such a performance of duty as to bar divorce. Third. That the plaintiff was entitled to a divorce for desertion, and total neglect of duty, and it was immaterial that the defendant was compelled to pay an allowance, when he had wilfully abandoned all matrimonial intercourse and companionship with the plaintiff against her will. (8) The court sustained the first claim, but ruled that upon the facts proved the plaintiff had failed to make out a complete cause of action upon the ground of wilful desertion, with a total neglect of duty, for three years, dismissing 47 L. R. A.

the complaint without prejudice to the plaintiff to bring another action upon the ground of desertion at the proper time, as will more fully appear by my memorandum dated November 7, 1899, and made part of this finding."

Mr. Charles A. Safford, for appellant:

Payment of the allowance by the defendant after being convicted of nonsupport of his wife, and by order of court, is not such a performance of his matrimonial duty as to bar a divorce in this action.

Desertion as a cause of divorce is the wilful cessation of the marital relation without justifiable cause, or an unjustifiable refusal to renew the marital relations.

Bennett v. Bennett, 43 Conn. 313; *Bishop, Marr. & Div. ed. 1891*, § 1662; *Nelson, Div. & Sep. ed. 1895*, § 51.

Utter desertion; wilful desertion with total neglect of duty; obstinate desertion; malicious desertion; and wilful desertion; and other phrases and statutory terms,—are practically alike in effect, and do not modify the meaning of the term "desertion," or add any further conditions to the definition given.

Bishop, Marr. & Div. § 1665; Nelson, Div. & Sep. §§ 56-61.

Wilful desertion with total neglect of duty is not an abrogation of all duties.

Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; *Magrath v. Magrath*, 103 Mass. 577; *Nelson, Div. & Sep. § 54.*

Maintaining the wife is a part of the duties of marriage, but it is so far secondary and aside from the special ends of matrimony that an abandonment of the other duties while this one is performed is by the law treated as a complete desertion.

Bishop, Marr. & Div. § 1673.

In this case the defendant did not voluntarily furnish his destitute wife with any means of support. He was prosecuted by the state, and convicted of a crime, and ordered by the court against his will to pay this allowance,—a very great aggravation of his offense of desertion.

State v. Schweitzer, 57 Conn. 532, 6 L. R. A. 125, 18 Atl. 787; *Nelson, Div. & Sep. § 100.*

There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home.

His wilful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse against her consent, is desertion within the meaning of the statutes.

Cleaman v. Cleaman, 15 N. Y. Civ. Proc. Rep. 313; *Bauder's Appeal*, 115 Pa. 480, 10 Atl. 41; *Stoffer v. Stoffer*, 50 Mich. 491, 15 N. W. 504; *Sargent v. Sargent*, 36 N. J. Eq. 645; *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489; *Macdonald v. Macdonald*, 4 Swab. & T. 242; *Willey v. Willey*, 11 Scotch Scas. Cas. 4th Series, 815; *Nott v. Nott*, L. R. 1 Prob. & Div. 251.

Andrews, Ch. J., delivered the opinion of the court:

In the recent case of *Dennis v. Dennis*, 68

Conn. 197, 34 L. R. A. 459, 36 Atl. 37, this court said: "The state desires good citizens. It regulates divorce procedure in its own interest. A divorce cannot be had except in that court which the state authorizes, and for those causes only, and with those formalities which it has by statute prescribed. As the state favors marriages for the reasons stated, so the state does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist in respect to one or the other of the married parties which seems to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate than if compelled to remain together. The state allows divorces, not as a punishment to the offending party, nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted." One of the offenses for which the superior court is authorized to grant a divorce is "wilful desertion for three years, with total neglect of duty." Desertion by a husband of his wife, as intended by this statute, means "a wilful absenting himself from the society of his wife with the intention on the part of the husband to continue to live apart in spite of her wish, and without any intention to return to cohabitation." *Bennett v. Bennett*, 43 Conn. 313; *Queen v. Cookham Union*, L. R. 9 Q. B. Div. 527; *Southwick v. Southwick*, 97 Mass. 329, 93 Am. Dec. 95; *Williams v. Williams*, 130 N. Y. 103, 14 L. R. A. 220, 29 N. E. 98. It is not alone a specific act, but a continuing course of conduct. *Heard v. Heard* [1896] P. 191. In his memorandum of decision (which is made a part of the finding) the judge who tried this case says: "Within three years next before the commencement of this action the defendant was ordered to and did pay a certain sum per week for the support of the plaintiff, his wife. The question now arises whether or not, under these circumstances, there has been a wilful desertion, with a total neglect of duty, for the three years required by the statute. If wilful or utter desertion for three years constituted a complete ground for divorce, I should be inclined to the opinion that a divorce should be granted, but our law upon the subject goes much further and requires, in addition to wilful desertion for three years, that there should be a total neglect of all duty. One of the chief duties and obligations which result from the marriage contract is that of support on the

part of the husband. This duty, it appears from the evidence, the defendant has performed for several months of the required term of three years; and therefore I have reached the conclusion that the plaintiff is not entitled to a divorce." This language indicates that the trial judge regarded the furnishing support to his wife by the defendant by the order of court as having the same effect upon the question of his desertion that the furnishing by him of such support voluntarily would have had, and this as matter of law; and that there could not be, in this case, a desertion with total neglect of duty, for the period of three years, within the meaning of the statute, because support had been in fact furnished for a part of the time by the defendant, although by compulsion and against his will, and when the alternative was imprisonment. We are compelled to differ from this view. We think it gives to the fact of the involuntary furnishing of support by the defendant to his wife a greater weight and significance than it justly ought to have. The statutory offense of desertion, as we have seen, contains in it the intent to put an end to the marital condition, and the intent never to renew it. A total neglect of duty, if voluntarily persisted in, would ordinarily furnish satisfactory evidence that the intention in both respects existed. If the neglect of duty is involuntary, then the intent to desert must be uncertain. *Bennett v. Bennett*, 43 Conn. 313. And so, on the other hand, if the performance of the duty is by compulsion, and against the will of the party, then the intention to desert cannot be said not to exist. *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 491; *Magrath v. Magrath*, 103 Mass. 577. The fact that the defendant furnished support to his wife by the order of the court was an evidential fact, proper for the court to consider. The error was in regarding it, not as evidence, but as a fact which modified the words of the statute; that is, as a rule of law. It is entirely possible that the court upon another trial, and treating the fact of the compulsory furnishing of support only as an evidential one, may come to the same conclusion which was reached in this case; and it is equally possible that a different conclusion may be reached. As the latter result is possible, the error has done injury to the plaintiff, and she is entitled to have a new trial.

There is error, and a new trial is granted.

The other Judges concur.

MAINE SUPREME JUDICIAL COURT.

James R. LYNN
v.
Frances HOOPER.
(.....Me.....)

1. The owner of land in a highway is

NOTE.—As to the liability of a municipality for injuries caused by a horse becoming frightened at an object in a highway, see *Bowes v. Boston* (Mass.) 15 L. R. A. 365, and *note*; also

47 L. R. A.

liable for damages caused by placing thereon objects of such a character as naturally to frighten horses which are ordinarily gentle and well broken.

2. A hay cap consisting of white cloth tied by the corners to stakes in the

Kieffer v. Hummelstown (Pa.) 17 L. R. A. 217; also *Bates v. Horner* (Vt.) 22 L. R. A. 824.

As to the liability of a water company for frightening a horse, see *Topeka Water Co. v. Whiting* (Kan.) 39 L. R. A. 90.

ground, so that it is moved by the wind, may constitute a nuisance for which the party maintaining it will be liable for the frightening of a horse on a highway, when it is placed within the limits of the highway, where it is naturally calculated to frighten a horse of ordinary gentleness.

(May 31, 1899.)

ON MOTION for new trial of an action for damages for injuries alleged to have been caused by negligently leaving an object near a highway calculated to frighten horses, which resulted in injury to plaintiff, in which a verdict in plaintiff's favor was returned at trial in the Supreme Judicial Court for Penobscot County. *Motion overruled.*

Defendant had placed a white cloth cap over a bunch of hay near the traveled portion of the highway in the town of Hermon. The corners of the cloth were fastened with ropes to stakes driven in the ground. Plaintiff, in driving along the highway, claiming to be in the exercise of due care, was injured by his horse becoming frightened at the cloth cap, and throwing him out of the carriage.

Further facts appear in the opinion.

Messrs. F. H. Gillin and C. J. Hutchings for defendant in support of motion.

Mr. Forest J. Martin, for plaintiff:

Whether or not this object which the defendant placed and permitted to remain where it was, under all the circumstances, was a nuisance, was a question entirely and solely for the determination of the jury.

Wood, Nuisances, 2d ed. § 249, p. 260.

A person entitled to use the street for the purposes of travel, or for any other purpose, should observe care not to take or leave thereon objects calculated to frighten horses of ordinary gentleness, or, if it be necessary to have or convey such objects on the highway, due care should be taken to prevent injury from horses frightened thereby, by warnings of danger, assisting the driver of such horses to make a safe passage by the object.

Thomas, Neg. 1895, *Frightening Horses*.

If one for his own benefit violates the rights of another, it is a nuisance.

Davis v. Winslow, 51 Me. 264, 81 Am. Dec. 573; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588.

A person who places within the bounds of the highway any objects which from their nature are calculated to frighten horses of ordinary gentleness is liable in damages to any person injured thereby.

Lawrence v. Mt. Vernon, 35 Me. 100; *Card v. Ellsworth*, 66 Me. 547, 20 Am. Rep. 722; *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Jones v. Housatonic R. Co.* 107 Mass. 261; *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721; *Cushing v. Bedford*, 125 Mass. 526; *Oule v. Fisher*, 11 Mass. 137; *Ayer v. Norwich*, 39 Conn. 376, 1 Am. Rep. 396; *Dimock v. Suffield*, 30 Conn. 129; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Darling v. Westmoreland*, 62 N. H. 401, 13 Am. Rep. 55; *Hewison v. New Haven*, 34 Conn. 130, 91 Am. Dec. 718; *Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600.

Any part of the highway may be used by 47 L. R. A.

the traveler, and in such direction as may suit his convenience or taste.

Dickey v. Maine Teleg. Co. 46 Me. 485; *Stinson v. Gardiner*, 42 Me. 248, 66 Am. Dec. 281.

No private person has a right to place or cause any obstruction which interferes with this right on any part of the highway within its exterior limits.

Davis v. Bangor, 42 Me. 522; *Clinton v. Howard*, 42 Conn. 294; *Eggleston v. Columbia Turnp. Road*, 82 N. Y. 279; *Burgess v. Gray*, 1 C. B. 578; *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628; *Wilkins v. Day*, L. R. 12 Q. B. Div. 110.

It is entirely immaterial whether the object which causes a traveler's horse to become frightened is within or without the limits of the highway, provided, if without, it is near enough to the traveled portion of the highway to produce the result, *viz.*, to frighten horses.

House v. Metcalf, 27 Conn. 631; *Knight v. Goudyeur's India Rubber Glove Mfg. Co.* 38 Conn. 438, 9 Am. Rep. 406; *Gordon v. Boston & M. R. Co.* 58 N. H. 396; *Lewis v. Eastern R. Co.* 60 N. H. 187; *Valley v. Concord & M. R. Co.* 68 N. H. 546, 38 Atl. 383.

Savage, J., delivered the opinion of the court:

Action for personal injuries occasioned by an alleged nuisance. The plaintiff claims that while traveling upon the highway adjacent to the defendant's land his horse became frightened by a hay cap placed by the defendant over a bunch of her hay standing upon or near the highway, and that the horse bolted against the fence on the opposite side of the road, whereby the plaintiff was thrown out of his wagon, and sustained the injuries complained of. The verdict was for the plaintiff. The defendant asks us to set the verdict aside as being contrary to the law and the evidence. Several issues of fact were sharply contested before the jury; among them, the character of the horse for gentleness, the location of the hay cap, its distance from the traveled way, and whether the horse's fright was occasioned by the hay cap or otherwise.

If the action is maintainable upon proof of such facts as a jury would be warranted in finding from the evidence in the case, the verdict must be sustained. A discussion of the evidence in detail is unnecessary. From a careful examination of the whole case, we think a jury would be warranted in finding the following facts: That the plaintiff's horse was ordinarily gentle and well broken; that the horse was frightened by the appearance of the hay cap; that thereby the injury was occasioned: that the hay cap, because of its color, its fluttering, flapping movement when disturbed by the breezes, and its proximity to the traveled way, was an object naturally calculated to frighten horses of ordinary gentleness; that the defendant permitted the hay cap to remain where it was after she had had notice that it was likely to frighten horses, and that horses had actually been frightened thereby.

The evidence tends to show that the cap covering the bunch of hay was a square piece of white cloth, and that its four corners were attached to ropes, which in turn were tied to four stakes driven in the ground in the form of a square. The evidence also tended to show that the cloth cap would move up and down by the action of the breezes, like the fluttering of a tent. The plaintiff testified that the hay cap was in motion at the time his horse became frightened. The bunch of hay was situated on land about 3 feet lower than the traveled way. Its distance from the nearest wheel track is in dispute. The defendant contends that it was 28 feet. The plaintiff is equally certain that it was only from 15 to 17 feet. There was no fence between the traveled way and the hay cap. We think the weight of evidence supports the contention of the plaintiff as to distance, or at least that a jury would have been warranted in so finding. Eight witnesses, several of them apparently disinterested, testified for the plaintiff on this point, and the farthest distance testified to by any of them is 17½ feet. There is also a controversy whether the hay cap was within the limits of the location of the highway. The defendant contends that it was without the location, upon her own land, and that, therefore, she had a lawful right to place it and keep it there without liability; that it was a reasonable use of her own property. But the plaintiff contends that the hay cap was within the located way. As we have already suggested, the balance of the weight of the evidence tends to support the contention of the plaintiff that the hay cap was not further than 17½ feet from the nearest wheel track, and an examination of the surveyor's plan, introduced and used by the defendant at the trial, shows that the side line of the located way, at the point where the hay cap was, was more than 17½ feet from the nearest wheel track. Therefore we must assume that the hay cap was within the way. Under these conditions, then, the next question which arises is whether the hay cap was so near the traveled part of the highway, and was of such a character, as naturally to frighten horses of ordinary gentleness lawfully driven thereon. Was it, as the plaintiff claims, a nuisance?

It is true that the owner of land adjacent to a way, and owning presumptively to the center of the way, may, subject to the public easement, make a reasonable use of the land, even within the location. *Furnessworth v. Rockland*, 83 Me. 508, 22 Atl. 394. But we think that a use which involves the placing therein of objects of such a character as naturally to frighten horses ordinarily gentle and well broken is not reasonable. Such a use is unlawful, and constitutes a nuisance. The landowner may not make erections or excavations within the located way of such a character as to imperil public travel by frightening horses lawfully driven along the way.

Whether in fact the hay cap was an object naturally calculated to frighten horses of ordinary gentleness is stoutly controverted. To show that it was such an object, the plain-

tiff relies, not only upon the appearance and proximity of the hay cap, but also upon the fact that other horses, claimed to be ordinarily gentle, had been frightened by this very cap. *Crocker v. McGregor*, 76 Me. 282; *House v. Metcalf*, 27 Conn. 631; *Brown v. Eastern & M. R. Co.* L. R. 22 Q. B. Div. 391. The hay was bunched, and the cap placed over it Wednesday. The plaintiff was injured the following Saturday. There is testimony that between these dates no less than seven or eight other horses became frightened by this same cap.

Was this cap of such a character, and so placed, as to constitute a nuisance? "A nuisance," said this court in *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588, "consists in a use of one's own property in such a manner as to cause injury to the property or other right or interest of another. It is the injury, annoyance, inconvenience, or discomfort thus occasioned that the law regards, and not the particular business, trade, or occupation from which these result. A lawful as well as an unlawful business may be carried on so as to prove a nuisance. The law, in this respect, looks with an impartial eye upon all useful trades, avocations, and professions. However ancient, useful, or necessary the business may be, if it is so managed as to occasion serious annoyance, injury, or inconvenience, the injured party has a remedy." *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573. These are general principles. In this case, if the hay cap was a nuisance, it was so because it endangered the public use of the way. *Staples v. Dickson*, 88 Me. 362, 34 Atl. 168. A thing may be a nuisance because it interferes with or endangers public travel, although it does not of itself constitute an obstruction in the highway. An object at the side of a highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness may constitute a nuisance. *Elliott, Roads & Streets*, 482; *Cooley, Torts*, 617.

It is impossible to state a general rule by which it can be determined whether any particular object constitutes a nuisance or not. The question must depend upon the conditions and circumstances in each case. Conditions vary. No two cases are alike. Hence it is rare that one case can be a binding precedent for another.

Its distance from the traveled path, its relation to fences and other objects, its height or depth from the road, its color, whether it is customarily found in similar places and under similar conditions, whether it is so situated that horses being driven come suddenly in sight of it, whether it is in repose, or whether it is fluttering like a living thing,—these and many other considerations must be taken account of in determining whether the object is a nuisance, or is dangerous to public travel. This suggestion is fully borne out by an examination of cases concerning objects causing fright, some of which we cite: A pile of shingles,—*Merrill v. Hampden*, 26 Me. 234; *Lawrence v. Mt. Vernon*, 35 Me. 100; evergreen trees standing in cart,—*Davis v. Bangor*, 42 Me. 522; a rock,—*Card v. Ellsworth*, 65 Me. 547,

20 Am. Rep. 722; a cow,—*Perkins v. Fayette*, 68 Me. 152; a hole,—*Spaulding v. Winslow*, 74 Me. 528; a pile of stones,—*Clinton v. Howard*, 42 Conn. 294; a pile of plastering,—*Dimock v. Suffield*, 30 Conn. 129; a tent,—*Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; a watering trough painted red,—*Cushing v. Bedford*, 125 Mass. 526; bales of hay charred by fire,—*Morse v. Richmond*, 41 Vt. 435, 98 Am. Dec. 600; a hollow log blackened by fire,—*Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; sled with tubs on it,—*Judd v. Fargo*, 107 Mass. 264; rubbish,—*Burgess v. Gray*, 1 C. B. 578. See also cases in note in *Elliot, Roads & Streets*, 449.

Most of these objects were held to be nuisances, or imperiling travel.

In the present case the court is of opinion that a jury might properly find that the defendant's hay cap was situated within the highway, and that, by reason of its color, shape, situation, and motion, it was naturally calculated to frighten a horse of ordinary gentleness. If so, it was unlawfully there, and the defendant is to be held responsible for the natural consequences. There are no legal impediments to the maintenance of the action. The facts have been passed upon by the jury, and we perceive no sufficient reason for disturbing their finding.

Motion overruled.

GEORGIA SUPREME COURT.

Mary AUSTIN, *Piff. in Err.*,

v.

AUGUSTA TERMINAL RAILWAY COMPANY.

(.....Ga.....)

*1. In that clause of the Constitution providing that "private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid" (Civil Code, § 5729), the word "damaged" is used in its usual sense as a law term, and does not change the substantive law of damages, or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase, *damnum absque injuria*; but it does preserve all existing causes of action for damages to private property, and prohibit exemptions of liability for such damages, even if occasioned by public uses.

2. The word "damaged," in this clause, refers to "actionable wrongs," and does not require compensation for depreciation in the value of private property, caused by the lawful operation of a public work owned by a corporation vested with the power of eminent domain, unless a private corporation or private individual would be liable for similar acts under like circumstances; nor is a quasi-public corporation liable where private property is depreciated in value as a result of the lawful use and enjoyment of the company's private property.

3. To "damage" property, within the meaning of the Constitution, there must be some physical interference with property, or physical interference with a right or use appurtenant to property; and therefore a railway company is not liable to the owner of real property for diminution in the market value thereof, resulting

from the making of noise, or from the sending forth of smoke and cinders, in the prosecution of the company's lawful business, which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same.

(*Lumpkin, P. J., and Lewis, J., dissent.*)

(August 2, 1899.)

ERROR to the City Court of Richmond to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiff's property by the operation of defendant's railroad. *Affirmed.*

The facts are stated in the opinions.

Messrs. F. W. Capers and Boykin Wright, for plaintiff in error:

Any evidence tending to show damage to the property would be admissible. If noise, smoke, dust, cinders, or things of that sort be shown to have damaged the property, they should be considered in arriving at the amount of the recovery.

Campbell v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078; *Davis v. East Tennessee, V. & G. R. Co.* 87 Ga. 605, 13 S. E. 567; *Pause v. Atlanta*, 98 Ga. 98, 20 S. E. 489; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460.

The interference with one's enjoyment of one's property is an infringement of his right of property.

Reid v. Atlanta, 73 Ga. 523; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

If the owner of property, because of the permanent physical improvement itself, suffers damages by reason of the permanent diminution in the value of his property or estate, as distinguished from mere personal inconvenience, he has a right of action for such damage; nor is it material whether the property damaged abuts directly upon the improvement or is distant therefrom.

*Headnotes by SIMMONS, Ch. J.

NOTE.—As to damages for smoke, noise, etc., from railroad, see also *Gainesville, H. & W. R. Co. v. Hall* (Tex.) 9 L. R. A. 298, and note; *Abendroth v. Manhattan R. Co.* (N. Y.) 11 L. R. A. 634; *Kane v. New York Elev. R. Co.* (N. Y.) 11 L. R. A. 640; and *Jones v. Erie & W. Valley R. Co.* (Pa.) 17 L. R. A. 758.

For injury to abutter's easement by railroad in street, see *Egerer v. New York C. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381; and *Highland Ave. & B. R. Co. v. Matthews* (Ala.) 14 L. R. A. 462. 47 L. R. A.

Pause v. Atlanta, 98 Ga. 101, 26 S. E. 489; *McCarthy v. Metropolitan Bd. of Works*, L. R. 7 C. P. 508; *Lewis*, Em. Dom. § 227; *Rigney v. Chicago*, 102 Ill. 64; *Caledonian R. Co. v. Walker*, L. R. 7 App. Cas. 259; *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078; *Atlanta v. Green*, 67 Ga. 386.

The instruction that plaintiff could not recover for any injuries resulting to her property from the operation of the road on defendant's private property is violative of that fundamental principle of law and morality, viz., "so to use one's own property as not to injure others."

Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Campbell v. Metropolitan Street R. Co.* 82 Ga. 321, 9 S. E. 1078.

Sic utere tuo ut alienum non laedas is not only a great principle of the common law, but is equally the teaching of Christian morality, and furnishes the rule by which every member of society possesses and enjoys his property.

3 Bl. Com. 217; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 331, 27 L. ed. 744, 2 Sup. Ct. Rep. 719.

The damages required by the Constitution to be first paid include future, as well as past, damages, and must all be assessed in one action; otherwise, how can they be first paid?

Atkinson v. Atlanta, 81 Ga. 627, 7 S. E. 692; *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 69; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Augusta v. Lombard*, 101 Ga. 727, 28 S. E. 994.

The interference with one's enjoyment of one's property as a home or as a church or as used for any other purpose is an infringement of one's right of property, as much so as the taking or the invasion of the property itself.

While damages for mere personal inconveniences as such are not recoverable they are to be considered as affecting one's right of enjoyment of his property as a home and as depreciating its general market value.

Campbell v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078; *Davis v. East Tennessee, V. & G. R. Co.* 87 Ga. 605, 13 S. E. 567; *Pause v. Atlanta*, 98 Ga. 98, 26 S. E. 489; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 331, 27 L. ed. 744, 2 Sup. Ct. Rep. 719; *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460; *Streyer v. Georgia S. & F. R. Co.* 90 Ga. 56, 15 S. E. 783; *Hurt v. Atlanta*, 100 Ga. 281, 28 S. E. 65; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 612; *Smith v. Floyd County*, 85 Ga. 420, 11 S. E. 850; *Davis v. East Tennessee, V. & G. R. Co.* 87 Ga. 605, 13 S. E. 567; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

Mr. J. R. Lamar, for defendant in error: The word "damaged" is a law term, meaning depreciation caused by some act or omission which gives rise to a cause of action. It is not equivalent to the word "depreciation" or "injury," in the popular sense. In using the word the framers of the Constitu-

tion did not intend to change the law of damages, nor the law as to *damnum absque injuria*, but to prevent charters being used as a shield and protection against liability for acts which would otherwise have given rise to a claim for damages.

Peel v. Atlanta, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582; *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Pause v. Atlanta*, 98 Ga. 98, 26 S. E. 489.

The Constitution preserved, as against companies having the right of eminent domain, the common-law right of action for damages. And at common law a mere depreciation in value did not give a cause of action. There must be some "taking" or some "physical invasion" of a right or easement appurtenant to the land.

Pause v. Atlanta, 98 Ga. 98, 26 S. E. 489; *Bacon v. Walker*, 77 Ga. 339; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Morgan v. Des Moines & St. L. R. Co.* 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96; *Rigney v. Chicago*, 102 Ill. 64; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 9 Atl. 871; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690; *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 256; *Hammermith & C. E. Co. v. Brand*, L. R. 4 H. L. 171; *Glasgow Union R. Co. v. Hunter*, L. R. 2 H. L. Sc. App. Cas. 78; *Rickett v. Metropolitan R. Co.* L. R. 2 H. L. 198; *Buocleuch v. Metropolitan Bd. of Works*, L. R. 3 Exch. 306; *Chapman v. Western U. Teleg. Co.* 88 Ga. 770, 17 L. R. A. 430, 15 S. E. 901; *Chicago v. Union Stockyards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430.

Inconvenience caused by noise, smoke, and cinders partakes more of the nature of damages to person than to property.

Mygatt v. Goetchins, 20 Ga. 358; *Coast Line R. Co. v. Cohen*, 50 Ga. 462; *Ruff v. Phillips*, 50 Ga. 133; *Bell v. Ohio & P. R. Co.* 25 Pa. 175, 64 Am. Dec. 687; *Wood*, Nuisances, p. 107; 26 Am. & Eng. Enc. Law, p. 570.

But even if noise and smoke cause depreciation in the value of near-by property, they do not give rise to a cause of action unless the smoke, noise, or like disturbances amount to a nuisance.

Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 332, 27 L. ed. 744, 2 Sup. Ct. Rep. 719.

A railroad on private property, conducted in the usual and ordinary manner, is not a nuisance.

Savannah & W. R. Co. v. Woodruff, 86 Ga. 98, 13 S. E. 156; *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271, 2 S. E. 636; *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 169, 13 S. E. 277; *Geiger v. Filor*, 8 Fla. 332; *Pierce*, Railroads, 2; *Hodge v. State*, 82 Ga. 643, 9 S. E. 676; 1 Rorer, Railroads, 8.

The requirement that damages are "first

to be paid" shows that the damages must be of a kind which can be determined and measured before the road is completed.

If the damages must first be paid, it cannot possibly refer to those uncertain damages which may or may not arise,—to damages which not only depend upon the future operation of the road, but which must be measured by the uncertainty of the future.

Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 13 Atl. 690.

Simmons, Ch. J., delivered the opinion of the court:

After this case had been regularly heard, it was ordered reargued on a question so framed as to embody the material points involved. An analysis of the evidence is, therefore, not necessary, further than to explain the situation of the property and the claim of the plaintiff. Bay street, in the city of Augusta, is laid along the southern bank of the Savannah river. Cumming and McCartan streets run south from it, at right angles. The railroad runs down Bay past Cumming street. By a spur track, it crosses a lot owned by the company at the corner of Bay and McCartan streets, and thence runs across McCartan street into its freight yard. Plaintiff's lot does not touch Bay or McCartan street, but abuts on Cumming street; the Goodrich lot intervening between her premises and Bay street, along which the track is laid. Plaintiff's lot corners on land belonging to the company, upon which one track has already been laid, and the plats in evidence show that other tracks are to be laid thereon in the future. The lot, with improvements, cost \$3,500, and was returned for taxes at \$2,500, before and after the road was built. After the road was in operation, plaintiff demanded \$5,000 as the price at which she would sell the property to the company. In spite of this demand and valuation, the witnesses varied in their estimate of damages from 10 per cent to 60 per cent on the original cost; all of them stating that, in their opinion, the depreciation in value was caused mainly, if not exclusively, by the movement of cars in the freight yard, on the square across McCartan street, and distant some 200 feet from plaintiff's lot. Petitioner also claims damages for laying the track and operating the cars in Bay street, and there was absolutely no evidence that she ever used Bay street, or that her means of ingress and egress had been interfered with in the slightest degree. Plaintiff's husband testified that he "noticed cracks, which he considered the result of vibrations," but this was the only allusion thereto, and no evidence was introduced as to the amount of damage occasioned by these cracks, or by any other one item of damage relied on by the plaintiff. Had she been entitled to recover for any specific act, it would have been impossible for the jury to have measured the amount, or to have rendered a proper verdict. All of the estimates were in a lump, besides being based principally on the result of operating the cars in the freight yard. All immaterial matters being eliminated,

47 J. R. A.

claims not supported by the evidence being excluded, and the record showing that in the construction of the road no property of plaintiff was taken, nor were her premises damaged by reason of any means of access, right of way, or easement, remote or near at hand, being physically interfered with, invaded, or disturbed, the court finds that the record requires an answer to this question: "Is the railway company liable to the owner of real property for the diminution in the market value thereof, resulting from the making of noise, or from the sending forth of smoke and cinders in the prosecution of the company's lawful business, which do not physically affect or injure the property itself, but merely cause personal inconvenience or discomfort to the occupants of the same?"

Plaintiff insists that, as the market value of her lot has been diminished in consequence of the operation of the railroad, she is entitled to recover therefor, by virtue of the provision in the Constitution that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Civil Code, § 5729. In a popular sense, the word "damage" does frequently mean depreciation in value, whether such depreciation is caused by a wrongful or a lawful act; but in statutes or other legal instruments giving compensation for "damages" the word always refers to some actionable wrong,—some loss, injury, or harm which results from the unlawful act, omission, or negligence of another. In this sense, and as a well-defined law term, it was used in the Constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damaged; but it did not give him compensation for depreciation in value caused by any legal act, since in law such an act was innocent, and therefore harmless, or, if not actually harmless, *damnum absque injuria*. There is nothing in the language of the Constitution, or in the debates, or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term. Nor was this sentence framed with a view of changing the substantive law of damages, or of making that actionable which before that time had been nonactionable. Rather the purpose was to make the law of damages uniform, so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain. For example, if, prior to 1877, a manufacturing company had obstructed a street, and thereby inflicted special damages, a property owner so injured could recover; but if identically the same act had been done by a municipality under its charter, it would have been just as much "damage" though the property owner could not recover, because the state's license to obstruct the street was authority for what had been done,—a shield and protection affording immunity from what would otherwise have been liability. In

both instances it "damaged" the property, because, while it did not "take" the corpus of the estate, it yet physically interfered with an easement or right of way appurtenant to the lot. But in the one case he could recover; in the other he could not. The Constitution intended to take away the city's exemption, and to leave it and the manufacturing company on an equal footing, ordaining that thereafter "damages," by whosoever caused, and even if for public purposes, should be paid. But they must be "damages" in the sense in which that word is used and applied in courts. Thereafter, what is damage by one is damage by all; and likewise what is *damnum absque injuria* to one is so to all. If one landowner diminishes the market value of his neighbor's house by cutting off light and air therefrom, he is not required to make good the depreciation. He had a right to build the wall, and, legally speaking, he has not "damaged" his neighbor. So, too, if a city should erect a public building, or a railroad put up a warehouse, and cut off the same easement of light and air, neither would they be liable, for they had the same right to build, and neither had they "damaged" the adjoining lotowner.

The elaboration of this point is necessary, as the plaintiff insists that the use of the word "damaged" in the Constitution gives her a new right,—a cause of action where none would otherwise have existed; and that wherever and whenever there is depreciation in value of real estate as the result of constructing or operating works intended for public use there is damage within the meaning of the Constitution,—citing cases from Nebraska, Texas, and Illinois in support of her right to recover. The Constitution of those states may use the word "damage," or its equivalent, but the language thereof is not identical with ours. Then, too, the facts in those cases are somewhat different. But, even if the reasoning and conclusions are conceded to be contrary to the views just expressed, it is an altogether sufficient answer to say that those cases are distinctly and avowedly opposed to the current of authorities as found in the decisions of England, Massachusetts, New Jersey, Pennsylvania, West Virginia, Missouri, Minnesota, and Colorado, and to our own cases of *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582, and *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257, each of which announces that the introduction of the word "damage" only makes the company liable to the same extent as an individual would have been at common law. We will consider these cases somewhat at length: The Missouri Constitution provides for payment where property is taken or damaged. Const. art. 2, § 21. *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257 (cited in the *Peel Case*), holds that by the use of the word "damage" the constitutional convention expressed an intention to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law." A New Jersey statute author-

ized the building of a bridge upon payment of damages to such owners of bridges as might be injured. The court says: "These compensation clauses do not create any new right, their purpose being simply to preserve the common-law right of the person injured. . . . If a railroad . . . does an act injurious to another, which at common law would not be actionable, such person so injuriously affected cannot obtain redress by force of the clause under consideration." *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558, following the English cases. In *Jordan v. Benwood*, 42 W. Va. 312, 36 L. R. A. 519, 26 S. E. 266, citing and following *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257, the court says: "The provision of the Constitution that private property shall not be taken or damaged for public use without just compensation does not render a city liable for damages from surface water, where a private individual would not be liable. It was not designed to be put upon the state, or upon counties or municipalities,—subordinate parts of the state government,—a burden not resting on private corporations under the same circumstances. If, then, the Constitution uses the word "damage" as a legal term, and as the equivalent of actionable wrong; if it does not repeal the principle expressed in the phrase *damnum absque injuria*; if it does not create a new cause of action,—it remains to determine whether the plaintiff has been "damaged" within the legal meaning of that word. According to the record, the defendant has not done any wrongful or unlawful act. It took no property; it invaded no right; it obstructed no way; it interfered with no easement or appurtenance, remote or close at hand. The diminution in value was caused by the lawful operation of defendant's cars on its own private property. A depreciation similar in kind, possibly equal in degree, might have been caused if police barracks or a jail had been erected in the near vicinity; and yet, according to the *Pease Case*, 98 Ga. 98-100, 26 S. E. 489, this would have been *damnum absque injuria*. If a great manufacturing plant had been erected on the adjoining lot, the market value of plaintiff's house might have been greatly injured, no matter how silent the operations of the mill. Properly conducted, decently appointed, and orderly managed stores, shops, factories, and business houses erected in close proximity to residential quarters frequently cause great depreciation in values. In the popular sense, they cause damage. But in such cases the annoyances—the inconveniences—occasioning the loss in value are not actionable, because they arise from lawful uses. The owners of these establishments are as much entitled to the use and enjoyment of their property as is the owner of the residence property reduced in value by their presence. The first occupier of land does not acquire the right to prevent his neighbor from erecting walls, digging excavations, erecting buildings, or engaging in manufacturing or mercantile business thereon, no matter how seriously such acts may depreciate the market price of adjoining

property. If the acts complained of do not amount to a nuisance, there is neither legal nor moral wrong done to the plaintiff.

The framers of the Constitution knew that railroads would take private property, would damage private property, and would annoy and inconvenience the holders of private property. For the first two of these consequences they provided a remedy. They could have done so as to the third. But they did not use the apt words to show that such was their intention. On the contrary, the guaranty of compensation was restricted to damages to property, not damages to person. They not only used a word which meant actionable wrong, but was identical with that already construed in Massachusetts, and the equivalent of "injuriously affected," which at that time had been finally construed, under the English condemnation acts, to require a taking or a physical interference with the land, or some right appurtenant thereto, in order to entitle the plaintiff to recover.

Inasmuch as no easement or other appurtenance belonging to the plaintiff was "physically interfered with," it is necessary to consider the cases which discuss the effect of that fact upon the right to recover. Under the old cases there had to be a physical taking; under the present Constitution there must be a physical damage. The property need not abut on the street, or be immediately contiguous to the railroad. It may be at a distance from the point where the injury is occasioned, but it must appear that plaintiff has some right, some user, some interest, which has been wholly or partially destroyed before there can be a recovery. "There must be some direct physical disturbance of a right, either public or private, which plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage." *Pause v. Atlanta*, 98 Ga. 98-100, 26 S. E. 489. These conclusions are fully sustained by decisions in Iowa, under a statute requiring payment for "injury to property abutting on the street" (*Morgan v. Des Moines & St. L. R. Co.* 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96); in *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501, 22 Pac. 814 (where the Constitution required payment for damages); in Minnesota, in the *Rochette Case*, construing the word "damages" (32 Minn. 201, 20 N. W. 140); in Massachusetts, where the statute required payment for "damage" (*Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1); in New Jersey, where the statute required payment for "injury" (*Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558); in Missouri, where the Constitution uses the word "damage" (*Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257); in a number of most elaborately argued and carefully considered cases in England, where payment was required to be made for property "injuriously affected;" in Illinois, where the word "damage" is construed in the *Rigney Case*, 102 Ill. 64; in the able opinion of the supreme court of Pennsylvania in the *Lippincott and Marchant Cases*, 116 Pa. 472, 9 Atl. 47 L. R. A.

871, 119 Pa. 541, 13 Atl. 690, affirmed in 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; and, lastly,—and until reversed in the manner provided by law, conclusively for us,—in the *Pause Case*, 98 Ga. 100, 26 S. E. 489; *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078; *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582. The damage must be to the land itself. Any other construction would open the doors to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature. *Ricket's Case*, L. R. 2 H. L. 198, cited in the *Peel Case*. The effect upon land of the annoyance or inconvenience arising from the frequent passing of the trains over a street by which it is approached affords no ground for damages. Such depreciation is not occasioned directly by any effect on the land of which the construction or the maintenance of the railroad is the cause. One belongs to that class of results which necessarily arise from the exercise of the franchise granted. The annoyances to the landowner are the same in kind as those suffered by the whole community, and the fact that land lying near the railroad is thereby rendered less desirable for the erection of dwellings, and of less market value in consequence, does not furnish an independent ground for the recovery of damages therefor. *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 6. The injury must affect some right held with regard to the property. The injury must be to the land itself; and mere personal obstruction or inconvenience or damage to the trade, although of such a nature that it might have been the subject of an action, would not entitle the party injured to compensation. The injury must not be of a personal character, but must be to the land, considered independently of any particular trade. There must be a physical interference as opposed to interference of a mental nature or of an inferential kind. The word "physical" is here used to distinguish the case from that class of cases where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind. *Metropolitan Bd. of Works v. McCarthy*, L. R. 7 H. L. 256. There is here a clear indication that the annoyances from smoke and noise are of a mental nature. While in *Hammeremith & O. R. Co. v. Brand*, L. R. 4 H. L. 171, the plaintiff was denied damage for noise and vibration, occasioned without negligence, by the passing of the trains over the railway, for the construction of which no part of the land was taken; and while in *Glasgow Union R. Co. v. Hunter*, L. R. 2 H. L. Sc. App. Cas. 78, compensation for noise and smoke was denied for the same reason,—the result would have been different if there had been a physical interference, or if the land, or some right appurtenant, had been invaded for railway purposes. *Bucleuch v. Metropolitan Bd. of Works*, L. R. 3 Exch. 306. And by the case of *Ricket v. Metropolitan R. Co.* L. R. 2 H. L. 175, approved and followed in *Peel's Case*, 85 Ga. 141, 8 L. R. A. 787, 11 S. E. 582, the rule was finally settled that the injury must af-

fect some right held in regard to the property, and personal inconvenience was not a sufficient basis for compensation. And in the *Rude Case*, 93 Mo. 408, 6 S. W. 257, under the Missouri Constitution, which uses the word "damage," it is said, There must be some physical disturbance of a right to entitle the property holder to recover. The Georgia cases are in perfect harmony with these authorities, and distinctly rule the question involved in this case. In fact, it would be necessary for this court to overrule the *Pause* and *Peel Cases* in order to reach the conclusion that the plaintiff could recover. And it will be found that in every decision by this court where a plaintiff was held entitled to recover for damages occasioned by works for public use there was always some physical interference with an easement, right of way, obstruction of the street near the premises, or some direct invasion of an appurtenance connected with the land. And in the many cases from other states, where the effect of smoke, noise, and cinders was considered, it will be found that the suit was by the owner of abutting property which had been damaged by change of grade, obstruction in a street, an actual taking of a part of the land, or the maintenance of a nuisance. In *Bacon v. Walker*, 77 Ga. 339, a bill was filed to enjoin the erection of a jail on private property belonging to the county, for the reason that it would create a nuisance, produce irreparable injury, and damage private property without compensation. The court says: This is not such a case as would be the change in the grade of a street and damage therefrom. The streets are under the government of the city, but all living upon them are interested in them for thoroughfares. The street is not the absolute property of a city, like the lot belonging to a county, on which a jail is erected; and the incidental damage done by its erection to the taste and sensibility of the residents around is too uncertain and remote to be considered damage in the sense of the Constitution. It is in connection with taking private property that "damaging" is used in the Constitution. It is intimated in the *Rigney Case* that under the old rule damages were limited to "taking" the corpus of property, while the use of the word "damage" enlarges the liability so as to allow damages for something besides a direct physical injury to the corpus. "But it is clear that it was not intended to reach every possible injury, which is necessarily incident to the ownership of property in towns and cities, which directly impairs the value of private property, for which the law does not, and never has, afforded any relief. Building of a jail, police station, will cause direct depreciation in the value, yet it is clearly a case of *damnum absque injuria*. *Rigney v. Chicago*, 102 Ill. 84, followed in the *Pause Case*. In the *Elevated Railroad Cases* damages from smoke and noises were allowed to abutting property owners. But the structures in the street physically invaded the owner's easement of light and air, as well as interfering with his means of access

to his premises. But in no cases has the owner of property on a cross street or a parallel street, no matter how close to the elevated road, been held entitled to recover, so far as we have found; and yet it is almost certain, as a business proposition, that persons owning property abutting on cross streets have found their property depreciated in value as a result of the construction and operation of the elevated roads. In our own case of *South Carolina R. Co. v. Steiner*, 44 Ga. 546, the tracks were in the street immediately in front of the plaintiff's residence, physically invading his right of way, and thereby giving him a cause of action. When there has been this physical interference, there is a "damage" in connection with the "taking" of the private property consisting of an easement or right of way, and the plaintiff, being thus damaged, is allowed to show all of the elements of that damage. The effect of smoke and noise are considered, not as independent elements of damage, but as tending to prove the value of the property after the said railroad has thus taken or damaged the property, or some right appurtenant to the property. *Bacon v. Walker*, 77 Ga. 339; *Chapman's Case*, 88 Ga. 770, 17 L. R. A. 430, 15 S. E. 901. There must be damage coupled with a wrong to give a cause of action. For a physical invasion or wrongful interference with property or its appurtenances, resulting in damage, the plaintiff may recover. Without some wrongful act on the part of the defendant, she cannot recover, even though there is deterioration in the value of her property.

Considering the language of our Constitution, and our own decisions, and this array of authorities, we cannot follow the cases cited by plaintiff in error, particularly as the case from Illinois seems to us in conflict with the *Rigney Case*, which has been generally approved by other courts, and by this court in the *Pause Case*. The last of these cases, decided by the supreme court of Illinois in 1896 (*Chicago v. Union Stock-Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430), held that the transportation of cattle through the streets created a serious public nuisance, for which reason the city had attempted to have the tracks removed. In denying the right of the city so to do, the court says: "It cannot, of course, be claimed that the city may compel the removal of all railroad tracks from the public streets because those who live near the tracks are disturbed by those annoyances which are incident to the operation of all railroads. As was said in *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, and *Illinois C. R. Co. v. Grubill*, 50 Ill. 244, 'such consequences of the construction and use of railroads must be borne by all living near them without complaint, and without hope of redress, for they are inseparable from the purposes and objects of such structures.'" Irrespective of all the authorities cited, there is a view of this question arising out of the very language of the Constitution itself, which lends great weight to that construction which limits the damages recoverable

to those arising from taking the land (*Bacon v. Walker*, 77 Ga. 339), or physically interfering with some right appurtenant thereto, excluding those which flow from the operation of the road. It is true that the requirement that damages shall be first paid was intended primarily for the benefit of the landowner. But the word is there not only for that purpose, but for all else it means when the sentence is read. And if, in requiring damages to be first paid, the Constitution defines as the damages to be paid those which can be assessed and measured before the road is built, the conclusion is irresistible that the Constitution guarantees payment of those direct, immediate injuries which certainly, directly, and inevitably flow from the construction of the railroad, highway, or other public works. If a street is laid out, no private property may be taken, and none may be damaged. Can it be that, as travel increases, and with it the bustle and noise and dust arising from the use of the streets by drays and wagons, the municipality can be called on to compensate the property holder who shows that, while he was not damaged by the construction of the street years before, the increased noise and dust have depreciated the market value of his residence? These annoyances flow from the operation of the street, and a city would be liable therefor, if, under like circumstances, a railroad is liable for the diminished value of near-by property, caused by the noise and smoke arising from the operation of the road. When no property is taken for laying out a street or building a railroad, it is not at all certain that the operation will cause depreciation, nor, if so, when and to what extent. That necessarily depends on the character of the vehicles used, as well as the extent of travel on the highway or the railway. Such depreciation may never come; it may come soon; it may be delayed for years. When it does come, it may be more, and it may be less. If plaintiff is entitled to compensation arising from conveniences and annoyances arising from smoke, then the amount of smoke is an important factor in the calculation. But that depends, not only on the amount of business and character of machinery, but on the quality of fuel used. Will it be hard coal, soft coal, or wood, or will these be varied from year to year, or will the company use animal power or electricity? The amount of noise will depend on the kind of engines and cars, and be largely influenced by the amount of business. And the amount of both noise and smoke reaching the plaintiff's premises will be lessened by the erection of buildings between it and the freight yard, and increased if such structures should burn down. In the first place, the market value may not be depreciated at all by these influences; and to attempt to say that it will be depreciated when the fact may turn out to the contrary, and then to say when and for how long the depreciation may exist, and next to determine how much these indefinite and fluctuating elements will affect the market price, is to "multiply uncertainty by uncertainty." 47 L. R. A.

And this view has been announced in the *Marchant Case*, 119 Pa. 541, 13 Atl. 690, where the court said: "The constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor, or security to be given, in advance. This is only possible where the injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, and which may never happen, be ascertained in advance, and compensation made therefor?" Our general condemnation law, as found in the Civil Code, also shows that the damages, both direct and consequential, which are recoverable, are those arising from the construction of the works, from some visible and physical interference with a specific piece of property, or with some specific right or use connected therewith, and capable of exact description; for the company is required to notify the owner what property or easement or franchise it proposed to take or damage. Civil Code, § 4658. The contention of the plaintiff would lead to the conclusion that everyone within the circle affected by noise or smoke was entitled to notice, though it would be impossible to say how far that circle might extend before the road was constructed, or how far it might be enlarged or diminished after the road was in operation; and that each member of the community could recover his share for this public annoyance, though the rule is that for public annoyances and inconveniences one property holder has no cause of action. The property must be depreciated in value by being deprived of some right or user or enjoyment growing out of and appurtenant to his estate as a direct consequence of the construction of the public improvement. *Pause v. Atlanta*, 98 Ga. 98-100, 26 S. E. 489. "It is in connection with taking private property that 'damaging' it is used in the Constitution." *Bacon v. Walker*, 77 Ga. 339. We understand it to be conceded that, according to our own cases and the weight of authority, there must be some physical interference with property, or with property rights, in order to recover. But it is claimed that noise and smoke amount to such physical invasion; if so, a recovery may be had for slight noises, or for insignificant particles of smoke. True, the damages in such cases may be only one cent; but, inasmuch as no one has the right to physically invade the property of another, there can always be some recovery, no matter how insignificant or harmless the invasion may be. For a harmless, but unlawful, invasion in trespassing upon land by walking across a field a plaintiff could always recover at least nominal damages. It is an unlawful invasion. And, if noise and smoke amount to a physical invasion, a plaintiff would have the same right to recover for the nominal damages occasioned thereby. Yet we apprehend that no one would claim there could be a recovery for such physical invasions by harmless noise

and barely perceptible smoke, and for the reason that noise and smoke do not physically invade a right of property. If, then, the liability for damages caused by smoke and noise cannot be based upon the theory of a physical invasion, it must be governed by the law of nuisance. And many and conclusive authorities may be cited to establish that a plaintiff can recover damages caused by noise and smoke sufficient in volume to amount to a nuisance; but noise and smoke *per se* give no cause of action. As noise and smoke affect the eye, ear, or the sense of smell, they would seem materially to be included among annoyances and inconveniences to person, rather than injuries to property. *Mygatt v. Goetohins*, 20 Ga. 358; *Central R. Co. v. English*, 73 Ga. 366. They do not seem to be treated as technical trespasses against property. Wood, Nuisances, p. 107; 20 Am. & Eng. Enc. Law, p. 570. If they be injuries to persons, of course they are not included within the provision of the Constitution as to the payment of damages to property. It is, however, unnecessary finally to determine here whether they are wrongs against person or property, or both, for in either case it must be admitted that smoke and noise give rise to no cause of action unless they create a nuisance. If, then, a recovery is dependent upon proof of the existence of noise and smoke sufficient to create a nuisance, the law applicable to nuisances must be enforced. While the state primarily owns the highway, and can authorize the use thereof by railroads, and thereby legalize what would else be a nuisance in the streets, many courts have doubted whether any charter could legalize a nuisance which damages private property. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 332, 27 L. ed. 744, 2 Sup. Ct. Rep. 719; *Burrus v. Columbus*, 105 Ga. 45, 31 S. E. 124; *Western & A. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68. And where a party is convicted of maintaining a nuisance, the judgment may direct its abatement (*Vason v. South Carolina R. Co.* 42 Ga. 637), and the same may often be done in a suit for damages, or proceedings for injunction (Wood, Nuisances, p. 876; *Macon v. Harris*, 75 Ga. 772 [Syl., point 2]). In fact, the law always contemplates that a nuisance is to be abated. The payment of damages is generally a mere *solatium* for past injuries, not an authority to continue the wrong; and often "persons who come to the nuisance" are entitled to damages, and sometimes to an injunction. *Central R. Co. v. English*, 73 Ga. 366; 16 Am. & Eng. Enc. Law, p. 934. In many cases neither prescription nor the statute of limitations affords protection to the party maintaining the nuisance. *Augusta v. Lombard*, 101 Ga. 727, 28 S. E. 994. We do not say that anyone maintains these views, but, if a railroad is a nuisance, we would be logically driven to apply to such cases the law of nuisance, and, on the theory that nuisances cannot be legalized, the judgment would not only include payment for past damages, but provide for an abatement. The courts would have to enforce the principle

that for successive nuisances there can be successive liabilities, and deny any defense based on prescription or the statute of limitations. So that, where a road has been built since 1877, if a citizen should thereafter build within reach of the noise, smoke, and vibrations, and his house be thereby rendered less convenient—less valuable—than it otherwise would have been, he could recover for such diminution in value.

We must not lose sight of the fact that there is no hard and fast line separating lawful from unlawful occupations. Society adjusts itself to changed conditions, and so does the law. Cutting down timber was waste at common law. The conditions in this country were exactly reversed, and clearing up land in many instances was regarded as an improvement, rather than waste. The easement to light and air was a valuable property right in England; but without the aid of statute, and to meet a wise public policy, the doctrine of ancient lights has been practically abandoned in a country which was more interested in encouraging the building of new structures than in preserving the right of one owner to light and air coming across his neighbor's lot. There are thousands of factories, mills, furnaces, and other plants in this country about which no complaint has ever been made in the courts which would have been considered nuisances according to the old view of such structures. Yet around them, as around railroads, densely populated cities have grown, demonstrating that, instead of being harmful and injurious nuisances, they are exactly the opposite. Yet, if nuisances, persons who come thereto, and build near by, can have them abated, to the destruction of the community depending upon their existence for support. A rigid enforcement of rules and definitions announced in an age that knew nothing of locomotives and blast furnaces would have stopped the wheels of commerce, put out the fires of furnaces, and silenced the rattle of manufactories. When, therefore, we see houses being built close to the line of railways, and the very building of these houses changing the farm into a village and the village into a city; when, as said by Judge McCay (*Coast Line R. Co. v. Cohen*, 50 Ga. 462 [3]) in a street-railroad nuisance case, all experience shows that cities are every day more and more anxious for them; when we see that people ride on railroads, sleep in their rapidly moving cars, and voluntarily build and live, in city and country, near the line where cars move day and night,—we are forced to hold that they are not nuisances, despite the frequent inconvenience and annoyance caused by their lawful operation. This line of reasoning is fully borne out by the case of *Ruff v. Phillips*, 50 Ga. 133, in which the court goes further, even, than we might be personally willing to follow. A similar line of reasoning was adopted in an earlier case in this court, where, speaking on an application to enjoin the building of a steam planing mill, Chief Justice Lumpkin said that it would not be a nuisance. "The only sense it will offend

will be that of hearing. And we know of no sound, however discordant, that may not, by habit, be converted into a lullaby, except the braying of an ass, or the tongue of a scold. . . . All persons purchase town lots in view of the possible purposes to which they may be appropriated. And if it be true that the risk from exposure will increase the insurance, . . . it cannot be denied that it will be more than counterbalanced by the enhanced value of property, produced by the prosperity of the city, occasioned by the establishments. It is suicidal to oppose them. There is too much that is fanciful and conjectural in the evils and dangers which are menaced. Be this as it may, you may as well attempt to stop up the mouth of Vesuvius as to arrest the application of steam to machinery at this day." *Mygatt v. Goetchins*, 20 Ga. 358. Other cases might be cited to the same effect, but none put the argument stronger than the trial judge in *Bell v. Ohio & P. R. Co.* 25 Pa. 175, 64 Am. Dec. 687. The affirmance was by a divided court, and it may not, therefore, be an authoritative decision, but the opinion can stand on the force and clearness of its reasoning. The application was to enjoin an unlawful invasion of plaintiff's right of commons, and to abate a public and private nuisance, caused by the maintenance of freight yards and the storage and moving of cars therein. It does not appear that defendants create any more noise or confusion than is usual or customary, or than is necessary and unavoidable in carrying on the business of their road. To deny them the use of their road would be in effect to exclude all railroads from our cities; to stop all machinery, of every description, driven by steam; to stop all public markets which produce noise, and disturb the citizens residing adjacent thereto; and restrain the use of coal because of the intolerable annoyances occasioned by its smoke. We live in an age and country of progress. New branches of business are constantly springing up on every hand. The unparalleled increase in agriculture, commerce, and manufactures demands increased facilities in travel and transportation. These and many other considerations require the modification of former rules, and judicious application of the expansive principles of the common law to the altered conditions of the country and the necessities of the public. The common law is said—and with great truth—to be the perfection of human reason. It is the embodied justice and wisdom of each successive age, molded and formed into a system adapted to the habits and wants of the current times. These remarks are made for the purpose of showing that what would at one time have been held to be a nuisance might not, and probably would not, be so considered now. Private interests and comfort must often yield to public necessity or convenience. If the company had authority to make their road, they are entitled to the ordinary and necessary uses of their position, and would not be responsible for any unavoidable annoyances or disturbances such uses might cause. While holding that a

lawfully constructed and lawfully operated railroad is not a nuisance, we are very far from holding that it may not be so operated in streets or on its private property as to become a nuisance. Railroad companies may use defective engines, which scatter unnecessary quantities of sparks, cinders, and smoke; at improper times, and in an unnecessary manner, they may sound their whistles, and blow off steam; they may maintain cattle yards in filthy conditions; they may maintain coal chutes and roundhouses at improper places, and operate them so carelessly and noisily as to create a nuisance. But when they do so they will get no protection from their charter, for the legislature does not legalize nuisances, whether they are maintained by manufacturing companies, railroads, municipalities, or private individuals.

It has been suggested that under our ruling in this case a railroad might so conduct its business as to render near-by property uninhabitable, drive the owner from his dwelling, and absolutely destroy its value. When such a case arises, the owner would not be without redress; and that, too, whether the road had, in the first instance, condemned the land, and paid damages, or not. Payment of damages presupposes a subsequent lawful, usual, and ordinary operation, not the creation of a nuisance. But the courts can certainly take judicial cognizance that the lawful operation of a railroad does not render property uninhabitable, nor drive the owner from his premises. The unlawful use may do so, and for such unlawful use the law not only awards damages, but it adjudges that the nuisance shall be abated; but it has no remedy for the diminution in value occasioned by the lawful use of adjacent property, whether that use is by a railroad, or a factory, or the erection of some unsightly, but lawful, structures. *Central R. Co. v. English*, 73 Ga. 366; *Western & A. R. Co. v. Coz*, 93 Ga. 561, 20 S. E. 68; *Butler v. Thomasville*, 74 Ga. 570; *Georgia Chemical etc. Co. v. Colquitt*, 72 Ga. 172. The marked difference between the lawful and the unlawful use of railroad property, and the different consequences flowing therefrom, are discussed in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sum. Ct. Rep. 719.—an instructive and weighty authority. There the company's roundhouse was located close to the church building. In this roundhouse many engines were housed, cleaned, fired up, steam blown off.—the act of blowing off steam frequently occupying from five to fifteen minutes; hammering noises were made in the workshop; and other wrongs committed, including the building of sixteen smokestacks, lower than the church windows, and so placed that the smoke therefrom poured directly into the audience room. "The engine house and repair shops as they were used by the railroad company were a nuisance in every sense of the term, and the liability of the company to respond for damages was not affected by its corporate character." The court thereupon laid down and applied the law of nuisance, wholly independent of the question of "taking or

damaging property for public use;" but it distinctly recognized that, so far as the usual and necessary noises which were occasioned by the operation of the railroad, as such, and in the performance of its public duty, a property owner could not recover. Justice Field says: "Undoubtedly a railway over the public highways, . . . including the streets, . . . may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can claim that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation." If the company would not be liable for operating its cars in the usual and ordinary manner in the street, it surely would not be liable for the same sort of operation when it moved the cars out of the street upon its private property. This case seems to be directly in point, and to sustain several of the propositions hereinbefore announced,—that the consequential damages are *damnum absque injuria*; that one cannot recover for noises necessarily attending the proper use of a railroad; that the private business of a railroad may be so conducted as to create a nuisance; and that, when the nuisance exists, the law of nuisance is to be applied, and not the law as to taking and damaging private property for public use. The company had no roundhouse, machine shop, or structure at this point. These were the freight yards immediately adjoining its depot, where the public was served by it as a carrier. The evidence does not show any unlawful, improper, or unusual noise, smoke, or movement of cars; therefore it could not have been a nuisance. In fact, the petition does not allege that it was a nuisance.

But it is said that these views can only be correct as applied to chartered companies; that an unincorporated railroad is a nuisance *per se*, and the owner thereof liable for all damages which such nuisance occasions; and therefore the same liability attaches to a chartered railroad, inasmuch as the Constitution preserves the common-law right of action, and makes the company liable to the same extent and for the same acts as a private individual would be. And 1 Elliott, Railroads, § 1, does, at first blush, seem to sustain the position, for it is there said: "Where a private person operates 'a railroad without legislative authority, it will be at the risk of being held liable for maintaining a nuisance, or for injuries caused by the operation of the road.'" 1 Wood, Railroads, § 2; 19 Am. & Eng. Enc. Law. Railroads. Except *Queen v. Train*, 2 Best & S. 640,—a *nisi prius* case, to which we have had no access,—we have examined all the other authorities cited, and find that they do not sustain the text. All of them refer to instances where railroads, without warrant of law, were laid on highways or alleys. Certainly

an unauthorized use of the highways is a nuisance, whether it be by a private person or an incorporated railroad. "When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course" (*Com. v. Erie & N. E. R. Co.* 27 Pa. 339); not on the private property between the highways. See also *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271, 2 S. E. 636, 78 Ga. 804, 4 S. E. 113; *Macon v. Harris*, 75 Ga. 771, 73 Ga. 428; *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 98, 13 S. E. 156 (Syl., point 2). The excavation of the roadway, laying of cross-ties and rails, movement of cars, frightening of animals, and obstruction of the streets, besides the physical invasion of the property holders' easements, and the interference with their means of ingress and egress, create a nuisance which is wholly independent of the amount of noise and smoke. If the cars be run ever so noiselessly by steam, horse power, cables, compressed air, or electricity, the result is the same. The gist of the nuisance is the obstruction of the highway. But the many cases which rule that an unauthorized, and therefore unlawful, use of the highway is a nuisance, fall far short of ruling that a railroad on private property, and operated in the usual method, constitutes a nuisance *per se*, so as to entitle near-by property owners to have the business abated, or recover damages from the usual and necessary noises and inconveniences resulting from its operation. There are countless switches and private tracks on private property running to and from factories, coal mines, stone quarries, mills, and warehouses in daily use all over the country, and so far as we have found, they are not treated as nuisances. Many miles of lumber roads in this state on private property are operated by private owners, and they seem to be within the purview of the statute enacted for the protection of railroads. *Hodge v. State*, 82 Ga. 643, 9 S. E. 676. While this case does not call for a ruling as to the status of private roads, it is proper, in view of the argument, to consider whether they are nuisances *per se*. It certainly is not unlawful for a private citizen to own and operate a railway on his own land. *Pierce, Railroads*, 2; 1 Rorer, Railroads, 8. And we have found no case holding that a railroad on private property is a nuisance *per se*. On the contrary, a number of cases expressly hold that they are not nuisances *per se*. "Railroads in cities or towns cannot, with propriety, be termed nuisances. They are decided not to be such in numerous cases, both by English and American courts." *Geiger v. Filor*, 8 Fla. 332, cited in *Randall v. Jacksonville Street R. Co.* 19 Fla. 409. To the same effect, *Bell v. Ohio & P. R. Co.* 25 Pa. 161, 64 Am. Dec. 687; *Hentz v. Long Island R. Co.* 13 Barb. 646; *Drake v. Hudson River R. Co.* 7 Barb. 508; and other cases cited in 6 Rapalje & M. Railway Dig. 886 (2). Several Georgia cases afford some intimations to the same effect, though the exact question was not involved. *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 169, 13 S. E. 277; *Hanbury v. Woodward Lumber Co.* 98 Ga. 54, 26 S. E. 477; *East*

Tennessee, V. & G. R. Co. v. Boardman, 96 Ga. 359, 23 S. E. 403; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; to which may be added the *Marchant Case*, which, in effect, really decides the exact point, for the court there said: This brings us to the question whether, in case a natural person were the owner of this road, operating it in the manner the defendant company is doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason that he would have a right to the reasonable use and enjoyment of his property; and if, in such use, without negligence or malice, a loss unavoidably falls on his neighbor, he is not liable in damages therefor. If the construction contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has a right to the lawful use and enjoyment of his property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. The rightful use of one's own land may cause damage to another without any legal wrong. It is not contended that the injuries of which plaintiff complains are in any degree the result of the negligence or unskilled operation of defendant's road. On the contrary, the company has expended many dollars to enable it to convey its passengers and freight into the heart of the city. It might have hauled its enormous freights in carts or drays, and no one would have had a legal cause of complaint, although it is easy to see that the condition of the property owners would have been far more intolerable than it is at present. If a natural person were the owner of this road, and were operating it in the manner the company is now doing, he would not be responsible, since he would have the right to the reasonable use and enjoyment of his property. The necessities of a railroad, the character of its business, compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own use, because it is in the direct line of its duty, whether that duty be performed by a corporation or an individual. It is a part of the lawful use and enjoyment of property, and, when it is done without negligence, entails no legal liability therefor. *Marchant Case*, 119 Pa. 541, 13 Atl. 690, Affirmed in 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894. Railroads not only seek centers of large cities for convenience of the public and their own profit, but they are left without option in the matter. Their route and the width of the right of way are fixed by charter, and depots and depot yards must necessarily be contiguous to the main line. So that it is impossible for the company to act on the suggestion on the authority of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, where the court, after deciding 47 L. R. A.

that a roundhouse was a nuisance, said, if the nuisance could not be abated, the plant must be located elsewhere. Changing the location of a roundhouse might be feasible, but changing the main line and adjuncts to the main line stands on a different footing. Location of the route by charter also makes it impossible to sustain the position that the wrongful act consists in the selection of the place where the plant is being operated. In itself it cannot be wrong for the road to do that which it is required by law to do. Nor can it be, as suggested, that, because the train movement is greater in a freight yard than along the main line, the company would be liable for decrease in value caused by constant movement of trains, and yet not liable for the diminution in value caused by the less frequent movement on the main line and in the country. The character and legal complexion of the company's act is not affected by the amount of business done by it. If the act complained of is unlawful, or a nuisance, it is liable. If the act is not a nuisance, and not unlawful, it is not liable, unless there is some invasion of plaintiff's right.

We have thus, at considerable length, given the reasons for our decision, and, on account of the importance of the question, instead of giving mere citations, have departed from our usual rule, and made frequent and lengthy quotations from the authorities. We cannot do better than conclude with a final quotation from *Carroll v. Wisconsin C. R. Co.* 40 Minn. 168, 41 N. W. 661, where, in speaking of railroads being a public necessity, the court says: Operating them in the most skilful and careful manner causes to the public incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, inconvenience by interference with travel at crossings, and the like. One person may suffer more from these than another. For instance, one whose premises lie within 100 feet of the railroad will feel the inconvenience in a greater degree than one whose premises are at a distance of 1,000 feet, and one who has to pass many times over it suffers more than one who seldom has occasion to pass it. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person has a right of action for such inconveniences, it would go far towards rendering the operation of railroads practically impossible.

While there are several grounds in the motion for new trial, the foregoing principles cover the controlling one in the case, and we deem it, therefore, unnecessary to discuss them. If we are right in the opinion, it follows that the judgment refusing a new trial must be affirmed, although immaterial errors may have been committed during the trial.

Judgment affirmed.

All the Justices concur, except **Lumpkin**, P. J., and **Lewis**, J., dissenting.

Lumpkin, P. J., dissenting:
After anxious and careful deliberation, Mr. Justice Lewis and myself were unable to

concur in the judgment rendered by the court in this case. He has, in the opinion which follows, stated the reasons upon which our dissent is based.

Lewis, J., dissenting:

The right to exercise the power of eminent domain is inherent in sovereignty, and has been very properly defined to be "the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare." Lewis, Em. Dom. § 1. It embraces all cases where the property of a private individual is taken by authority of the state for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen. It differs very materially from the exercise of the taxing power. Taxes are imposed upon the people upon some just basis of apportionment, and are exacted from individuals for their respective shares of contribution to a public burden. But when private property is taken for a public purpose by an exercise of the power of eminent domain, it is not appropriated as the owner's share of contribution to a public burden, but as so much over and above his share. To forcibly seize the property of an individual without compensation would be manifestly unjust and oppressive, and hence it is that all just governments make provision for compensation of the owner of private property that is taken for the benefit of the public. Corporations, as well as individuals, usually apply for this power of eminent domain for their profit. The state grants the power in consideration of the convenience and advantage to the public. It would, indeed, be a very unwise and unjust government that would compel an individual, without his consent, to surrender and sacrifice his property in order to promote either the interests of the corporations of a public enterprise or the public at large. So keen has been the sense of wrong that would follow the exercise of such power conferred by a legislature that it has been seriously questioned by some very able jurists whether such action on the part of a state legislature would be valid, even in the absence of any constitutional limitation or restriction on the subject. But that is no longer a practical question in this country, for every state in the Union except North Carolina has in its Constitution mandatory provisions requiring compensation to be paid to owners of private property which has been seized for public uses. The form of this limitation in nearly all the Constitutions of the several states is that private property shall not be "taken" for public use without just compensation. There has arisen considerable conflict of authority among the several courts of the different states as to the proper construction to be placed upon the word "taken," as used in these constitutional provisions, some of the authorities limiting the right of recovery to those whose property has been actually seized and appropriated, while others have given a more liberal construction to this word, and have applied it to cases where property has not been actual-

ly appropriated, but merely injured by an invasion of some property right of the owner physically affecting the market value of the property. Viewed from the standpoint of simple justice, there is no reason why compensation should not be allowed in the one case just as much as in the other. The people of a few of the states, doubtless realizing, through their representatives in constitutional convention assembled, the great hardship which might arise by a strictly literal construction of the term "taken," have expressly extended the right to compensation to owners of private property which has been injuriously affected, by adding to their Constitution a provision like that in the present Constitution of Georgia, which declares that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid." The evident purpose of our fundamental law on this subject as it now stands is to compel those—whether corporations, companies, or individuals—who exercise the high power of eminent domain for the purpose of carrying on a work or business claimed to be to the public advantage, to pay the entire cost of the enterprise, including the construction of the work, and all damages naturally flowing from the operation of the business. A part of the inevitable cost of putting on foot such an enterprise is the expense of compensating, not only those whose property has been actually seized and appropriated, but also those whose property, though not so taken, has been injuriously affected and lessened in value. The introduction into the later Constitutions of several of the states of the words "or damaged" has given rise to further differences of judicial opinion; some courts contending that they relate only to such damages as would have been recoverable at common law in the event the wrongs complained of had been committed by an individual without statutory authority, and other courts holding that they refer to all damages causing a diminution in the value of property, whether such damages were recoverable at common law or not. The majority of our brethren have, in the present case, adopted the first view, which seems to be supported by a great weight of authority. We will not attempt to enter upon a discussion of the relative merits of these two conflicting views. So far as a case like the present is concerned, we concede that the plaintiff must show that some property right of his has been injuriously affected by the wrongs complained of before he is entitled to recover. The word "property," however, should not be restricted in its meaning to such things merely as lands and tenements themselves, nor should a recovery by the person aggrieved be limited to such physical injuries done them as are tangible and visible to an ordinary observer. In the ordinary acceptance of the term "property," the common mind generally applies it only to such tangible, material things. In legal contemplation, however, they may be regarded more the subject-matter of property than property itself. To say the least of it, the law as jealously guards against unlawful interfer-

once with all easements and rights appurtenant to the ownership of lands as it does against an actual invasion of or trespass upon the lands themselves. For instance, the owner of land is entitled to the water upon his place in its natural state, and any pollution or contamination of the same by another, though brought about by acts done elsewhere than on the premises of the owner, will give a right of action for damages resulting from such wrongful act. Such owner has the same right to the pure atmosphere which envelops his premises, and any act done by another which impregnates it with foreign substances to such an extent as to render the occupation of the premises physically uncomfortable to a person of ordinary sensibilities will likewise give a right of action for the consequent injury to the value of the property. Where one occupies his premises as a home and habitation for himself and family, he is entitled to enjoy this occupancy with freedom from any unreasonable disturbance of the peace and quiet thereof. Indeed, there is no right of an individual more sacredly guarded by the common law than is this right of habitation. It is the ordinary, common use made of lands by the large mass of any civilized population. It is superior to any trade or business, or even a public enterprise, that may be engaged in for the common welfare. Accordingly, where one is using his premises for the ordinary purposes of habitation or cultivation, he is entitled to the protection of the law in the quiet enjoyment of his property for such uses, and an action at common law will lie against his neighbor for the establishment in the vicinity of any business the operation of which will materially interfere with such enjoyment. In other words, where the interests of two property owners conflict, the one who seeks to use his premises for an extraordinary purpose, which operates to the prejudice of his neighbor, will have to yield to the other, so long as the latter is merely asserting a right to the undisturbed enjoyment of his property for the ordinary purposes of life. It is a great mistake, therefore, to suppose that one can do what he pleases with property he absolutely owns, and accordingly has a legal right to erect thereon any structure he sees fit for the purpose of carrying on a legitimate and useful trade or business. Every man holds his property subject to that universal rule, *Sic utere tuo ut alienum non ledas*. No one, for instance, has a right to erect upon his land a manufacturing establishment the operation of which will necessarily produce such discomfort to the occupants of a home in the vicinity as to seriously impair the value of their habitation. This discomfort and interference with the natural and common-law rights of habitation may be brought about in a varied number of ways; but perhaps none are so common in the books as injuries produced by noise, smoke, cinders, and noxious gases or vapors, caused by the operation of machinery. It is clearly the duty of the proprietors of such a business, in the selection of a site for the construction of

47 L. R. A.

their plant, to obtain a sufficient area of territory to guard against damages to owners of adjacent property. The lands in the immediate vicinity may even be vacant at the time of the construction of such works and the commencement of the operation of such business, yet the right nevertheless exists in the owners of adjacent lands to at any time use the same for the ordinary purposes of habitation or cultivation; and if, subsequently, they elect to do so, they have a right of action at common law against the proprietors of such enterprise. It makes no difference that the business conducted by them is perfectly legitimate in and of itself, or that it is carried on in a careful and diligent manner, with no more noise, smoke, etc., than is absolutely necessary for the proper conduct of the business. The wrongful act really consists in the selection of the place where the plant is being operated, and its erection thereon.

We gather from the headnotes and opinion filed by the majority of the court in the present case that it is conceded that the action brought by the plaintiff should be sustained if she has presented by the evidence introduced in her behalf such a case as would entitle her at common law to an action against a private individual who had, without statutory authority, done the acts complained of. If the construction and operation of the defendant's railroad would, at common law, have amounted to a nuisance resulting in special injury to her property, there can be no question that she would have a right, not only to institute proceedings to abate the nuisance, but also to recover damages for the injuries sustained. In considering the question as to whether the facts disclosed by this record give rise to a cause of action, it is, of course, important to bear in mind the prominent features that were developed by the testimony introduced on the trial below. In the record appear, as a part of the evidence relied on by the plaintiff, plats or diagrams indicating the exact location of the plaintiff's premises with respect to the railroad tracks and freight yard of the defendant company in the immediate vicinity. While it may be true that the defendant's yard was 200 feet from the plaintiff's residence, it appears from the plats and from the testimony that three of its tracks ran from its yard across an adjoining lot lying between Cumming and Bay streets, and that at one point these tracks came within 40 feet of her premises. In switching cars and in the movement of trains these tracks were in constant use, both by day and by night. It further appears that there were six or seven other tracks that entered the company's yard from an opposite direction. The testimony introduced by the plaintiff showed that the noise caused by the movement of trains was almost unbearable to the occupants of her premises. So great was it that it sometimes stopped conversation. Furthermore, "the movement of the cars had a perceptible effect on the house." In this connection the plaintiff's husband testified: "We feel it like the effect of an earthquake. It makes the house

oscillate. This occurs both day and night. I noticed cracks in the walls of my house, which I consider the result of this oscillation." This witness, in speaking of the switching, backwards and forwards, of cars on the tracks running past the plaintiff's residence, thus graphically described the situation: "That shifting is a kind of quadrille, forward and backward,—a quadrille with freight boxes. In shifting, these engines make it almost unbearable." Another witness testified: "The continual jarring and noise and smoke make it very disagreeable. . . . I should think Mrs. Austin's property has been depreciated, by the coming of the Augusta Railway Company in its neighborhood, not less than 50 per cent. . . . If there was no shifting yard there, and no pulling in and out of cars, and the train merely passed along Bay street, then I would not consider the damage so great. My evidence is largely influenced by the presence of these freight yards and passing in and out of shifting engines." There were a number of other witnesses introduced by the plaintiff, who testified that they were familiar with her premises, and the location and operation of the defendant's railroad in the immediate vicinity. They variously estimated the depreciation in the market value of her property to be from 35 to 60 or 70 per cent of its former value, and attributed this result to the operation of the defendant's railway. All of the witnesses offered in its behalf who testified on the subject admitted that the market value of the plaintiff's premises was injuriously affected by the construction and operation of its road in that vicinity, and estimated the damages thus occasioned to amount to at least 10 per cent, some of these witnesses expressing the opinion that the diminution in market value of her property was as high as 25 per cent. It appears, then, that there was really no conflict in the evidence concerning the plaintiff's contention that her property was substantially damaged, not only as regards its value as a residence, but also as to its general market value, by the construction and operation of the defendant's road. The only difference among the witnesses was as to the extent of the injury and consequent loss sustained by her. It is also a fair, if not an unavoidable, inference from the testimony, taken as a whole, that this effect upon the plaintiff's property was produced mainly by the repeated and continuous movement of cars back and forth in close proximity to her dwelling, causing such quantities of smoke, and such noise and vibration, as to create great physical discomfort to the occupants of the premises, and thus depreciate their market value for residence purposes, with no corresponding benefits to the owner arising from the location in the immediate vicinity of the defendant's railway. Indeed, there was no pretense on the part of the company that the plaintiff's premises had in this manner been in the least degree enhanced in value for other purposes, notwithstanding their utility for residence purposes had been impaired. It will therefore be readily per-

ceived that this case is clearly distinguishable from that class of cases wherein the market value of property has not really been diminished by the building of a public improvement in the neighborhood, and accordingly the owners thereof in reality suffer no substantial loss, and will not be heard to complain.

As a general proposition, it is, of course, true that the owner of property has a right to do with the same as he pleases, so long as he devotes it to a legitimate purpose; but the exercise of such right should always be understood as qualified by the proviso that he does nothing which injuriously interferes with the legal rights of others. For instance, the mere location of an unsightly structure on premises adjacent to the handsome residence of a neighbor may have the practical effect of diminishing the former value of such residence, but its owner would be without any legal redress, for the simple reason that no property right of his would thereby be interfered with. One's view might be seriously obstructed by the erection of a wall on a neighbor's lot, built in such a manner as to greatly detract from the appearance of the former's home, and actually lessen its value as a residence, but manifestly no legal right of his would thus be invaded; and therefore it would be simply ridiculous to contend that he had any legal cause of complaint. To hold that he had a natural right to an unobstructed view over the lands of adjacent proprietors would place it in his power to decree desolation, so far as all improvements were concerned, in every direction from his residence, and as far-reaching as the natural landscape could enchant the human vision. On the other hand, as before seen, everyone has a legal right to the reasonable enjoyment of his property whenever he desires to use or occupy the same for any ordinary purpose, and any act which seriously interferes with that enjoyment to such an extent as to produce material physical discomfort and annoyance to the owner, and which would naturally produce this effect upon one of ordinary sensibilities, will give rise to an action under the well-defined rules of the common law. We use the words "one of ordinary sensibilities" advisedly, for it does not follow that, simply because a person of fanciful or fastidious tastes might be annoyed and disturbed by ordinary noises and similar agencies produced on the premises of another, legal redress will be afforded as a matter of course. To illustrate: A resident of a large and populous city is necessarily subjected to more discomforts from noise, smoke, and such things, than one who lives in a small town or village or in the country; but this would be true merely because his neighbors were exercising their legal right to use their premises for strictly legitimate purposes, and his own were not sufficiently extensive to insure him that peace and quiet he might in a less populous locality enjoy. If, however, the owner of city property is subjected to any special annoyance and interference with the peaceful en-

joyment of his premises over and above what the public generally suffer, he is clearly entitled to invoke the protection of the courts. In a word, the question to be determined in any given case is, Have the property rights of the individual seeking redress been unlawfully disregarded and invaded, to his injury?

The case at bar is also to be distinguished from that class of cases wherein it appears that the damages complained of are of a public nature, and no more affect the individual complaining than the public at large. Not unfrequently railroad companies are sued for causing an obstruction by their tracks of a public highway, and the courts, upon inquiring into the peculiar facts of a particular case, justly reach the conclusion that the wrong complained of has no more prejudicial effect upon the individual who makes complaint thereof than it has upon the traveling public generally; and accordingly the mere fact that he is the owner of realty at a greater or less distance from such obstruction, which does not interfere with the enjoyment of his property, but merely annoys and interferes with him in his capacity of a citizen in the use of the street, will afford no reason for singling him out of the entire population as the proper party to enter complaint for a grievance common alike to all citizens who have occasion to use the highway. On the other hand, however, whenever it appears that an easement or other right appurtenant to the ownership of realty is interfered with by such an obstruction in a public street,—as where, for instance, the natural ingress into and egress from one's premises have been seriously impaired,—special damage and injury do result to the owner of such property, and relief will be granted as a matter of strict legal right.

A distinction should likewise be drawn between the present case and those in which it has been decided, in states where the organic law provides simply for compensation for property "taken," that redress cannot be had for consequential damages thus arising to the owners of property which has not been actually appropriated to a public use. So far as we are aware, every court of the Union which has ever dealt with the provisions of a state Constitution which, like ours, provided that private property should be neither taken nor damaged for the benefit of the public without just compensation to the owner, has unequivocally declared that the term "damaged" extends the right to compensation to the owners of all property injuriously affected, irrespective of the fact that it has not been actually appropriated, especially if the character of the injury be such as would give a right of action at common law. There is nothing in the record now before us that can authorize an inference that the damages complained of by Mrs. Austin are not special in their nature, or that they fall within the application of the doctrine *damnum absque injuria*. A nuisance may be public, and at the same time cause special injury to an individual or a number of individuals which is not shared in common with the general

public, and in that event relief will be granted to anyone or to all the persons thus peculiarly affected. Of course, it does not follow that, merely because several persons are especially hurt, the wrongdoer will be relieved from liability to any one of them. These principles are, so far as this court is concerned, effectually settled by the embodiment in our Civil Code of the rules of the common law bearing upon the subject. Section 3861 defines a nuisance to be "anything that worketh hurt, inconvenience, or damage, to another," and specifically declares that "the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man." Section 3859 provides that if "a public nuisance causes special damage to an individual, in which the public do not participate, such special damage gives a right of action." On the subject of injuries to property, § 3874 lays down the rule of the common law, that, "the right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action."

Now, in the light of the present record, how can it be seriously insisted that there was no testimony authorizing the conclusion that important property rights of the plaintiff were materially affected by the operation of the defendant's railway? Can it be urged that injuries of the nature she has sustained exist only in the imagination; that they are the result alone of a mere fanciful or fastidious taste; that a person of ordinary sensibilities would not be seriously incommoded or inconvenienced by the noise and jar of tremendous machinery operating day and night in close proximity to his dwelling, causing it to oscillate and vibrate as though under the influence of an earthquake, until, as a result of this physical disturbance, great cracks appear in the walls of the building? It will be noted that the operation of the defendant's road in this particular vicinity was attended with unusual noise, smoke, cinders, etc. Immediately in the rear of plaintiff's residence a freight depot was erected, with divers tracks from different directions entering the company's freight yard. Several of these tracks ran within 40 feet of her house, and were in constant use day and night, in switching cars, etc. It is quite manifest, therefore, that the noise and other disturbing agencies originated by the company in this particular locality were far greater than would ordinarily be occasioned by the usual running of trains between stations on its line of railway. In reason, justice, and in law, a railway company should be held to be under the imperative duty, when selecting a site for its freight yards, repair shops, etc., of paying due regard to the effect upon adjacent property. The idea is advanced in the able opinion filed in this case by the Chief Justice that the business interests of rail-

roads, as well as those of the public, require that they should seek the hearts of large and populous cities in the selection of sites for the location of their terminal facilities. The principal reason why a railway company seeks such a place for this purpose is on account of the profit which will accrue to it; and, though the general public may likewise have an interest to be subserved in regard to this matter, we are at a loss to perceive why the railway company should not be required, as would an individual wishing to conduct a private enterprise, to pay the legitimate cost of its selection. Railway companies enjoy great privileges. Were it not for the fact that they operate under express legislative authority, the business they conduct, tested by the rules of the common law, would be by every enlightened court declared to be a nuisance, pure and simple, unless by grant or purchase they acquired sufficient territory surrounding their works to insure the owners of neighboring property against the evil effects attending the operation of their lines of road. When a railway company is permitted to exercise the power of eminent domain, it is not put to the enormous expense of buying such a vast quantity of land as to enable it to confine all injurious agencies generated by it within its own premises, but need actually acquire title to only such lands as are necessary to a proper operation of its road; and as to adjacent property which may be damaged, but for which the company has no particular use, and therefore does not care to purchase outright, it is permitted, as against the owners thereof, to acquire the right to carry on its chartered enterprise by merely compensating them for the loss they sustain by reason of the depreciation in market value of their property caused by the operation of a business which our Constitution plainly and unequivocally declares cannot upon any other terms be prosecuted at all, notwithstanding the fact that public interests will thereby be greatly subserved. It is not the policy of our fundamental law that the general public should enjoy any advantage or benefit whatever at the expense of a private citizen. Indeed, the framers of our Constitution proclaimed that the people of Georgia were imbued with a proper sense of independence and justice, and would not demand at the hands of any individual who might elect to make his abode among them the surrender of any property to which he had just claim, without adequate compensation therefor. It therefore follows that, however much the general public may desire a given benefit which involves the expense of paying such compensation, enjoyment thereof must be deferred until such time as our people find themselves financially able to make the purchase; and if a railway company undertakes, by the acceptance of charter privileges which the people have reserved to themselves, to supply them with a long-felt want, it cannot, as the duly authorized representative of the state, assert any greater rights or immunities than it was within the power of its people to bestow, and accordingly is

under the bounden duty of making full atonement to every private individual whose property is necessarily either actually appropriated or damaged in the successful prosecution of the enterprise. If the legitimate cost thereof is more than the company is able or willing to pay in consideration of the privileges conferred upon it as an inducement to serve the public, it cannot, of course, carry into effect its good intentions of benefiting the people at large, and incidentally (?) making a profit to itself on the required outlay of capital which the investment involves. Were the enterprise projected wholly for the purpose of private gain to its promoters, it could not be lawfully conducted under ordinary conditions, for it would amount to neither more nor less than a common-law nuisance. Only upon the idea that the material interests of the general public are advanced by the operations of public carriers can the running of a railway through a populous locality be considered a legitimate and lawful business; and, in view of our constitutional provisions bearing upon this subject, we maintain that such a business loses the elements which would characterize it as a nuisance, if conducted without legislative sanction by an individual, only when its promoters comply fully with their constitutional obligation of making just and adequate compensation to every owner of neighboring property whose legal rights in the premises have been injuriously affected. In a word, such an enterprise ceases to be a nuisance only from the moment its sting has been removed,—when, after full atonement to every person who has suffered legal damages, its operation no longer interferes with the vested rights of others, and accordingly there is an absence of that inexcusable injury which characterizes the maintenance of what, in legal contemplation, constitutes a nuisance, either public or private.

The principles of the common law relating to nuisances resulting from unusual or excessive noises, smoke, cinders, or the impregnation of air with noxious vapors, are well established by judicial authority both in England and in this country. It is a grave mistake to suppose that damages flowing from such causes are not recoverable unless they produce a visibly injurious effect upon the *corpus* of the property,—a strictly physical injury thereto, tangible in its nature, and readily apparent to the ordinary observer. The term "physical effect," used by a number of the authorities in this connection, is not intended to be restricted in its application and meaning solely to the visible signs made upon the subject-matter of the owner's property rights, but should be understood as covering every right appurtenant to the ownership of realty or personal effects, including the paramount right of uninterrupted and undisturbed enjoyment thereof. As a matter of course, one may be entirely deprived of this latter right, notwithstanding the tortious act by which this result is brought about leaves no visible traces of the injury inflicted, so far as the *corpus* of the property

is concerned; that is to say, the term "physical" is used to distinguish the kind of injury meant from those which have purely a mental effect. In 1 Wood, Nuisances, § 3, the proposition is laid down that "a use of premises that, by reason of its peculiar results, renders the enjoyment of life uncomfortable, is a nuisance, although it produces no visibly injurious effect upon property of any kind, such as noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells that render the enjoyment of life uncomfortable." This able writer devotes an entire chapter of his work to the one subject of nuisances occasioned by smoke. See *Id.* chap. 15. Another chapter is devoted to a discussion of nuisances produced by noise and vibration. 2 Wood, Nuisances, chap. 18. In section 495 the author says: "Every person has a right to have the air diffused over his premises in its natural state, free from all artificial impurities. Indeed, it may be said that no one has a right to interfere with the supply of pure air that flows over another's land, any more than he has to interfere with that neighbor's soil. The right is a natural one, and is just as well recognized by the courts as the right to a natural flow of water. Therefore every use of one's property that produces an unwarrantable impregnation of the atmosphere with foreign substances, to the detriment of another, is a nuisance, and actionable as such. This is true whether the injury arises from smoke, noxious vapors, noisome smells, or from loading the atmosphere with dust, chaff, or other foreign substances that would not exist there except for the act of the party through whose instrumentality it is communicated." In § 497 recognition is given to the right of a property owner to recover damages, not only for injuries affecting the *corpus* of his estate, but also for such as impair its legitimate use and enjoyment, and the author asserts that, "if the injury complained of is to the enjoyment of property, it must be such as would render the occupancy of the premises physically uncomfortable to a person of ordinary sensibilities for any of the purposes to which the owner may choose to devote it. It matters not whether the enjoyment impaired is of a dwelling house, a store, a shop, a studio, a church, a playground, or a garden or farm. It is enough if the result of the business or act complained of contaminates the atmosphere to such an extent as to impair the enjoyment of property for whatever purpose the owner may see fit to use it." In § 505 it is declared that "smoke alone may constitute a nuisance;" and the author recognizes that it becomes a nuisance, not only when it produces a tangible injury to the property itself, but also when it sensibly interferes with the comfortable enjoyment of the same. "The rule is," he says, "that the comfortable enjoyment of the premises must be sensibly diminished, either by actual, tangible injury to property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment

of life." In volume 2, § 611, of the same work, it is declared that "noise alone, unaccompanied with smoke, noxious vapors, or noisome smells, may create a nuisance, and be the subject of an action at law for damages." We further quote as follows from § 619: "A trade cannot be carried on in a locality where, by reason of the noise incident to the business, it produces damage to others; and the diminution of the comfortable enjoyment of life or property is regarded as a sufficient damage to uphold an action."

The principles above announced are also supported by an almost unbroken line of judicial adjudications by the various courts of last resort in the United States. A leading case is that of *Whitney v. Bartholomew*, 21 Conn. 213, wherein it appeared that the blacksmith shop and chimneys of a carriage factory were placed near the dwelling house of the plaintiff, and that cinders, ashes, and smoke issuing therefrom were thrown in large quantities upon his premises. The reviewing court held that while such a trade and occupation were unquestionably lawful and useful, and the building erected for the purpose of carrying on the same was not *per se* a nuisance, yet, "if such building, though erected on the builder's own land, and occupied in the usual manner, be in an improper place, where its use will probably result in an injury to another, this is, of itself, a wrongful act, for which the wrongdoer is responsible to one essentially injured thereby." In delivering the opinion of the court in that case, Church, Ch. J., declared (p. 218): "The first object of society and of the laws should be to protect life, health, and property, and the comfortable enjoyment of them; and whatever essentially, injuriously, and unnecessarily affects these must be wrong. They are paramount to the mere convenience of pursuing a lawful calling in a particular place, and so the common law has considered it from the earliest times. . . . The defendant assumes that, as he erected his shop and pursued his business on his own land, there could be no wrong on his part if the business was conducted with due care and caution. Herein, we think, is his mistake, and he will find no authority to sustain that position. He had a right to erect his shop on his own land; but he must so use it, even there, as not to injure his neighbor. Indeed, as we have said, the erection of a building on one's own land, with a purpose of its being so used that its use will probably result in an injury to others, is of itself a wrongful act. . . . Blackstone says that even lawful trades, producing such results as the plaintiff complains of, should be carried on in remote places. 3 Bl. Com. 217." A similar ruling was announced in *Duncan v. Hayes*, 22 N. J. Eq. 25, wherein it was held that "filling the air around a dwelling house with dense smoke and soot or cinders, or with noxious or offensive vapors or odors, or with annoying noises, to such a degree as will render living in the house uncomfortable to persons of ordinary sensitiveness on those matters, is a nuisance and unlawful injury

which will be restrained by injunction." In that case it was shown that the defendants had commenced the erection of a planing and saw mill, to be driven by a steam engine fed with fuel of a character likely to produce soot and smoke in large quantities. The plant was located 200 feet from the plaintiff's premises, whereon she was conducting a boarding house, and the gravamen of her complaint was that the smoke from the fuel which the defendants intended to use in running their engine would "fill and surround her house, and make it uncomfortable for her or her guests to live in, and that the sawing and planing machines meant to be used [would] make an intolerable noise and render the house uncomfortable," so that it would "become an undesirable residence for boarders, and her business be greatly injured, if not wholly destroyed." Again, in *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L. R. A. 329, 22 Atl. 649, the opinion, delivered by Williams, J., discloses that the plaintiff brought his action to recover damages sustained by reason of the operation by the defendants, on their own land, of ovens used in the manufacture of coke; he alleging that the smoke and gas from these ovens passed over and across his farm, injuring his crops, and diminishing the productiveness of the soil and the desirability of his house as a place of residence. In passing upon his right to a recovery, the supreme court of Pennsylvania, to which court the case was taken by appeal, held that one owning and operating ovens for manufacturing coke from coal obtained from strangers, and not mined in the land on which the ovens stand, the natural effect of which is to substantially injure property in their vicinity, must pay to the owners of such property the damages sustained by them, although the ovens are located on his own land, at a place so well adapted to the business that they would not be enjoined. Another case directly in point is that of *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735. The defendants were engaged in a manufacturing enterprise operated on their own lands. The owners of adjacent property, which was vacant when the plant was first put into operation, subsequently sought to use their premises for residence purposes. They made complaint that, in the prosecution of this industry, odors, smoke, and soot were produced, of such a noxious character and extent as to materially affect the health of persons living in that neighborhood; and it was held by the court of last resort that "where, after the establishment of a manufacturing business, the adjacent vacant land is utilized by the owners for residence purposes, to whom its continuance becomes a nuisance, the business must give way to the rights of the public, and those prosecuting it must devise some means to avoid the nuisance, or must remove or discontinue such business." In the opinion delivered by Grant, J., he said (p. 478, 82 Mich., p. 737, 46 N. W., and p. 725, 9 L. R. A.) that it was of no "consequence that the business is useful or necessary, or 47 L. R. A.

that it contributes to the wealth and prosperity of the community." In *Wallace v. Auer*, 10 Phila. 356, it appeared that the defendant conducted a workshop in which he carried on the business of a gold beater and manufacturer of silver leaf. The effect of his operations was to seriously impair the comfortable enjoyment of adjacent premises owned by the plaintiff, rendering it difficult to hear conversation, and, by concussion, causing the house to be in a state of constant vibration. The following is a synopsis of the decision made in that case: "The business of a gold or silver beater, set up in a quiet dwelling neighborhood, and by its noise and concussion unreasonably interfering with the quiet enjoyment, and perhaps safety, of neighboring property, is a nuisance which equity will restrain."

If it were necessary, we could multiply the citation of authority in support of the principles above enunciated, but the foregoing will suffice to show the trend of the judicial opinion in this country upon the subject. The decided weight of English authority is to the same effect. An instance in point is the decision pronounced in *Heginbotham v. Eastern & C. Packet Co.* 8 C. B. 337, which was an action on the case, brought by a hotel keeper, who complained that the defendant maintained workshops, etc., near plaintiff's premises, and by the operation of the business conducted therein made divers loud and unusual noises. As a result thereof, the plaintiff, his family, and his guests, were greatly disturbed and annoyed in the enjoyment of his premises. The defendant pleaded to the action that it was a joint-stock company, duly empowered under the law to carry on its business by steamboats between England and France; that for this purpose it was necessary to repair its steamboats at the particular place where its workshops were located, as the same could be done there at less expense to the company; that its business was conducted in a careful and lawful manner; and that the noise produced was necessary and unavoidable. A verdict returned in the plaintiff's favor was upheld by the court. Following is the entire opinion delivered by Maule, J., as to the right of the plaintiff to recover in view of the plea relied on by the defendant: "The plea was a plea in excuse, and not in denial; setting up a reason, and a bad one, for doing that which was complained of in the declaration." In *Carterwright v. Gray*, 12 Grant, Ch. (U. C.) 399, the general rule was laid down that, "everyone has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbor's house any impurity which there are known means of guarding against." In this connection, see also *Tipping v. St. Helen's Smelting Co.* 4 Best & S. 608. For other English cases having a direct bearing

on the subject, see citations of the same, and comments thereon, in 1 Wood, Nuisances, §§ 518 et seq. In § 517 the author deals with the case of *Hole v. Barlow*, 4 C. B. (N. S.) 336, decided in 1858, wherein it was held that the business objected to, being a lawful and necessary enterprise, and being carried on in a careful and in the usual manner and in a proper place, was not a nuisance. He calls attention to the fact that this decision "made a wide departure from the doctrine of previous cases decided in the courts of that country," and adds: "But this attempt to overturn the entire doctrine of the courts in restraint of noxious trades met with no favor, and was never recognized as an authority upon similar questions by the able courts of England." Following this comment, the author cites a number of decisions rendered in that country which clearly indicate that the common-law doctrine for which we are contending in the present case has been almost universally recognized and enforced by the English courts. In § 509 he specially refers to the case of *Walter v. Selfe*, 4 Eng. L. & Eq. 15, on the trial of which it was made to appear that the defendant had commenced the manufacture of brick upon premises adjoining those occupied by the plaintiff as a residence, and the smoke developed in the process of burning floated over the latter's premises and entered his dwelling, rendering its enjoyment physically uncomfortable. He contended that he had a right to an untainted and unpolluted stream of air from all directions over his premises, but this right was denied by the defendant. The court held, in effect, that inconvenience and discomfort caused the plaintiff by the impregnation of the atmosphere on his premises with smoke gave him a right of action against the defendant, and that the question as to whether such foreign substances in the atmosphere went to the extent of being noxious to human health, to animal health in any sense, or to vegetable life, was not an important one to be considered, as it was with a private, and not a public, nuisance that the defendant was charged. In the opinion filed in that case, Knight-Bruce, the learned vice chancellor, put the controlling question as follows: "Ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness,—as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people?" This point was held to be against the defendant. Says Wood, in commenting upon this decision (pp. 703, 704): "The doctrine of this case, in its fullest extent, has been adopted by the courts of this country and England, and the rule as to the degree of discomfort requisite to be produced from interferences with the atmosphere has been generally adopted as the true rule." It will be noted that the several adjudications hereinbefore referred to do not make one's right of

action dependent upon the fact that the injury complained of visibly affects the subject-matter of the property itself. To the casual observer no such injury need be apparent. In accordance with this rule is the decision of this court in the case of *Coker v. Birge*, 9 Ga. 425, 54 Am. Dec. 347. There it appeared that the defendant was about to erect a livery stable, with a plank floor, fronting on a public thoroughfare in a city, but entirely on his own land, which was some 65 feet from a public hotel owned and kept by the plaintiff. The latter claimed that the carrying on of a livery business in the building erected for that purpose "would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that [would] arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein." It was held by a full bench "that the erection of the stable at the place stated would operate as a nuisance to the property of complainant, and that he was entitled to an injunction to restrain its erection." In announcing the decision of the court, Warner, J., quoted approvingly the rule laid down by Blackstone, to the effect that if one does an "act in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive." 3 Bl. Com. p. 217. The injury sought to be enjoined in that case was not of a nature to visibly affect the house or the premises of the plaintiff, but would have operated solely upon the owner's right of undisturbed and peaceable enjoyment thereof, together with his family and his guests. On the same line was the decision rendered in *Athens Mfg. Co. v. Rucker*, 80 Ga. 291 (Syl., point 4), 4 S. E. 885, in which case this court laid down the general rule that "whenever the right to enjoy one's property to its fullest extent is invaded, and injury arises therefrom, he may recover any damages sustained by reason of such invasion; nor is he bound to do anything to avoid the consequences thereof."

We will now consider the question under discussion in the light of the law relating to the exercise of the power of eminent domain. In treating of this subject, and in discussing the liability of railroad companies for injuries to private property caused by smoke, noise, vibration, etc., it is stated in 10 Am. & Eng. Enc. Law, 2d ed. p. 1122, that "the courts are not agreed as to whether such injuries are to be considered a sufficient taking to require compensation. But no doubt the greater weight of authority favors the view that the owner of property thus injured may recover if the property is rendered less desirable for the purpose for which it is used or to which it is adapted, excluding all such injuries as affect the owner in common with the people of the community." See, in note 2, a large number of authorities cited to support the text. In Lewis, Em. Dom. § 234,

the author, after a painstaking review of the decisions pro and con, announces his conclusions to be "that any interference with any private right appurtenant to property, such as the right of support, the right to pure air, etc., was a taking for which compensation must be made under our Constitutions as they existed prior to 1870," the decision of many courts to the contrary notwithstanding. We certainly concur in the further opinion expressed by this eminent writer, that it is "clear that where such interference is held not to be a taking, it must be held to be a damage or injury." Indeed, we have, during the course of our investigation, encountered in no text-book the suggestion that there is room for doubt or misgivings as to this particular point. Much less have we been able to find any direct adjudication by any court to the effect that such damages are not recoverable under the provisions of a Constitution declaring that just compensation must be made, not only for all private property actually taken, but likewise for all that is damaged, in the interest of the general public. In one of our early cases, involving a construction of the term "taken" as used in our state Constitution then of force (*South Carolina R. Co. v. Steiner*, 44 Ga. 546), it appeared that the city council of Augusta conferred upon certain railway companies the right to operate a railway over and along one of the streets of that city, using steam or other power, and that the contract between the city and these companies, whereby this privilege was granted, was subsequently confirmed by an act of the legislature approved October 26, 1870. It was conceded in that case that the fee to the soil in the street in question was in the state of Georgia, subject only to its use as a public highway by the people of the state. The railroads claimed the right to run their trains by steam power along this street, without responsibility for damages sustained by the owners of property fronting thereon; and the issue raised was whether or not such owners had a right of action growing out of the construction and operation of this railway, and could recover damages caused by the noise, smoke, vibration, etc., thereby occasioned. It was decided by a majority of the members of this court that "while the use of a public street may be granted to railroads to lay bars of iron on to run over with trains, without endangering the street by obstructions or embankments, yet if the use of locomotives inflicts injury upon those who live on the street, by throwing smoke through the houses along the street, or by its weight shaking them or breaking the plastering or walls, etc., and by the noise and screeching of whistles and engines, the legislative right to run over the street does not make such acts harmless, and the injury inflicted upon the legal rights of the parties is not *damnum absque injuria*." It will be noted that this case was decided before the adoption of our present Constitution of 1877, and at a time when the only constitutional provision of force looking to the compensation of owners of private property injuriously affected by

the construction and maintenance of an enterprise conducted in furtherance of the public good related solely to the "taking" of such property for public uses. Nevertheless it was, in effect, held by a majority of the court that the injuries complained of amounted to a "taking" of property, within the meaning of the organic law of this state as then expressed in its Constitution. In the opinion delivered by Judge Warner, he says (p. 561): "If the general assembly, in the exercise of its right of eminent domain, should pass an act for the taking of private property for public use without providing any just compensation therefor, the act would be unconstitutional, in violation of the fundamental principles of the law as the same has existed from Magna Charta to the present time." Judge McCay, who declined to concur in the judgment rendered, based his dissent wholly upon the proposition that there was no actual "taking" of private property for the public use, the property actually taken having always belonged to the public. While this case is not, strictly speaking, binding authority upon this court as at present constituted,—the same not being a unanimous decision,—yet its moral force and effect should not be overlooked. A careful reading of Judge McCay's dissenting opinion (pp. 562, 563) will convincingly show, we think, that he fully recognized that the property rights of the owners of premises fronting on the street occupied by the railroad companies with their track had been seriously interfered with, and that they had accordingly suffered substantial damages; and, this being so, doubtless he would have concurred in the judgment had the Constitution then of force specifically declared, as does our present Constitution, that private property can neither be taken nor damaged for the public use without just and adequate compensation being first paid.

The question now in hand was discussed at length by the Supreme Court of the United States in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. In that case it appeared that the railroad company had conferred upon it by an act of Congress authority to build its line into the city of Washington along a particular route selected for that purpose. The plaintiff made complaint that the company had erected an engine house and machine shop upon a parcel of land immediately adjoining a church edifice belonging to the plaintiff, and had since used them in such a way as to disturb, both on the Sabbath and on other days, the congregation assembled in the church, to interfere with religious services conducted therein, break up its Sunday schools, and destroy the value of the building as a place of public worship. On the trial of the case it was shown that "these services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation sit-

ting in parts of the church farthest from the shops from hearing what was said; . . . and that in the summer time, when the windows of the church were opened for air, smoke, cinders, and dust were blown from the smokestacks through the windows of the church, settling upon the pews and furniture, and soiling the clothes of the occupants, accompanied by an offensive odor, which greatly annoyed the congregation." An action was brought for the damages thus sustained, and a recovery had. In passing upon the merits of the plaintiff's complaint, it was held by the reviewing court that "in an action at law damages may be recovered against a person who maintains a nuisance which renders the ordinary use and occupation of property physically uncomfortable to its owner; and, if the cause of the annoyance and discomfort be continuous, equity will restrain it." It was further ruled that "the measure of damages in an action at law against the maintenance of a nuisance affecting real estate is not simply the depreciation of the property. The jury are authorized also to take into consideration personal discomfort which may be caused by the nuisance," etc., "even if there be no arithmetical rule for the estimate." And it was still further distinctly ruled that "legislative authorization exempts from liability to suits, civil or criminal, at the instance of the state, but it does not affect claims of private citizens for damages for special inconvenience and discomfort not experienced by the public at large." In the able opinion delivered by Mr. Justice Field, he said, in this connection (p. 331, 108 U. S., p. 744, 27 L. ed., and p. 728, 2 Sup. Ct. Rep.): "Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." On page 334, 108 U. S., page 745, 27 L. ed., and page 730, 2 Sup. Ct. Rep., speaking of the direct cause of the injury, complained of in that case, he further says: "If, as asserted by the defendant, the noise, smoke, and odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place, where by their use the plaintiff would not be thus annoyed and disturbed in the enjoyment of its proper-

ty." It is true, as stated by Chief Justice Simmons in the opinion filed by him in the case at bar, referring to the case just cited, that the right of action was based upon the maintenance of a nuisance by the railroad company; but he does not undertake to refer to any authority with a view to showing that the agencies put in operation by the defendant company in that case are not to be considered identical with those of which complaint is made in the present action. Another case peculiarly in point upon its facts is that of *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79. There the church claimed damages resulting from noise and the jarring produced by steam engines and cars which disturbed and molested its congregation, and had the effect of diminishing the value of its house of worship. It was held in that case that it was enough to show that the plaintiff's property had been rendered less valuable for the purposes to which it was devoted, and it need not further appear that its value was likewise depreciated for other purposes. A ruling to the contrary was made in *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313; but it is to be observed that, while the decision in that case appears in a later report, it was really rendered at the May term, 1848, of the court, whereas the decision above cited from 5 Barb. was announced at the November term of that year, and overruled the decision reported in 6 Barb. In a more recent New York case (*Drucker v. Manhattan R. Co.* 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568), decided in 1887, Finch, J., in referring to the damages from the construction and operation of the defendant company's elevated railway, said: "Smoke and gases, ashes and cinders, affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the landowner's easement, and to that extent, at least, are subjects for redress in an action for damages." See also *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

We will now direct attention to the precise questions passed upon and rulings announced in the cases cited and relied on by the Chief Justice in the opinion prepared by him, as supporting the views entertained by a majority of the members of this court. In *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201, 20 N. W. 140, it appeared that the defendant, in constructing its railroad, made an excavation extending across certain streets in the vicinity of the plaintiff's premises, thereby cutting off his most convenient and usual means of access to and from his place of business in the city. It was simply held in that case that the injuries complained of were not special to the plaintiff, but the same in kind sustained by the general public in common with himself, and

therefore the acts committed by the defendant, even if unlawful, would constitute a public nuisance, merely, and not one entitling the plaintiff to maintain his action. Furthermore, it was decided that the acts complained of did not constitute a "taking" of the plaintiff's property, within the meaning of the Constitution of Minnesota. It is to be noted in this connection that the Constitution of that state, in the clause thereof relating to an exercise of the power of eminent domain, merely provides that just compensation shall be made for property "taken," and does not in addition use the words "or damaged," or any other terms equivalent thereto. What has just been said with reference to the case last cited also applies to the decision in *Carroll v. Wisconsin C. R. Co.* 40 Minn. 188, 41 N. W. 661, wherein a similar ruling was announced. In *Morgan v. Des Moines & St. L. R. Co.* 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96, an action for damages was brought against the company under a statute of the state providing that municipal corporations should have power to authorize or forbid the location of railway tracks along streets, but that no railway track could thus be located and laid down "until after the injury to property abutting upon the street . . . upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement." A track was laid down which crossed another street, on which the plaintiff was living; and the court simply held, in construing this statute, that the plaintiff had no cause of action, because his property did not abut upon the street along which the track was laid. As to the case of *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558, it appears from the report thereof that a statute of the state required the bridge company to pay damages occasioned to the owners of such ferries as might be injured by the erection of its bridge; and the court simply decided that the criterion of the right to recover was whether or not the acts causing the damage were such as, independently of the statutory powers of the company, would have been actionable at common law. The damages claimed in that case arose merely from loss of patronage, and it was accordingly very properly held that the owners of the ferry thus rendered less profitable had no common-law right to immunity from legitimate competition such as necessarily arose from the building of the company's toll bridge. The report of the case of *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, 9 Atl. 871, discloses that "a railroad company constructed a viaduct or elevated roadway upon property owned by it in fee, lying on one side of a street, and operated its steam railway thereon. From the noise, smoke, and dust caused by the engines and cars, the necessary consequence of the operation of the railroad, injuries resulted to the plaintiff's property on the opposite side of the street, no portion of which property was taken or used in the construction of said viaduct." And it was held that, "except on proof of

negligence, the lawful use by a railroad company of a lawful erection entirely upon its own property is not the subject of damage" under the Pennsylvania Constitution. On page 483, 116 Pa., and page 874, 9 Atl., the provision of that Constitution under consideration was quoted as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed, in the construction or enlargement of their works, highways, or improvements." The difference between this provision and that contained in the Constitution of this state is obvious. The former, in express terms, restricts compensation to cases where private property is taken, injured, or destroyed in the construction or enlargement of works of a public character; and therefore it might with much force be contended that the framers of the Pennsylvania Constitution did not contemplate that compensation should be paid to the owners of property in no way injuriously affected by the "construction or enlargement" of a public enterprise, although they might thereafter suffer consequential damages arising solely out of its operation in a legitimate and lawful manner. This question was more particularly gone into in the subsequent case of *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13 Atl. 690, which is also especially relied on by the majority of our brethren. In construing the constitutional provision of that state above quoted, the court in that case held expressly that "the remedy provided by said constitutional provision, to secure just compensation by corporations for property 'injured or destroyed,' has relation to injuries which, though popularly termed consequential, are yet to be understood as confined to such injuries to one's property as are actual, positive, and visible,—the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the Constitution, in advance." Accordingly a majority of the court announced their conclusion to be that the defendant company, which had not taken, injured, or destroyed any of the plaintiff's property during the course of the construction of its road, was not answerable in damages for any injuries incident and solely attributable to a subsequent operation of the road in a proper and lawful manner, and without any admixture of negligence whatever. It will be noted that Mr. Justice Sterrett declined to concur in the judgment rendered, and in his dissenting opinion (pp. 562 *et seq.*, 119 Pa., and p. 698, 13 Atl.) enters into a very thorough and able argument in opposition to the views entertained by the majority. It is also proper to call attention to the fact that in the *Lippincott Case*, 116 Pa. 472, 9 Atl. 871, there was likewise a dissenting opinion filed by two justices. The affirmation by the Supreme Court of the United States of the decision pronounced by the

state court in the *Marchant Case* adds no weight whatever to it as authority upon the questions therein dealt with. See that case reported in 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894. The Supreme Court merely undertook to pass upon the Federal questions raised, as to whether or not the plaintiff, under the decision made by the Pennsylvania court, had been denied the equal protection of the law. In the opinion delivered by Mr. Justice Shiras, he says explicitly (p. 385, 153 U. S., p. 754, 38 L. ed., and p. 896, 14 Sup. Ct. Rep.: "We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and Constitution of that state; and, if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

The Constitution of the state of Missouri, like the Constitution of Georgia, employs the words "taken or damaged." The case of *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257, is cited in the majority opinion filed in the present case to sustain the views therein advanced. It should be observed, however, that the Missouri court merely announced the well-established rule that "a property owner, in order to recover damages for an obstruction to a highway, must show that the damages suffered are peculiar to him; being such as are different in kind, and not merely in degree, from those sustained by other members of the community." And in applying this rule to the facts of that case the court very properly held that the plaintiff, who alleged he had been damaged by an excavation in the street some 500 feet distant from his premises, so as to render the street impassable for teams, was not entitled to maintain an action. In the opinion filed in that case the views expressed by the supreme court of Illinois in *Rigney v. Chicago*, 102 Ill. 80, seem to be indorsed by the members of the Missouri court, at least to the extent of recognizing the right of one to recover when there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, so that by reason of such disturbance he sustains peculiar damages not suffered by the general public. As the *Rigney Case* is especially relied on as supporting the judgment rendered in the case at bar, it is pertinent to inquire what was really therein decided. We feel entirely confident that, instead of the decision being authority for the propositions for which it is cited by the Chief Justice, it can clearly be shown that the principles announced directly sustain the views set forth in this dissenting opinion. The Constitution of Illinois, in so far as it provides that private property shall not be "taken or damaged" for public use, is identical with ours. That Constitution went 47 L. R. A.

into effect in 1870, and was the first in the United States to extend the right to compensation by use of the words "or damaged." The action instituted by Rigney was one to recover damages against the city for constructing a viaduct or bridge over a public street not far from his residence, whereby he claimed his premises had been depreciated in value. On the trial of the case in the lower court there was a verdict and judgment in favor of the city, and the case was taken to the supreme court of Illinois for review. It reversed the judgment of the trial court, and held that damages were recoverable. It seems, from the facts reported, that the contention of the city was that no property of the plaintiff had been actually taken or appropriated, and that the acts complained of, not physically affecting his property, gave him no right of action. The reviewing court, however, declined to restrict the meaning of the word "property," as used in the Constitution, to such things as lands and tenements themselves, but construed it to mean "that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects." It was further stated in this connection that before the adoption of the Constitution of 1870 it was a settled doctrine of the court that "any actual physical injury to private property by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby the appropriate use or enjoyment of the property was materially interrupted, or its value substantially impaired, was regarded as a 'taking' of private property, within the meaning of the Constitution, to the extent of the damages thereby sustained, and actions for such injuries were uniformly sustained. But the remedy was restricted to such cases of direct, physical injury." In view of this fact the court held expressly that, under the Constitution of 1870, redress was afforded in cases not provided for by the Constitution of force prior to that time, and that the additional protection thus secured to the owners of private property comprehended "every case where there is a direct, physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provision, give a right of action." Furthermore, the principle was clearly laid down by the court that whenever there has been a physical disturbance of any legal right which one enjoys in connection with his property, whereby he sustains injury and damage, the fact that there was no direct, physical invasion of the premises themselves will not prevent a recovery. In the opinion prepared by Mr. Justice Mulkey (pp. 74 *et seq.*), he presents an able argument to the effect that, to restrict a recovery to direct, physical injuries to the property itself, as distinguished from the owner's property rights therein, would be to make the words "or damaged," as used in the Constitution of the state, entirely without meaning; for the right to re-

cover damages for such injuries had existed under the previous Constitution, which limited compensation to cases where private property was "taken" for public use. Attention was also called to the fact that while the term "property" was frequently used to indicate the *res* or subject of the property, rather than the property itself, yet in its appropriate sense it included the right of user and enjoyment of anything which the law recognized as capable of becoming the subject-matter of ownership. In *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820, it was decided that, under the provisions of the Constitution of the state of Illinois adopted in 1870, a recovery may be had in cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in a diminution of its market value. That case came by writ of error from the circuit court of the United States for the northern district of Illinois. There was a verdict and judgment against the city, which was affirmed by the United States Supreme Court. The official report discloses that the court had under consideration the decision in *Rigney's Case*, cited above. Other previous adjudications by the Illinois supreme court were reviewed, and express recognition was given to the new rule laid down in the *Rigney Case*, that compensation must be made in all cases where there had been some physical disturbance of a right, public or private, which one enjoys in connection with his property, even though there had been no trespass upon, or actual invasion of, his premises. See page 108, 125 U. S., page 641, 31 L. ed., and page 825, 8 Sup. Ct. Rep. It seems that counsel for the city in that case, in his argument before the reviewing court, dwelt somewhat at length upon the serious consequences which he predicted would result from enforcing the rules laid down by the supreme court of Illinois. In reply to this argument, Mr. Justice Harlan, in the concluding sentence of his opinion, said: "We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the state in support of the proposition to change their Constitution."

The identical question we are now considering was involved in the case of *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750. That was a suit against a railway company to recover damages caused by the construction, maintenance, and operation of its line of railway near the plaintiff's premises. The railroad was built on the opposite side of an adjoining avenue, and the complaint made was that in the operation of this road the company had thrown and deposited upon the plaintiff's premises dust, cinders, and smoke, etc., and that by reason of the running of trains her premises had been greatly shaken and disturbed. It was held that the owner of land in the vicinity of a railroad may recover for injury to his property caused by the noise and disturbance

arising from the passage of trains. From the opinion filed by Bailey, J., in that case, it appears that error was assigned upon the refusal of the trial judge to charge the jury, as requested by the defendant, that there could be no recovery by the plaintiff for any damages caused by reason of the noise, confusion, or disturbance occasioned by the operation of the defendant's trains in its yards or upon its tracks. The supreme court ruled that this request was properly refused, saying: "The railway having been built and being operated by authority of law, its operation, of course, cannot be held to be, in law, a nuisance; but, while that is so, it is difficult to see how the damages resulting to adjacent property from its operation are in any degree affected by that circumstance. If the noise, confusion, and disturbance caused by the defendant's engines and cars is such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*." In reviewing the case of *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42, Bailey, J., observed that an expression was used in the opinion filed therein to the effect that noise and confusion in the vicinity of the railroad could not be considered in the estimate of damages; but "on examining the report of the case, however, it will readily be seen that no such question was involved in the case. [as] No damages by reason of the noise and confusion caused by the operation of the railroad were claimed in the pleadings, nor, so far as appears, was any evidence on that subject offered, nor any claim made to damages arising from that cause." Accordingly, he announced that the court adhered to its ruling in *Chicago, P. & St. L. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81, where it was held that when the noise made by passing trains has a tendency to render a farm less desirable as a place of residence, and therefore less valuable in the market, it was an element of damage which the jury might properly take into consideration. That an action for damages lies for injuries sustained by reason of smoke, cinders, and vibration occasioned by the running of trains on a railway was also recognized by the Illinois supreme court in *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, and in *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67.

In the Constitution of the state of Nebraska is a provision like that contained in the Constitutions of Illinois and of Georgia. The supreme court of Nebraska, in construing the words "or damaged," as used in the Constitution of that state, held them to include all damages arising from an exercise of the right of eminent domain which caused a diminution in the value of private property. *Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Omaha & N. P. R.*

Co. v. Jancock, 30 Neb. 276, 46 N. W. 478; and *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67, citing approvingly *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 16 N. W. 475, and 17 N. W. 120, which seems to be the parent case, wherein the court said (p. 560, 14 Neb., and p. 479, 16 N. W.), in speaking of the change wrought in the organic law of that state by the introduction into its new Constitution of the additional words "or damaged:" "The constitutional provision therefore is that private property shall not be taken or injuriously affected without just compensation therefor. The evident object of the amendment was to afford relief in certain cases where under our former Constitution none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. To this extent the property owner is entitled to recover. It is not necessary, to entitle a party to recover, that there should be a direct, physical injury to his property, if he has sustained damages in respect to the property itself whereby its value has been permanently impaired and diminished. This is but justice. While public improvements are essential to progress and to the welfare of the race, yet as the public are to receive the benefits, whether by the opening of streets and public grounds or by the construction of railways, the party receiving the benefit should bear the burden. This should not be cast upon others." The Constitution of Kentucky also contains words equivalent in meaning to those employed in the Constitution of this state. It provides for "compensation for property taken, injured, or destroyed." Const. § 242. This identical question in reference to damages to property occasioned by discomfort of its occupants from smoke, noise, etc., of passing trains was recently before the court of appeals in that state, when it was decided: "Damages may be recovered for injury to abutting property on account of annoyance and discomfort habitually suffered by the occupants from smoke, cinders, and unusual noise from trains passing over a railroad in the streets of a city." *Louisville Southern R. Co. v. Hooe* (Ky.) 47 S. W. 621, 622. In the same case it was decided that it was competent for the jury to consider whether the personal annoyance of the occupant would conduce to a diminution of the value of the property; and in the opinion of Burnam, J., it is stated: "If, as matter of fact, the occupants of this building habitually suffer annoyance and discomfort on account of the smoke, cinders, noise, etc., from passing trains, this fact tends to diminish the value of the property." 20 Ky. L. Rep. 849. The Constitution of Texas contains a similar provision, by declaring: "No person's property shall be taken, damaged, or de-

stroyed, or applied to public use, without adequate compensation." Tex. Rev. Stat. 1879, p. 2, § 17. In a recent decision by the court of appeals of that state the same doctrine was announced with reference to a right of recovery against a railroad for such damages. In that case it was also ruled: "Where plaintiff was damaged by noise, dust, and smoke from a railway running along a public street, the fact that lot owners generally abutting on the same street suffered similar injury furnishes no reason why plaintiff may not recover." *Tewarkana & Ft. S. R. Co. v. Bulgier* (Tex. Civ. App.) 47 S. W. 1047.

We find nothing in any of the decisions of this court which are relied on by counsel for the defendant in error, and cited in the majority opinion delivered in this case, at all in conflict with our views of the law, and a proper application thereof to the peculiar facts here presented. The three cases mainly relied on are *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078; *Peel v. Atlanta*, 85 Ga. 138, 8 L. R. A. 787, 11 S. E. 582; and *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489. In the first case mentioned it was held: "Any evidence that will tend to show damage to the property would be admissible. If noise, smoke, dust, cinders, or things of that sort, be shown to have damaged the property, they should be considered in arriving at the amount of the recovery; but, if they amount merely to inconvenience or discomfort to its occupants, they are not an element of damages, and should not be so considered." It will therefore be seen that the right to recover on account of noise, smoke, etc., whenever the effect of these agencies was to damage the property, is distinctly recognized in that case; and not a word is said in the opinion which can possibly warrant the assumption that the court intended to restrict the right of recovery to cases wherein it was shown that the premises of a private individual were physically invaded, and a direct injury thereto committed, or that the term "property" was meant to include only the *res* or subject-matter of such person's property rights as owner. In the *Peel Case* it appeared that the plaintiff brought suit against the city, alleging herself to be the owner of a lot of land, a portion of which she sold, and of which portion the city afterwards became the purchaser, and opened a public street thereon adjoining the portion she retained, rendering it unsightly and depriving it of privacy, and that she had reason to fear assessments upon all three sides of her lot for street improvements, which fact reduced the value of her premises. Accordingly this court held that she had no cause of action, as the city had committed no act interfering with any property right she could lawfully assert. This case therefore has no application whatever to the facts presented by the record now before us. In *Pause v. Atlanta* it did not appear that there was any actual physical invasion of, or interference with, the premises themselves, which the plaintiff

leased for the purpose of conducting a restaurant therein; yet this court nevertheless held that the plaintiff could maintain her action. Her complaint was that she had suffered damages by reason of the obstruction by the city of a street running by the premises, which had the effect of impairing the use to which her apartments were devoted, in that, because of the inconvenience occasioned to her patrons, "her custom had fallen off to such an extent that the business could be carried on only at a loss." In other words, the injury complained of went solely to the peaceful enjoyment and user of the premises for the purposes she had rented them for, and had no injurious effect whatever upon the building itself or upon its market value. Upon the question of damages, it was, notwithstanding this fact, explicitly ruled that the plaintiff could recover for the loss sustained by reason of a diminution in the rental value of the leased premises; and, while she could not likewise recover "the cost of fixtures or other improvements placed therein" with a view to conducting her business of restaurant keeper, she was entitled to offer evidence to show "the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements," which evidence should be by the jury "considered in computing the damages to the leasehold estate." Further comment upon that case would be superfluous.

We are further thoroughly satisfied that the requirement in our Constitution to the effect that compensation shall be "first" paid, before private property is either taken or damaged for public use, lends no weight whatever to the position that the framers of our organic law deliberately intended, by making use of the word quoted, to exclude compensation for all damages which were the result of the operation, merely, of a railway. Indeed, we do not feel that we can, consistently with our duty to administer justice "agreeably to the laws and Constitution of this state," arbitrarily add thereto the far-reaching proviso which any such construction of the clause under consideration imperatively necessitates. Obviously, the important requirement that the owners of private property taken for the public use, "or damaged thereby, should be 'first' fully compensated," was intended for the benefit and protection of private individuals injuriously affected by an interference by the public with their vested legal rights incident to the ownership and unrestricted enjoyment of property of that character. If not "first" paid, their right to demand compensation for injuries might frequently prove an empty blessing; for what redress of a practical nature can one who has sustained such injuries possibly hope to have afforded him by the courts, in the event some wholly irresponsible corporation or some totally insolvent aggregation of individuals has ruthlessly invaded his property rights by virtue of legislative sanction? Were it not for this wise provision in our Constitution, even a court of equity might be powerless to protect him;

for unless, as would be improbable, he was fully possessed of all the facts, and was able to show beyond peradventure that he would suffer irreparable injury if the promoters of a wild-cat and purely speculative enterprise, launched by them under the guise of a public benefit, were not enjoined, he could not avail himself of the remedy of injunction. As our organic law now stands, he is at liberty to invoke this remedy the moment any corporation, however solvent and responsible it may be, undertakes, without payment of all damages in advance, to invade or interfere with his property rights, although, as a matter of course, he is not confined to this single remedy, and may, if he elects to venture the risk involved, wait until such time as these damages have actually accrued, and then institute suit to recover the same. Furthermore, the construction given to our constitutional provision on the subject by the majority of the members of this court will inevitably operate to wholly cut off all right to compensation on the part of every property holder whose premises are not actually appropriated, temporarily seized, or invaded during the course of the physical construction of a railway line or other public enterprise. A moment's reflection will suffice to make apparent the fact that it is difficult, if not impossible, to conceive of a case where such a property owner could logically claim to have suffered injury from the mere construction of a public work, although the moment the same is, after final completion, put into operation, he may immediately begin to sustain injuries of the most aggravated character. Our brethren nevertheless hold, in effect, that all damages arising solely from the operation of a railway are of such an uncertain character, and so difficult of reasonably exact computation in advance, that they cannot be considered in any event recoverable, merely, forsooth, because of the requirement of our Constitution that damages must, before the contemplated injury is inflicted, be "first" paid. The somewhat ingenious, though unsound, argument presented by the Chief Justice in this connection may, however, be fully met by the observation that not only is it entirely practicable to measure in advance such consequential damages, but that, in every case where private property is either taken or damaged for the public welfare, all consequential damages thus arising must be so ascertained and first paid is the positive mandate of our general assembly. See Acts 1894, pp. 95 *et seq.*; Civil Code, §§ 4658, 4674, 4675, relating to the "condemnation of private property" under the power of eminent domain. It may possibly be true that the owner of property adjacent to lands over which a railway is being constructed is frequently not in a position to know what effect the operation of the road, when completed, will have upon his premises. This would result, however, really because, not being in the company's confidence, he would be uninformed as to the precise use, and the extent thereof, the company contemplated making of its works in the immediate vicinity. The

company certainly would know how it wished and intended to use its own property in the neighborhood; and if it fairly and correctly communicated its information on the subject to a board of arbitrators who were familiar with the location, relatively to the company's works, of the premises of an adjacent landowner, we entertain no doubt that a just and sufficiently accurate award of damages would be possible, in the event the board came to the conclusion that the injuries which must inevitably ensue from the operation of the company's business overbalanced the benefits which the other party would derive therefrom. The real danger to be anticipated would be that the owner of adjacent premises would not be able to bring to the attention of the board all the elements of damage he would suffer if the company did not in good faith acquaint him or it with all the details of its plans. But, certainly, if it is possible for a court of equity, upon an application by a property owner to restrain the erection of a manufacturing enterprise in his neighborhood, to definitely ascertain what effect the contemplated project and its attending evils will have on adjoining property, if not enjoined, it is likewise within the range of possibility to ascertain in advance, with equal fairness and accuracy, what effect the same baleful agencies, if originated by a chartered railroad company, will have upon property so situated as to be inevitably more or less affected thereby. No one has ever doubted the ability of a court of equity, upon such an investigation, to bring out the facts, and from them arrive at a definite conclusion; and, of course, if the evil effects which will be produced by noise, smoke, cinders, vibration, etc., be once accurately ascertained, the matter of compensation therefor can, agreeably to the law relating to the recovery of damages for such injuries, be as readily adjusted before as after their actual infliction. In this connection the case of *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320, 9 S. E. 1078, which has already been herein referred to, is quite pertinent. It was therein expressly ruled that "under the present Constitution, whether the property is taken or not, if it is damaged by the construction or operation of improvements made for the use of the public, its owner can recover whatever damage it has actually sustained." And the present Chief Justice, then Mr. Justice Simmons, in delivering the opinion of the court, said (p. 325, 82 Ga., and p. 1079, 9 S. E.): "Under the new rule, whether the property is taken or not, if it has been damaged by reason of the construction or operation of any improvements made for the use of the public, the owner can recover whatever damage the property has actually sustained. So we think it does not matter whether the construction and operation of the street railroad is a new use or burden on the street or not. If, by reason of such construction or operation, the private property of an individual is damaged, he is entitled to recover therefor." As a number of the authorities above cited will show, it

has been directly ruled, not only by several of the state courts, but by the Supreme Court of the United States, that, under constitutional provisions such as we have in Georgia, consequential damages arising from the operation of a railway are recoverable, independently of the question whether the mere construction of the road did or did not injuriously affect one complaining of the evil effects attending the prosecution of the business carried on by the company in a legitimate exercise of its franchises. We cannot agree with the majority of our brethren that in the operation of its road the defendant company in the present case committed no act of which the plaintiff could legally or justly complain. If, as was clearly shown by the testimony, that operation caused the damages complained of, the defendant has been guilty of a continuous trespass in thus producing damages without first making compensation therefor. That trespass consisted of an actual, physical invasion of the plaintiff's premises by using the same as an avenue of escape for noise, smoke, and vibrations which the company generated upon its own premises, but which were not confined thereon, and could not be, because of their limited extent. Even under the purely arbitrary rule adopted by the majority of the court, that it is incumbent upon a plaintiff to show that the injury complained of produced some visible, physical effect upon the property itself, we think, under the evidence submitted, in this case, that Mrs. Austin was entitled to a recovery in some amount; for, among the obvious, tangible, and strictly physical effects shown by the testimony to have been caused by the operation of the company's road was the cracking of the walls of the house, and, furthermore, it was made to appear that her dwelling was otherwise physically disturbed, and in an almost constant state of oscillation, by the jarring produced by the defendant's engines and cars.

The argument advanced to the effect that, if suits to recover merely consequential damages were tolerated by the courts, an immense amount of litigation would thereby be invited, and there would be endangered by speculative actions the prosperity of numerous enterprises established for the public good, is not a matter for the judicial mind to consider. The same reasoning might apply with equal force to suits against corporations for personal injuries the character of which is much more calculated to excite the sympathy of the average jury in favor of the complaining party. It is true that the owners of a business conducted under express legislative sanction for the public good should be fully protected in the enjoyment of all their legal rights; but this obligation is no more binding upon any branch of the state government than is the duty of also affording complete protection to the natural rights of the common masses of mankind, which are their unquestionable inheritance from the common law, and with which, as is shown by our Constitution, they have never consented to part. Among these

rights is that of habitation, ever regarded both by jurists and statesmen of all ages as of paramount importance. The right to the peaceable and comfortable enjoyment of home and farm immeasurably contributes to the peace and happiness of our people, and accordingly should be jealously guarded, not alone as a matter of simple justice, but as one of public policy. Regard for such right lies at the foundation of every just and good government. No other right of an Englishman has been more vigilantly upheld by the courts of Great Britain, and doubtless in this fact lies one of the most important secrets of her power and the happiness, wealth, and prosperity of her people. It matters not how humble or dilapidated the home of a British subject may be; in the language of Lord Erskine in one of his memorable speeches, "the King, with all his power, dare not, unbidden, cross the threshold of the ruined tenement."

The logical result of the conclusions reached by a majority of the court in the present case would necessarily lead to a de-

nial of any relief to an owner of private property, even though he and his family might be actually driven from their home by noises so deafening, volumes of smoke and cinders so vast, and noxious and offensive gases and odors so baleful and injurious to the health, as to render the premises uninhabitable and absolutely worthless for any purpose. Unquestionably, as has been seen, the common law would have afforded relief against any such wanton invasion of private rights; and we have no reason to believe that the framers of our present Constitution ever remotely contemplated that such rights should be ignored in any case where the power of eminent domain might be exercised, either by the state itself, or by any corporation under legislative authority, in the taking or damaging of private property for the public welfare. If we are right in the view we confidently entertain as to this matter, it follows inevitably, as our brethren very frankly concede, that the judgment of the court below should be reversed.

PENNSYLVANIA SUPREME COURT.

Sebastian A. RUDOLPH

v.

PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY, App't.

(186 Pa. 541.)

1. A single tract of land used for the purposes of a paper mill is not severed by the taking of a strip for a railroad and the conveyance of an additional strip for coal and freight sidings, so as to prevent consideration of injury to the water which supplies the mill on one side of the road, when assessing consequential damages to the mill property on the other side of the road.
2. The taking of a route for a railroad, which is afterwards abandoned without building the road there, and another route selected, does not prevent recovery for consequential injuries caused by the operation of the road on the later location.
3. Whether compensation for the pollution of a stream by operation of a rail-

road was made when land was appropriated for the first railroad across the premises is a question for the jury, on an issue as to damages from the subsequent construction of another railroad.

4. The pollution of the water of a stream so as to render it unfit for use in a paper mill, resulting from the operation of a railroad through the premises, is to be considered in determining the amount of damages caused by the construction and operation of the railroad.
5. The refusal to allow a jury to view water in a pond and then after it has been passed through filters, on an issue as to pollution, is within the discretion of the court and not subject to review.
6. Describing land only by outside boundaries, without defining a strip through it conveyed to a railroad company, is not ground for dismissing a petition for consequential damages from pollution of water by operation of a railroad.

(July 21, 1898.)

NOTE.—Pollution of water as an element of damages for taking railroad right of way.

RUDOLPH v. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD COMPANY appears to be the first case in which the court has considered the question of the pollution of water as an element of damages in an eminent domain proceeding for the condemnation of a right of way for a railroad. The cases in which the necessary conditions to raise the question arise are necessarily limited, but there appears to be no reason why if pure water is necessary for some particular purpose of the owner of the property sought to be taken, and this purity will be necessarily injured by the operation of the road, the railroad company should not be required to pay for the injury. In contrast with this case, however, is that of *Texas & S. R. Co. v. Meadows*, 73 Tex. 82, 3 L. R. A. 565, 11 S. W. 145, where, by reason of the construction of the road, sand was loosened which was washed into the stream,

filling up a millpond and interfering with the wheel, and the court held that an action for damages would not lie. The court says, if a corporation does an act which it acquires a right to do by virtue of its franchise granted for a public use, and if a person having no franchise could not have done the act lawfully, and the property of another is directly damaged, the one doing the act will be liable for the injury notwithstanding the franchise. In other words, the Constitution prohibits the grant of franchises to a corporation which will carry with them immunity for damages which may proximately result to property from the exercise of the privileges granted. The court concludes, however, that in the present case the act done was lawful for any owner of the land to do without authority from the legislature, and hence as to the railroad company it was not an act unlawful but for the franchises granted to it.

H. P. F.

APPEAL by defendant from a judgment of the Court of Common Pleas for Montgomery County awarding damages to plaintiff for injuries to his property resulting from the appropriation of a portion of it for a railroad right of way and the operation thereon of a railroad. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wayne MacVeagh, Charles H. Stinson, O. Henry Stinson, and William F. Solly for appellant.

Messrs. John M. Vanderslice, Thad. L. Vanderslice, and N. H. Lenzelore, for appellee:

The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself. It does not depend upon appropriation or presumed grant from long acquiescence on the part of other riparian proprietors above and below, but exists *jure naturæ* as parcel of the land.

Gould, Waters, chap. 6, § 204.

A right to a stream of water is as sacred as a right to the soil over which it flows.

Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 527; *Angell, Watercourses*, § 5; *Cary v. Daniels*, 5 Met. 236; *Baltimore v. Appold*, 42 Md. 442; *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. 615; *Wheatley v. Christian*, 24 Pa. 298, 64 Am. Dec. 657; *McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656; *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Atl. 780; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 22 Atl. 989; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 650.

There seems to be no substantial difference recognized in the decisions, between diminution of quantity and corruption of quality: both are equally the objects of protection.

Where the owner of land taken by a railway company had built a reservoir on other land belonging to him, for the purpose of supplying mills to be erected on the land taken, it was held that the land taken was "injuriously affected" within the meaning of the statute providing for compensation.

Ripley v. Great Northern R. Co. L. R. 10 Ch. 435; *Johnson v. Boston*, 130 Mass. 452; *Union Canal Co. v. Stump*, 81* Pa. 360; Gould, Waters, § 219.

A partial destruction and diminution of value is the taking of private property.

Glover v. Powell, 10 N. J. Eq. 229; *Ten Eyck v. Delaware & R. Canal Co.* 18 N. J. L. 202, 37 Am. Dec. 233.

"Taking" and "construction" imply lawful operation. If not so implied, many of the elements of damages which enter into the calculation of difference in market value could not be considered.

Western Pennsylvania R. Co. v. Hill, 56 Pa. 460; *Comstock v. Clearfield & M. R. Co.* 169 Pa. 587, 32 Atl. 431; *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, 5 Atl. 742; *Philadelphia & R. Co. v. Patent*, 17 W. N. C. 199; *Pennsylvania S. Valley R. Co. v. Walsh*, 124 Pa. 544, 17 Atl. 186.

The driving of the dust, smoke, and fine particles of coal dirt through the mill, and 47 L. R. A.

their falling upon the stream and reservoir, fouling and destroying it, were as bound to happen upon the construction and lawful operation as the blowing of the steam whistle on the engine, or the noise bound to ensue from the driving wheels thereof.

Jones v. Erie & W. Valley R. Co. 151 Pa. 46, 17 L. R. A. 768, 25 Atl. 134.

Where a corporation has condemned land, it pays for the right to do all things which it deems necessary for the lawful construction, maintenance, and operation of its undertaking, and is under no further liability to the owner. The compensation is conclusively presumed to cover all damages due or incident to such construction, maintenance, and operation.

Randolph, Em. Dom. p. 152; *North & West Branch R. Co. v. Swank*, 105 Pa. 555; *O'Brien v. Pennsylvania S. Valley R. Co.* 119 Pa. 184, 13 Atl. 74; *Hoffeditz v. Southern Pennsylvania R. & Min. Co.* 129 Pa. 264, 18 Atl. 125; *Updegrave v. Pennsylvania S. Valley R. Co.* 132 Pa. 540, 7 L. R. A. 213, 19 Atl. 283; *Kemp v. Pennsylvania R. Co.* 156 Pa. 441, 26 Atl. 1074; *Hodge v. Lehigh Valley R. Co.* 39 Fed. Rep. 449; *Brady v. Fall River*, 121 Mass. 262; *Johnson v. Boston*, 130 Mass. 452; *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 5 N. E. 142; *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199; *Van Schoick v. Delaware & R. Canal Co.* 20 N. J. L. 249.

Liability is predicated upon what the expropriators are entitled to take and the use to be made; not what they may choose to take or the use they may choose to make of it. They cannot be heard to say they will not exercise their full right, or will limit the incidental injuries naturally flowing from a full, lawful exercise of their right.

Miller v. Windsor Water Co. 148 Pa. 429, 23 Atl. 1132; *Howe v. Weymouth*, 148 Mass. 605, 20 N. E. 316.

With respect to injuries which are not the result of negligence or bad faith in the execution of the powers conferred, a corporation acting under public authority is presumed to act within the scope of the powers granted by its charter; and the only redress for such injuries is in the mode, and by the means, provided by statute.

Mellen v. Western R. Corp. 4 Gray, 301; *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, 5 Atl. 742; *Pittsburgh Junction R. Co. v. McCutcheon*, 18 W. N. C. 529; *Pennsylvania S. Valley R. Co. v. Walsh*, 124 Pa. 544, 17 Atl. 186.

No matter what might be the necessities of appellants' business (if they stood in the relation of riparian owners), they would have no right to injure and destroy this water to the prejudice of Mr. Rudolph's rights, and could be enjoined for such act.

Clark v. Pennsylvania R. Co. 145 Pa. 449, 22 Atl. 989; *Haupt's Appeal*, 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436; *Monongahela Nav. Co. v. Coon*, 6 Pa. 383, 47 Am. Dec. 474.

Dean, J., delivered the opinion of the court:

This was a proceeding under the statute,

by plaintiff, for damages resulting from defendant's appropriation of his land, and the construction through it of a steam railroad. The plaintiff owned in fee a tract of about 6 acres in lower Merion township, Montgomery county. The land had a frontage of 300 feet on the Schuylkill river, and extended back 1,100 feet. Through it flowed a stream known as "Gully Run," alleged by plaintiff to be pure spring water. On this land, at an expense of over \$350,000, he had erected a large paper factory, known as the "Ashland Paper Mills," operated for the manufacturing of book paper. There were also erected on the land, a mansion house, with stables, tenement houses for workmen, pulp mills, and all the accessories for a proper operation of the plant. There was also upon the land a reservoir for retaining pure water, of an area of about 3 acres, from which the water pipes leading to the factory were fed. Prior to the erection of the paper mill, the Reading Railroad had been located through the land, upon an elevated structure, having a right of way 30 feet wide. In addition to this appropriation, Rudolph in May, 1868, conveyed to the same railroad company a strip of land 100 feet wide, containing about $\frac{1}{4}$ of an acre, adjoining its right of way, for purposes of a coal siding and freight facilities for his mills. The company, besides stipulating that it would at its own proper cost, construct sidings and coal bins, further covenanted that it would in no way obstruct or interfere with the watercourse upon the property. In 1890, defendant, desiring to connect its road with the Pencoyd Iron Works, under its right of domain condemned about $\frac{1}{2}$ an acre of the property at the western end, but this (after some work upon it), by a change of plan, was abandoned; and then, by condemnation, were taken a small part of the ground on which the mansion house was located, and the land above the reservoir, including 436 feet of the stream leading to it. This involved, to some extent, the reconstruction of the bank of the stream to make room for and sustain the railroad bed. The defendant then constructed and commenced operating its railroad. Plaintiff afterwards operated his paper mills, but eventually closed them, in which condition they have remained. Soon after an adverse decision in an equity suit (*Rudolph v. Pennsylvania S. Valley R. Co.* 166 Pa. 430, 31 Atl. 131), on March 9, 1895, he commenced this statutory proceeding to have his damages assessed. One petition (that in No. 107, October term, 1890) averred the railroad company had entered upon and taken about 200.023 acres of his land west of the Reading Railroad, along Gully run, and then down said run and along the Schuylkill river, to the Pencoyd Iron Works; that, further, the railroad company, for the purpose of constructing and operating its railroad, had removed the earth, and created an artificial embankment for the location of its track, and thereby the stream washed into the earth, and carried it into his reservoir or settling pool: and, further, by the operation of the road, coal dust, cin-

ders, soot, and grease were constantly deposited in the pool, polluting the water, and rendering it unfit for manufacturing purposes. Viewers were appointed on this petition, who assessed plaintiff's damages at \$67,158. From this award, plaintiff appealed. On the same day, plaintiff presented another petition, averring that the railroad company had appropriated about $\frac{1}{4}$ acre of other land for the purpose of constructing its branch to said Pencoyd Iron Works, and, in the construction of its road, had removed two dwelling houses, filled up the cellars, and located trestlework along the stream, thereby greatly depreciating the market value of his property; that the water of said stream was polluted by washings of earth, occasioned by rain storms; that he had sustained great damage, both direct and consequential. He therefore prayed a view to assess his damages. Viewers were appointed, who assessed his damages on this petition at \$2,970.40. Plaintiff appealed from this award also. Both appeals, by agreement, were tried in the court below before one struck jury. In the first issue a verdict was rendered in favor of plaintiff for \$110,000; in the second, for \$5,360. After full consideration by the court on motions for new trial, judgments for plaintiff were directed on both verdicts, and we have before us two appeals by defendant. A third appeal was tried before the same jury. It related exclusively to the mansion-house property, and no question concerning it is involved in the two appeals before us. A new trial was granted, and it is still pending in the court below.

Appellant, in No. 107 of the common pleas, and known in the trial in the court below as "Claim No. 3," formally prefers seventeen assignments of error, and takes up nearly ten pages of a closely-printed paper book in a mere statement of them. We shall endeavor to give their substance in fewer words: (1) Appellant alleges error in the court's refusal to allow the jury to look at the water in the pool, and then at it after it had passed through filters. (2) Error in refusing to dismiss plaintiff's petition because of misdescription of the property. (3) Error in not giving sufficient significance in the charge to the testimony of one Shelldrake, who had testified that at a moderate expense the pond could be roofed so as to exclude soot and coal dust. (4) Error in refusing to charge, when requested, that the conveyance of the strip by plaintiff to the Reading Railroad Company, May 18, 1868, was a severance of the tract into two distinct parcels of land, and therefore there could be no recovery in this proceeding for damages sustained by pollution of the water, and damage to the mill arising from pollution of the stream on another distinct and separate piece of land. (5) This is a substantial repetition of the fourth, with the addition that error is alleged because the court, for the same reason, did not instruct the jury that the sole measure of damages for their consideration was the difference between the market value of the one piece of land before, and immediate

ly after, the taking. (6) That as the Reading Railroad Company had, for more than twenty years before the construction of defendant's road, been operating its road through said land by steam locomotives, which might be fired with bituminous coal, creating soot and dust, it must be assumed, as matter of law, plaintiff or his predecessors had been compensated for damage sustained thereby; and the court erred in not so charging the jury when requested by defendant. (7) Error in not charging, when so requested, that it must be presumed the conveyance by plaintiff to the Reading Company of the strip of land resulted, to him, in full compensation for any injury to him by reason of the pollution of the water from coal dust, soot, and cinders. (8) Error in not deciding, as requested, that as there was a severance of the tract into two separate parcels, and the petition described the tract as an entirety, there could be no recovery, but that plaintiff must commence by new petitions, describing each tract separately. (9 and 10 are repetitions of the same legal conclusions which defendant asked the court to announce in the eighth.) (11) The court erred in not instructing the jury, as requested by defendant, that as the evidence showed defendant had already appropriated another and adjoining piece of plaintiff's land, and damages had been assessed therefor, no further assessment could be made, for it should be presumed all the elements of damages had been included in the first assessment. (12) Error in not instructing the jury, as requested, that, as it had been established by the evidence that all the damage from pollution complained of by plaintiff could be avoided by the use of filters, the measure of damage should be the cost of filters, and the expense of their operation. (13) In not instructing the jury, as requested, that, as the evidence established that the pond could be roofed over at a cost of \$12,333, that represented the amount of plaintiff's damage, and the jury should award accordingly. (14) In not instructing the jury that the measure of damages is the value of the land actually taken. (15, 16, and 17) The court erred in not setting the verdict aside because it was excessive.

The fourth to eleventh assignments are mainly based on the assumed fact that there was a severance of the original tract by the construction of the Reading Railroad, and the conveyance to that company by the plaintiff of a strip of land for coal and freight sidings. If the fact assumed had no existence, the assignments of error fall. The conveyance to plaintiff is of the land as an entirety, and it was in fact in one tract. The Reading Railroad appropriated a right of way through it, and long afterwards plaintiff conveyed to the same company a strip adjoining this right of way for railroad purposes. Did this make the one tract two? The property was purchased by plaintiff for a distinct purpose,—the manufacture of paper. The whole tract was as necessary to his purpose as any part of it. The stream and the land adjoining, while not intended

to supply a water power, were intended to secure an uninterrupted and uninterfered with supply of water for manufacturing purposes in the mill. Without the supply of water furnished from the stream and reservoir on the land on the opposite side of the Reading Railroad, the paper mill could not be operated. The water and the land on which it was accumulated constituted an indispensable appurtenance of the mill, and made the whole one property, and the mere right of way and conveyance could not destroy their identity as one property. We think, with the court below, that the remarks of Justice Clark in *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 13 Atl. 291, are directly in point: "In order that two properties having no physical connection may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied as that the injury or destruction of one must necessarily and permanently injure the other." It is assumed in that case that there may be but one assessment of two properties wholly disconnected, if they are necessarily used as one. Here the land was not disconnected, except that a common carrier, serving the manufactory, ran its cars over the surface; and even then plaintiff had a right of way across the railroad. If the taking by defendant had been at one time, instead of at different dates, in distinct parcels, one view could have embraced every item of plaintiff's claim. The court below therefore committed no error in assuming in its instruction to the jury that the property injured by the taking was one property, and that injury to the water which supplied the mill on the part west of the Reading Railroad was a proper subject for consideration in assessing consequential damages to the mill property east of the road.

Defendant further asked the court to decide, as matter of law, that the appropriation of the land west of the road necessarily included the consequential injury to the mill which the water supplied, and that whether evidence had been given in that particular, or not, in that proceeding, it could not be considered in estimating the damages to the mill. To understand this point, the order in which the land was appropriated must be noticed. In February the railroad company located its road across the stream at the head of the reservoir, intending to follow the bank on the north side. This route was subsequently abandoned, and another selected on the south bank of the stream. This taking included the stream, and all the tract on the south bank. On this the road was constructed, and has since been operated. There were thus two takings. As the first taking was not followed by the operation of the road, and the second was, the consequential injuries to the mill were in fact sustained by the second taking. The request for instruction was based wholly on a theory, and not on a fact. If the first location had been followed by the construction and operation of the road upon it, then the consequen-

tial injury would have arisen by that appropriation; but, having been abandoned, the evidence as to pollution of the water related mainly to the second location. As the injury might have been occasioned by the adoption of the first route, but was not, there is no reason why the claim should not be made for the act which really occasioned it. The court below most carefully instructed the jury on the facts proved, and there could not have been any duplication of damages, or any injustice to defendants, when the charge and answers to points are considered together. While the appropriation by the first taking was complete as soon as the railroad company filed its bond, yet the market value of the property is to be determined, not only by the taking, but also from the construction and operation. And this was the measure of damages the jury was instructed to adopt.

As to the injury being of the same character as that already done by the construction and operation of the Reading Railroad, and it must be assumed plaintiff had already been compensated by that company, that was a question of fact properly submitted to the jury. It was alleged by plaintiff that the Reading was operated by anthracite coal, and caused no serious inconvenience, while defendant consumed bituminous coal, which had a very polluting effect on the water.

Every question raised by these fourth to eleventh assignments, inclusive, has been so fully and impartially considered by the learned trial judge in his opinion overruling the motion for a new trial that it is a waste of time to notice them further.

The fourteenth assignment alleges error in refusing to instruct the jury that the measure of damages was the value of the land actually taken. We assume that it was intended by this point to withdraw from the consideration of the jury the evidence as to damage from pollution of the water caused by the operation of the railroad. That the right of the plaintiff in the water is a property right is abundantly sustained by the authorities. It must be kept in mind, in determining his remedy, that defendant appropriated for its roadbed and embankments a considerable part of the bed of the stream. We are not called upon to consider what would have been his remedy, if any, for the pollution of the water alone, had defendant located its road on the land of another. It is undisputed that they took possession of part of the creek bed. Chancellor Kent, in *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526, says: "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be dispossessed 'but by lawful judgment of his peers, or by due process of law.'" In a note to this case (7 Am. Dec. 527), after citing cases following it, it is said: "The right to the use of water is a right of property, depending on the ownership of the land over which the water flows." Angell on Watercourses (§ 5) says: "The right of private property in a watercourse is derived as a corporeal right 47 L. R. A.

or hereditament from, or is embraced by, the ownership of the soil over which it naturally passes." All our cases—and they are many—distinctly hold this qualified right of property in the riparian owner. The decisions in our state are practically summarized in *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Atl. 780: "The upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted, and without essential diminution." It is a hereditament which passes with the land by descent, devise, or deed. *Haupt's Appeal*, 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436; *Lord v. Meadville Water Co.* 135 Pa. 131, 19 Atl. 1007; *Clark v. Pennsylvania R. Co.* 145 Pa. 452, 22 Atl. 989, and the other cases cited by appellant, do not touch the question raised here. In substance, they hold that the riparian right is not an absolute ownership of the water of the stream. This is not pretended. The riparian owner could not sell the water to a nonriparian owner, nor could he possess himself of the whole of it. Such is not his right. His right is qualified by the rights of the lower riparian owners. But this qualified right appertaining to his property along the stream adds to the value of the property. When plaintiff's property was taken, defendant injured and, from the evidence, to some extent destroyed, it. It became useless to him. Therefore he had used the stream lawfully. Now, of that use, by defendant's appropriation of his land, and construction and operation of its road, he has been deprived. We have, then, these facts: That the land appropriated, had upon it 436 feet of the stream above the mill, and that the construction and ordinary operation of the road so polluted the water as to render it unfit for use at the mills. The damage by pollution, in results, is not distinguishable from an appropriation. In fact, all the cases treat them as a like interference with the owner's right. The plaintiff had established his right to have the water pure, against an upper landowner, before this taking, by a permanent injunction. See *Rudolph v. Dobson*, 11 Montg. Co. L. Rep. 197.

This brings us, then, to the question: Should the court have permitted the jury in their computation of the value of the land, to consider the depreciation of the property by the pollution of the stream? But little attention was given to this question in the court below, nor is there a special assignment of error. It seems to have been treated at the trial as a proper element of damages, although really raised by appellant's twelfth prayer for instruction, and fourteenth assignment, that "the measure of damages in this case is the value of the land, actually taken." It has, however, at the suggestion of this court, been reargued by both sides. We now, after careful consideration, think it is settled by both reason and authority. The taking of the land, which formed part of the bed of the stream, and the construction of the road, were lawful. The necessary implication from the

appropriation and construction was the ordinary and lawful use of the road when constructed. An extraordinary use or an unlawful one was not within the contemplation of the remedial statute, nor of the parties; and, of course, for such damage in the future the plaintiff must seek his remedy under another form of action. The 11th section of the act of February 19, 1849, P. L. 79, after conferring on the company the power to fix and determine the extent of the appropriation, further directs that where the owner and company cannot agree upon the damages the court shall appoint viewers, who shall go upon the premises, and "estimate and determine the quantity, quality, and value of said lands so taken or occupied, . . . and having a due regard to and making just allowance for the advantages which may have resulted or which may seem likely to result to the owner or owners of said land . . . in consequence of the making or opening of said railroad, and the construction of the works connected therewith; and after having made a fair and just comparison of said advantages and disadvantages, they shall estimate and determine whether any, and if any, what, amount of damages has been or may be sustained." In *Watson v. Pittsburgh & O. R. Co.* 37 Pa. 469, the special act under which the railroad company entered provided for a view in case of disagreement with the owner, but gave only authority to estimate the damages, and, in doing so, also to consider the advantages accruing to the owner. It did not, as does the act of 1849, require them to take into consideration the disadvantages. This court (Strong, J.) said: "It would be a narrow construction, however, were we to hold that the legislature did not intend an assessment of all the damages which are the direct and immediate consequence of the construction of the railroad to the whole tract of land through which it may pass. It is upon the whole tract that the road is located, though only a part is actually occupied. The injury is therefore done to the tract as a whole, of whatever components that injury may consist. The exclusive appropriation of a part, the inconvenience arising from division or from increased difficulty of access, and the cost of additional necessary fencing, are alike the direct and immediate result of the construction of the railroad." The same ruling was made in *East Pennsylvania R. Co. v. Hester*, 40 Pa. 53, where it was held that it was proper to admit evidence before the viewers that proximity of the railroad to plaintiff's flour mill made it dangerous for horses to approach, and therefore tended to decrease custom. In *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. 374, it was held (approving the charge of the court on appeal from award of viewers): "If the building, from any cause, is rendered unfit for the purposes to which it has heretofore been applied, and for which it is best adapted, the property is certainly and at once depreciated." In *Hoffer v. Pennsylvania Canal Co.* 87 Pa. 221 (an appeal also from an award of viewers), at the trial the owner proposed

to prove that by the construction of an embankment there would be increased percolation of water on his land, thereby injuring it. The court below rejected the evidence, saying: "The company is only answerable for taking the land, not for injury caused indirectly by percolation through the banks." This was held to be error, this court saying: "The viewers are required, after having made a fair and just comparison of the advantages and disadvantages resulting from the construction of the railroad or canal, to estimate what amount of damages has been or may be sustained. . . . As the damages here spoken of cannot have reference to the land actually appropriated, since, as to it, its price is a full compensation, it follows that we must construe this statutory direction to mean an estimation of the depreciation resulting to the remaining lands of the proprietor from the construction of the works. In other words, the statute does, in terms, authorize compensation for damages purely consequential." It is plain from these and numerous other cases, that the obvious consequence of the appropriation of plaintiff's land, and the construction of the railroad upon it, was the pollution of the water, which, though a consequential injury, nevertheless gives him a claim for damages. The case then comes under a long line of cases which hold that his remedy is under the statute, such as *O'Brien v. Pennsylvania S. Valley R. Co.* 119 Pa. 184, 13 Atl. 74, in which Clark, J., in delivering the opinion of the court, says: "It has been repeatedly held, construing this act of 1849, that, when the railroad has been located, the land has been taken and appropriated for public use; that the right of the landowner to sue for his damages is complete, and he may recover all which may be caused by the location and by the subsequent construction; that he can have but one action, and that the damages cannot be severed." Here the action was case, and there was no taking of the claimant's property. The injury complained of was suffered, it was alleged, when the appropriation was made, in the lifetime of the owner. The construction and completion were after his death. The court below instructed the jury that the one who owned the injured property when the work was completed was alone entitled to recover. This was held to be error; that there could be no severance; the moment of appropriation with a view to construction gave the right of action. In several cases, commencing with *North & West Branch R. Co. v. Swanik*, 105 Pa. 555, we have held that a mere release by the owner of the right of way was a bar to a subsequent action for damages from the construction and lawful operation of the railroad. The plaintiff could not sever his cause of action under the statute from his consequential injury by the lawful operation of the road. There could not be two actions for one cause. Therefore in the trial the court below properly passed on plaintiff's whole claim. The 2d section of the act of April 9, 1856, has no application to the facts before us. The

intention of that act clearly was to authorize the appropriation by a railroad company, for steam and other railroad purposes, of water and water rights. The land appropriated here was for a roadbed, with the consequent damage from the construction. The company did not appropriate a gallon of water for any purpose under the right of eminent domain conferred by the act of 1856.

The first assignment, alleging error in refusing to allow the jury to view the water in the pond, and then after it had been passed through filters, was a question for the court's discretion, and it is not the subject of review.

The second complains of the refusal to dismiss the petition because of a misdescription of the land. There was no serious error in the description. It, in substance, described the land correctly by its outside boundaries, without striking off by boundaries the strip conveyed to the railroad company. But, instead of calling for over 6 acres, the quantity included in the boundaries, the petition set forth there were but $5\frac{1}{2}$ acres. There is no evidence that plaintiff claimed before the viewers a quantity more than he owned after the conveyance.

The third assignment is without merit. The court gave to the evidence all the significance it was entitled to. The same may be said of the twelfth and thirteenth.

As to the fifteenth, sixteenth, and seventeenth, which complain of the verdict as excessive, the court below did not think so. As there was evidence which, if believed by the jury, warranted it, it is not of that excessive character which calls for review here.

The judgment is affirmed.

Frank McANALLY, *Appt.*,
v.

PENNSYLVANIA RAILROAD COMPANY.

(194 Pa. 484.)

A person starting to cross a railroad track, but prevented from doing so by a train, who, on finding that the safety gates have been closed, takes a dangerous position, disregards a call to get back, and resists the gateman's efforts to remove him to a safe place, cannot recover from the railroad company for being thrown down in the tussle, in consequence of which his leg is cut off by the train, since his resisting the effort to save him is the proximate cause of his injury.

(*Mitchell, J., and Sterrett, Ch. J., dissent.*)

(February 5, 1900.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas No. 1 for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

NOTE.—For proximate cause of injury at railway crossings, see *Hill v. Port Royal & W. C. R. Co.* (S. C.) 5 L. R. A. 349; *Mueller v. Milwaukee Street R. Co.* (Wis.) 21 L. R. A. 721; *Wood v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 199; see also footnote thereto.

The facts are stated in the opinion.

Mr. A. S. Ashbridge, Jr., for appellant: The authorities do not hold a man who is placed in a position of sudden peril to the exercise of that nice judgment which otherwise a man is called upon to use.

Pennsylvania R. Co. v. Werner, 89 Pa. 59; *Pittsburgh, B. & W. R. Co. v. Rohrman*, 13 W. N. C. 258; *Aiken v. Pennsylvania R. Co.* 130 Pa. 380, 18 Atl. 619; *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L. R. A. 743, 23 Atl. 594; *O'Toole v. Pittsburgh & L. E. R. Co.* 158 Pa. 99, 22 L. R. A. 606, 27 Atl. 737.

It must be admitted that there was negligence on the part of the defendant, which led the man into the position near to the track.

Imminent danger did not exist, and the act of the flagman was indefensible, and the company is responsible.

Floyd v. Philadelphia & R. R. Co. 162 Pa. 29, 29 Atl. 396.

Mr. George Tucker Bispham, for appellee:

His honor was right in holding the question to be one of law.

Mann v. Philadelphia Traction Co. 175 Pa. 122, 34 Atl. 572; *Bard v. Pennsylvania Traction Co.* 176 Pa. 97, 34 Atl. 953; *Mitchell v. Stewart*, 187 Pa. 217, 40 Atl. 799.

If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly.

Cooley, Torts, 2d ed. 804; 16 Am. & Eng. Enc. Law, pp. 466-468, and notes.

There was no proof that the gateman acted negligently in the discharge of any duty as defendant's employee. The utmost extent to which the evidence goes is that the gateman made an honest effort to rescue the plaintiff from a position of danger.

If the gateman acted maliciously, then the company would certainly not be responsible.

Scanlon v. Suter, 158 Pa. 275, 27 Atl. 963; *Pennsylvania Co. v. Toomey*, 91 Pa. 258.

The plaintiff was in a position of actual danger. If, then, the gateman, in endeavoring to remove the plaintiff from such a position, was acting in the line of humanity, if not in the actual line of his duty, and if an accident happened in such an emergency and when sudden action was demanded, the defendant cannot be responsible for consequences.

Floyd v. Philadelphia & R. R. Co. 162 Pa. 29, 29 Atl. 396; *Donahue v. Kelly*, 181 Pa. 93, 37 Atl. 186.

Although the plaintiff may not have been in a position of actual danger, yet if the gateman honestly believed that he was in danger, the action of the latter in such an emergency, and the defendant's responsibility therefor, fall within the ruling of the cases just cited.

Oberdorfer v. Philadelphia & R. R. Co. 149 Pa. 6, 27 Atl. 304.

McCollum, J., delivered the opinion of the court:

This is a case of which it may well be said that nothing exactly like it appears in the Reports. It must be conceded, however, that the principles applicable to the facts established by the testimony are well settled and plain. The plaintiff, intending to cross the railroad tracks, entered upon the space between the safety gates and the nearest rail before the gates were lowered. The distance from the gates to the rail was about 8 feet. When the plaintiff came within 6 inches of the rail, he saw a freight train approaching from the east. He testified that he thought the engine of the train was then from 15 to 20 feet from where he was when he first saw it, and that the train was then running, as he thought, at the rate of 20 or 25 miles an hour. Of course, his estimate of the distance of the locomotive from him, and of the speed of the train, was a mere guess. According to his testimony, he could not see a train coming from the east until he had passed the high board fence east of the sidewalk, and within 3 feet of the nearest rail. The safety gates were then closed. He made no effort to pass under them, as he might have done, or to go back from the rail to them; but he stepped back from the rail, and towards the high board fence. His distance from the rail to the point where he stopped is not definitely defined by the testimony, but it is certain that the gateman regarded his position as perilous, and did all in his power to rescue him from it. As his calls to the plaintiff to "get back" were disregarded, he sought by force to compel him to get back; but he was met by a stubborn resistance, which resulted in the injury for which this suit was brought. It was barely possible that the plaintiff might have escaped injury from the train at the point where he stood when he was called to get back, but the appearances and probabilities were against this view, and the effort of the gateman to remove him to a place of safety was fully justified by them. There is nothing in the evidence to create a belief or authorize an inference that the gateman, in his efforts to remove the plaintiff from the danger to which he was exposed, was prompted by anything more than humane motives and a sense of duty. The plaintiff, on the contrary, disregarded his plain duty under the circumstances, and stubbornly resisted the efforts made for his protection. Compliance with the call to "get back" was all that was required of him, and it was noncompliance with it which led to the injury of which he complains. Instead of yielding to the efforts of the gateman to rescue him, he resisted them, and thus precipitated the casualty which the unresisted efforts of the gateman would have prevented. The resistance he made to the gateman's efforts to save him from harm appears to have been the direct and proximate cause of the injury he received. The omission of the trainmen to ring the bell, blow the whistle, or check the speed of the

train, was not the proximate cause of the casualty; nor was the failure of the gateman to lower the gates before the plaintiff passed them the cause of it. The plaintiff saw the train approaching in time to avoid dangerous proximity to it, and the avoidance would have been easy and certain if he had conformed to the instructions or acquiesced in the efforts of the gateman in his behalf. But his disregard of the former and resistance of the latter were in defiance of both and inexplicable. There is no evidence in the case showing that the conduct of the gateman towards the plaintiff was wilful, wanton, or malicious; and, if there had been such evidence, the company would not be responsible for the consequences of such conduct, without proof that the company had instigated or authorized it. *Pennsylvania Co. v. Toomey*, 91 Pa. 256; *Scanlon v. Suter*, 158 Pa. 275, 27 Atl. 963. "An act done upon a sudden emergency, when life is apparently in peril, is not negligent, even though it be mistaken." *Floyd v. Philadelphia & R. R. Co.* 162 Pa. 29, 29 Atl. 396; *Donahue v. Kelly*, 181 Pa. 93, 37 Atl. 187; and *Oberdorfer v. Philadelphia & R. R. Co.* 149 Pa. 6, 27 Atl. 304.

A careful consideration of the evidence in the case has convinced us that the learned court below did not err in entering a compulsory nonsuit, and refusing to take it off.

Judgment affirmed.

Mitchell, J., dissenting:

The plaintiff, discovering the approaching train, stepped back to a place he thought safe. It was a place with a narrow margin from danger, but, as the evidence indicates, it was in fact safe. The learned judge below so treats it, as he says it "probably, from subsequent events, was a place of safety, because the locomotive and some few cars passed him, and he was perfectly safe." While in that position, the gateman, having a different view, ran towards him, with a warning to "get back," and, finding his warning disregarded, seized hold of the plaintiff, who in the tussle was thrown, and had his leg cut off by the train. The act of the gateman was in clear excess of his authority. His right terminated with the warning, which he saw was intentionally disregarded. Plaintiff chose to stand on his own judgment. He had a right to do so. He was not a passenger who had committed himself to train or boat and was bound to obey the officers in charge, but was a citizen in the exercise of his right of travel on a public street. Whether his act was wise or foolish, it was his right, and he would have taken upon himself the risk of the consequences. The act of the gateman was a trespass, and, as it was in the course of his employment, the defendant was liable for it. Even under the most favorable view, it was for the jury to say whether, under all the circumstances, his act was not negligence. I would reverse the judgment, and send the case to a jury.

Sterrett, Ch. J., joins in this dissent.

Patrick Henry McKENNA

v.

BRIDGEWATER GAS COMPANY, App't.

(193 Pa. 633.)

1. An explosion of gas in a dwelling supplied by a low-pressure line, caused by connecting therewith a high-pressure line, leaving the gas uncontrolled by the regulator, does not render the gas company liable, in the absence of negligence on its part, where the connection was blunderingly made by an employee of another gas company, who was a trespasser in so doing.
2. Negligence of a gas company in the construction of a box inclosing a by-pass, by opening which high-pressure and low-pressure lines may be connected, is not shown by the fact that an expert employee of another company, with an expert's tool, consisting of a long lever or curb key, pried open the box and manipulated the gate.
3. The failure of a gas company's inspector to detect the fact that a plank box containing a by-pass for connecting high and low pressure lines had been broken into and the lines connected by someone who was either a blunderer or a criminal does not show negligence, when there was nothing externally indicating that the box had been opened or the gas tampered with.

(December 30, 1899.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Beaver County in favor of plaintiff in an action brought to recover damages for alleged negligence in permitting gas to escape into plaintiff's house, which resulted in an explosion and injury to plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Martin & Martin, Weil & Thorp, and J. C. Gray, for appellant:

If the defendant used the same vigilance, appliances, and methods as were ordinarily and generally used by companies transacting a like business, it used the vigilance, the appliances, and the methods that an ordinarily prudent man would have used under the circumstances; and if it did so there could be no negligence.

Kehler v. Schwenk, 144 Pa. 357, 13 L. R. A. 374, 22 Atl. 910; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 626, 20 Atl. 517.

In order to charge the defendant with negligence, there should have been affirmative evidence showing that the gas escaped and flowed into the storeroom of the plaintiff by reason of some negligent act of the defendant company.

Voigt v. Michigan Peninsular Car Co. 112 Mich. 504, 70 N. W. 1103; *Easton v. Neff*, 102 Pa. 474.

Where there are no disputed facts, the question of proximate cause is for the court, and not the jury.

Hoag v. Lake Shore & M. S. R. Co. 85 Pa.

293; *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866; *South Side Pass. R. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627; *Scott v. Allegheny Valley R. Co.* 172 Pa. 646, 33 Atl. 712.

The undisputed facts of this case show that Charles Miller, an employee of the Citizens' Natural Gas Company, a company in no way connected with the defendant, pried off the top of the box containing the valve of the by-pass, and turned the valve of the by-pass with his wrench, thus connecting the high-pressure with the low-pressure mains of the Bridgewater Gas Company, and thus permitting the gas to flow around the regulator, or, as the name of the by-pass implies, passing the gas by the regulator, and not through it.

This was the proximate cause of the damage to plaintiff:

Yoders v. Amwell Twp. 172 Pa. 447, 33 Atl. 1017; *Etna F. Ins. Co. v. Boon*, 95 U. S. 133, 24 L. ed. 399; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259.

Messrs. J. F. Reed, C. F. McKenna, E. J. McKenna, John M. Buchanan, and W. A. McConnell, for appellee:

Miller's entry occurred as early as 8 o'clock A. M. on the 27th inst. The next morning defendant's superintendent was informed of it. Hours before Long turned on the high-pressure gas in the South Beaver field Gordon could have informed him that the box had been opened and the by-pass tampered with, or could have closed it himself. Here was an employee of defendant, who saw a stranger in this box, knew what it contained, and failed to make examination to see if it had been tampered with. Is not defendant liable for his negligence under the circumstances?

The admitted ignorance on the part of the superintendent, of any means whatever to promptly prevent or check such a dangerous pressure on the night of the 27th of September, 1897, establishes as conclusive a case of negligence on the part of the company's superintendent as if the superintendent, possessed of full knowledge, were deliberately to refuse to act, or wilfully decline to take any steps to shut off the gas at the open by-pass.

If the original wrong only becomes injurious in consequence of the intervention of some wrongful act of omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was far remote.

Cooley, Torts, p. 6.

The original act of Miller in mistakenly interfering with the street box and by-pass only became injurious in consequence of the negligent act of the superintendent of defendant company in not knowing of the location, or even of the existence, of the by-pass in question.

A gas company is bound to a high degree

NOTE.—As to liability for negligence in escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337, and note; *Schmeer v. Gaslight Co.* (N. Y.) 80 L. R. A. 653; *Consolidated Gas Co. v. Crocker* (Md.) 31 L. R. A. 785; *Consumers' Gas Trust Co. v.* 47 L. R. A.

Perrego (Ind.) 32 L. R. A. 146; *Pine Bluff Water & Light Co. v. Schneider* (Ark.) 33 L. R. A. 366; *Richmond Gas Co. v. Baker* (Ind.) 36 L. R. A. 683; and *Barrickman v. Marion Oil Co.* (W. Va.) 44 L. R. A. 92.

of care in the management and control of all its work, and if it can be shown that, in the transaction of a particular portion of its business, its agents did not exercise care which ordinary prudence would suggest, and which persons engaged in like business would exercise, it certainly cannot complain.

Wharton, Neg. ¶ 955.

Where a natural-gas company fails to control the pressure of its gas, and as a result the flow into the pipes is so great as to occasion an explosion, the question of defendant's negligence is for the jury.

Stoughton v. Manufacturer's Nat. Gas Co. 159 Pa. 64, 28 Atl. 227; 2 Shearm. & Redf. Neg. p. 693.

As a gas company is in charge of a dangerous material, it is bound itself to use due care proportioned to the risk, and also to use similar care in preventing careless interference with its pipes by others.

Butcher v. Providence Gas Co. 12 R. I. 149, 34 Am. Rep. 626.

It is the duty of a gas company to build all its works, lay its pipes, and carry on its business in such a manner as to avoid injury to the property of others by the escape of gas.

2 Shearm. & Redf. Neg. p. 692; 8 Am. & Eng. Enc. Law, p. 1273; Jaggard, Torts, p. 934; 1 Thomp. Neg. p. 108.

Proof of custom in disregard of ordinary care is held no defense against negligence. *Stordet v. Hall*, 4 Bing. 607.

If the company knew, or ought to have known, of an interference or defect in its line, it was its duty to guard against any damages.

Koelsch v. Philadelphia Co. 152 Pa. 362, 18 L. R. A. 759, 25 Atl. 522.

Dean, J., delivered the opinion of the court:

The defendant and the Citizens' Natural Gas Company both maintained gas lines in the borough of New Brighton, Beaver county. On September 27, 1897, an employee of the Citizens' Company (one Miller) opened the gate of what is known as the "by-pass" of the Bridgewater Company, and thus connected its low and high pressure lines, leaving the gas uncontrolled by the regulator. This line introduced gas into the dwelling of Mr. McKenna, the plaintiff. In consequence of this opening of the gate the pressure rose in the low-pressure line of defendant, with which Mr. McKenna's house was connected, and an explosion in the house followed, which blew it to pieces, and so severely burned and otherwise injured plaintiff's wife that she soon after died. Plaintiff sued the Bridgewater Company for damages, alleging this company was guilty of negligence in leaving the by-pass in such an exposed condition that anyone had access to it, and could so manipulate it as to cause injury to the company's customers, and, further, that defendant's system of inspection was loose and inefficient. The defendant denied any responsibility for the act of Miller, who was not its servant, and was to it unknown; also, denied any negligence in any of the particulars charged. The court submitted the evidence bearing on the question of negligence to the jury, in-
47 L. R. A.

structing them that the burden was on defendant to rebut the inference of negligence fairly derivable from the circumstances. There was a verdict for plaintiff in sum of \$15,000. Motion for new trial was made, which, after hearing, was refused, and judgment entered. Defendant now appeals, assigning for error the refusal of the court to peremptorily instruct the jury to render a verdict for defendant.

We do not see how, under any view of this evidence, the judgment can be sustained. Miller was superintendent of the Citizens' Gas Company. He testified that the people along Fourth avenue, on their line, were urgently demanding a supply of gas, and he went out along the Citizens' Company's old line to ascertain if they could be supplied from that source. He had no knowledge of his own which would enable him to locate it with certainty, so he asked one Albright, a former superintendent, to aid him. Albright, standing at Sixth avenue and Thirteenth street, pointed to the line where was located a box with a stopcock fitted to the Phoenix Glass House. From this point Miller followed what he supposed was the Citizens' line until he came to a box at the corner of Fourth and Thirteenth streets. This box inclosed a by-pass, and stood about 20 feet from the regulator. He had with him what is called a "curb key," about 1/2 inch in diameter and 4 feet long. With this he pried open the box, got into it, and opened the gate separating the low from the high pressure. The disaster to plaintiff followed. Instead of manipulating his own line (that of the Citizens'), Miller had blundered onto the Bridgewater line, where he ignorantly pried off the plank which protected their gate, and, without inquiry, recklessly put the gas in such a dangerous state of transmission that it exploded and blew up plaintiff's house. It is not pretended that the defendant company had any control of, or even knew, Miller. He was an intruder on their easement, — a trespasser in opening their box. Unless defendant failed in some duty it owed to McKenna as a patron, it cannot be answerable to him for negligence. It undoubtedly owed to him the duty of care in the construction of the line through which the gas was conveyed to his house. It was bound to adopt and use those appliances by which it could regulate and keep under control such a volatile and explosive substance, and inclose or protect these appliances so as to render them reasonably secure and ready for use. All this, from the undisputed evidence, defendant did. It was not bound to maintain a line of sentries the length of its route, to keep off trespassers; nor was it bound, by personal inspection at frequent intervals during the day, to ascertain whether some other gas company had mistaken defendant's line for its own, and tampered with its valves. In what respect, then, did it fail in duty? Where is negligence to be imputed to it?

The learned judge of the court below, in his general charge, speaks as follows: "It appears, and from the uncontradicted evidence, that the gas which caused the excessive pres-

sure in the low-pressure mains came through the by-pass; and, if it had not been for the act or interference of Charles Miller, the superintendent of the Citizens' Natural Gas Company, with the valve upon this by-pass, we are safe in saying in this case that the accident would not have occurred.

As we have said before, without the turning of this by-pass no accident would have occurred,—that this accident would not have occurred; and that to this cause is directly attributable the deplorable condition of things on that night, and its dreadful results." If those remarks be correct, as they undoubtedly are, then the damage was caused by the unauthorized act of Miller. But the court submitted the case to the jury on two theories, either or both of which they might adopt: First. Was the box so negligently constructed that it was not secure from intrusion? We answer, it was planked. Miller raised the lid by prying it up with a lever 4 feet long; that is, the curb key. With the same key he manipulated the gate. He was an expert, for that was his business, and he had the expert's tools. An expert burglar with the tools of his trade can enter a house which the ordinary man would find effectually barred against him. Nothing would have been complete protection of this box, except a construction as strong as a jail. No such exacting duty was imposed on defendant by any rule of law, nor was there any evidence which warranted the jury in so finding. Second. It was left to the jury to find whether defendant enforced such rigid rules of inspection along its lines as would relieve it from the imputation of negligence. That it enforced such rules, and that they were observed by its employees with reasonable fidelity, cannot be disputed. That in their observance the servants of the company failed to detect this intrusion soon afterwards does

not show want of care, but only that, with ordinary acuteness of perception (sharpened, too, by experience), they failed to see a most improbable thing, to wit, that the expert of another company had come on their line, had broken into the box, and had turned the gate. These inspectors were not bound to assume that either a blunderer or a criminal having no right upon the premises would commit such an act. When nothing externally indicated that the box had been opened or the gas tampered with, there was no negligence in hastily extending their examination to other parts of the line. If, then, as the learned judge says, without this unauthorized act of the intruder, Miller, the injury would not have occurred, why hunt, or authorize the jury to hunt, for some other cause, which bore no direct relation to the result? Here was the cause standing out palpable and conspicuous. The court below so conceded. The jury ought to have so found. To say that, if there had been an impenetrable box, the injury would not have happened, or, if there had been personal inspection of the box every hour, it would not have happened, does not warrant an inference of negligence. If the valve had not been there, it would not have occurred; if it had been inclosed in an impenetrable steel cage, it would not have occurred; if defendant had not built its line at all, it would not have occurred. But, being built, and connected with plaintiff's house with the ordinary attachment for regulating the flow of gas, Miller, a wrongdoer (although not an intentional one), blew up the house. He was the direct, efficient, dominant cause of the injury, for whom defendant is in no way answerable, and the court ought to have said so to the jury.

The judgment is reversed, and judgment is entered for defendant.

ILLINOIS SUPREME COURT.

William J. STRONG, *Appt.*,

v.

George E. BRENNAN *et al.*, Receivers of International Building, Loan, & Investment Union, *et al.*

(183 Ill. 97.)

An attorney employed by a building and loan association to procure the discharge of all receivers who have been appointed for it, but who is also employed and paid by one of the contesting sets of receivers and renders services for them, will be precluded by public policy from recovering from the association, even if the board of directors has by resolution approved what he has done, with full knowledge of his inconsistent employments.

(December 18, 1899.)

NOTE.—For agent acting in double capacity, see also *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218, and *note*; *Wilson v. Brookshire* (Ind.) 9 L. R. A. 792, and *note*; *McNutt v. Dix* (Mich.) 10 L. R. A. 660; *Cannell v. Smith* (Pa.) 12 L. R. A. 395, and *note*; *Jansen v. Williams* (Neb.) 20 L. R. A. 207; *Boswell v. Cunningham* (Fla.) 21 47 L. R. A.

APPEAL by intervener from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County dismissing his petition filed in a proceeding to wind up the defendant association, for the purpose of securing compensation for professional services rendered to it. *Affirmed.*

Statement by the Court:

On November 23, 1897, a bill was filed by one Emrick alleging insolvency of the appellee building and loan association, and seeking its dissolution. Thereunder a receiver was appointed, and subsequently, and on March 3, 1898, the people, upon the relation of the state auditor, filed a similar bill. These cases were consolidated, the former receiver removed, and the present receivers

L. R. A. 45; *Ferguson v. Gooch* (Va.) 40 L. R. A. 234; and *Kimball v. Ranney* (Mich.) 46 L. R. A. 403.

For broker acting as agent for both parties, see *Leathers v. Canfield* (Mich.) 45 L. R. A. 33, and *note*.

were appointed, and have since been liquidating the union. In this consolidated suit, appellant on May 19, 1898, filed his intervening petition, averring that between January 1, 1897, and August 14, 1898, he had, under the employment of the union, rendered to it legal services which were reasonably worth \$5,000, and of which he asked payment. This was resisted by these receivers, and after a hearing the superior court dismissed appellant's petition for want of equity. Upon appeal to the appellate court the order of the superior court was affirmed; hence the present appeal.

The statement of facts accompanying the opinion of the appellate court is as follows: "A bill was filed by one Emrick, alleging insolvency of appellee, a building and loan association, and a receiver for it was appointed. In that suit appellant filed a petition which alleged, in effect, that the appellee was indebted to him for professional services, and praying that his claim be allowed, and that the receiver be ordered to pay the same. Appellee answered the petition, denying that appellant was entitled to any amount in that behalf. Upon hearing, the petition was dismissed for want of equity. Appellant is a practising attorney at law, and there is evidence to show that he rendered professional services to appellee as follows: In 1896 suits were begun both in the circuit and superior courts of Cook county for the appointment of receivers of appellee on the ground of its then insolvency. Receivers were appointed by each court, and a conflict ensued as to the priority of jurisdiction acquired. Upon January 1, 1897, the president of the association called a meeting of the directors, which was held upon that day in appellant's office. It was at this meeting that appellant was first employed by the directors of the association to take charge of its litigation then pending. Services were rendered by appellant in the various proceedings which followed, up to August 14, 1897, at which latter date his services ceased. At that time the association had been freed from litigation, its various receivers had been discharged, and it was again a going concern. Whether this result was accomplished through efforts of appellant is a controverted question. The amount claimed by appellant for services is \$5,000, and there is evidence tending to show that the amount would be a proper compensation for the services claimed to have been rendered. The employment of appellant was for the purpose of accomplishing the discharge of all receivers, and the restoration of the association to the management of its own officers. During the period of this employment,—the exact time is not shown by the abstract,—appellant accepted retainer and employment by one of the contesting sets of receivers, viz., the receivers appointed by the superior court, and thereafter, and during the period of his employment by the association, proceeded to render professional services as well to these receivers in the same litigation. For his services to the receivers he was paid \$1,295. After the association had been freed from the litigation, 47 L. R. A.

and the receivers had been discharged, and a new board of directors elected, the validity of whose election is not questioned, a resolution was adopted by the board of directors at a meeting held on August 7, 1897, by which it was resolved 'that we do hereby approve of all that our attorney, William J. Strong, has done in behalf of the union in the litigation that has been pending in the circuit and superior courts in the case of McGonigle et al. against this union,' etc. On November 17, 1897, another resolution was presented at a meeting of this board of directors, to the effect that 'Strong had no authority to represent the union,' and 'that all previous resolutions of this board regarding Strong's claim be rescinded.' This resolution was defeated by a vote of seven to two. Again, on November 27, 1897, a resolution was adopted by this board of directors, which, in effect, recites that the sum of \$1,295 had been paid to appellant under a misapprehension, and instructing the attorney of the association to commence proceedings against appellant to recover the amount so paid. There was evidence tending to show that appellant agreed with the association that, unless he should succeed in getting the assets of the association restored to it,—i. e., unless he procured the discharge of the receivers within sixty days from February 4, 1897,—he would charge nothing for his services to the association. This is denied by appellant, who testified that he had agreed only to charge nothing to the members of the board of directors individually in the contingency named. The receivers were not discharged, nor were the assets of the association returned to its management, until after the expiration of the sixty days indicated."

Mr. Henry S. Robbins, for appellant:

The only authority the appellate court relies upon (*MacDonald v. Wagner*, 5 Mo. App. 56,) is discredited by the later one of *Stone v. Slattery*, 71 Mo. App. 442.

The rule must be confined to litigated cases, for every practising lawyer has in his office practice frequently been called upon to render, as attorney for two parties, services (in drafting contracts, etc.) where their interests were—technically at least—conflicting.

In all cases the question of double employment is one that the parties interested can waive.

It frequently happens that the attorney of the party of whose property the receiver is appointed is the only lawyer sufficiently conversant with such litigation to properly conduct it to a conclusion.

Actual morality will be best attained by fixing a standard that is practical and reasonable, rather than one that is fanciful and arbitrary.

The public interest will be best subserved by allowing the question to be decided in each case by the parties interested therein.

If the appellate court is right, *McManomy v. Chicago, D. & V. R. Co.* 167 Ill. 497, 47 N. E. 712, was wrongfully decided.

There is no solid ground for a distinction between an agent acting for two adverse parties and an attorney so acting. The same

considerations of public policy which condemn one equally condemn the other. As rigid a rule is required in one case as in the other.

This court, in *Young v. Trainor*, 158 Ill. 423, 42 N. E. 139, while depriving the agent of commissions because he had acted for both parties, said: "Appellant made no attempt to rebut the presumption of unfair dealing necessarily arising from this double agency by showing that appellees knew that he was acting as Winter's agent, and had given his consent that he should so act."

The authorities do not sustain the appellate court in holding that the objection of double employment in a receivership case cannot be waived.

Warren v. Sprague, 11 Paige, 200; *High, Receivers*, 2d ed. § 217; *Beach, Receivers*, § 262.

Even where the attorney is acting for two individuals whose interests are adverse, the objection is subject to waiver by the parties interested.

Hughes v. Dundee Mortg. & T. Invest. Co. 21 Fed. Rep. 169; *Coa v. Barnes*, 45 Neb. 172, 63 N. W. 394; *Culver v. Nester*, 116 Mich. 191, 74 N. W. 532.

Messrs. Pam, Donnelly, & Glennon, for appellees:

The appellant claims to have been employed as counsel for the purpose of having the receivers removed and the assets restored to the union; at the same time he was in the employ of those same receivers whom it was his duty to remove. The relations were inconsistent, and the appellant is not entitled to recover any compensation.

Farwell v. Great Western Teleg. Co. 161 Ill. 522, 44 N. E. 891; *Heffron v. Flower*, 35 Ill. App. 200; *MacDonald v. Wagner*, 5 Mo. App. 50; *Spinks v. Davis*, 32 Miss. 152; *McArthur v. Fry*, 10 Kan. 233; *Parker v. Parker*, 99 Ala. 239, 13 So. 520; *Decelis v. Brunsen*, 53 Cal. 372; *Orr v. Tanner*, 12 R. I. 94.

The ratification alleged to have taken place on August 7 is not sufficient to authorize the appellant to recover, because,—

(a) The employment was void, and could not be ratified.

Durkec v. People ex rel. Askren, 155 Ill. 354, 40 N. E. 626.

(b) It clearly appears from the evidence that the whole purport and intention of the resolution were to avoid having it appear that the appellant was summarily discharged as attorney.

(c) Before a valid ratification can be claimed, it must be affirmatively shown that the ratification took place with a full knowledge of all the material facts. It not having been shown that at the time of the ratification the board of directors had knowledge that the appellant was acting adversely and in the employ of the receiver, such ratification was wholly ineffectual.

Williams v. Reed, 3 Mason, 405, Fed. Cas. No. 17,733; *Farwell v. Meyer*, 35 Ill. 40; *Cram v. Sickel*, 51 Neb. 828, 71 N. W. 724; *Kerr v. Sharp*, 83 Ill. 199; *Reynolds v. Ferree*, 86 Ill. 570; *Proctor v. Tous*, 115 Ill. 138, 3 N. E. 669; *International Bank v. Ferris*, 47 L. R. A.

118 Ill. 465, 8 N. E. 825; *McCormick v. Nichols*, 19 Ill. App. 334; *Oberne v. O'Donnell*, 35 Ill. App. 180.

Per Curiam:

In deciding this case, the appellate court delivered the following opinion:

"We do not deem it necessary to go into any discussion of the evidence, either as to the regularity of the election of the various boards of directors prior to the last, or as to the fact of the employment of appellant by the association. We regard the resolution of the board of directors of August 7, 1897, as disposing of all such questions. The then board of directors was legally elected; and while question may be made as to the legality of the other conflicting boards, and hence as to the authority of the one or the other to employ counsel for the association, yet this last board of directors, as to the legality of which no question is raised, ratified the employment of appellant by the resolution of August 7, 1897. The resolution of November 17, 1897, which was defeated, and not adopted, had no effect upon the prior ratification. Nor did the resolution which was adopted on November 27, 1897; for that resolution related only to the moneys paid to appellant from the funds of the association for his services to the receivers, and not at all to the claim for services rendered to the association. The same consideration disposes of the question raised by the conflict in the evidence as to whether appellant agreed to make no charge at all against the association for his services unless he accomplished certain results, which it is conceded were not accomplished. The resolution ratifying the employment, and approving of the services rendered, would, we think, operate to dispose of this question in favor of appellant. But it appears from the evidence, and without any contradiction, that appellant, after having been retained by the association, accepted employment in the same litigation as counsel for others, who represented interests adverse to the interests of the association (viz. the receivers) and that he performed services for the receivers during the period of his employment by the association, and while he was charging the association for services to it, and that he has been paid from the funds of the association for such services to the receivers. Appellant testified that 'the union [the association] was antagonistic to the receivership'; that he was allowed by the court \$1,295 for services rendered the receivers; that the services rendered in the receivers' behalf were in contempt proceedings; that the order directing the assets to be held for the payment of fees was entered later. Attorneys at law cannot thus accept employment from adverse litigants at the same time, and in the same controversy. Nor does it matter that the intention and motives of the lawyers are honest, as we fully believe them to have been in the present instance. This rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose be-

tween conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. *Farwell v. Great Western Teleg. Co.* 161 Ill. 522, 44 N. E. 891; *Weeks, Attorneys*, § 271; *Heffron v. Flower*, 35 Ill. App. 200; *Adams v. Woods*, 8 Cal. 306; *MacDonald v. Wagner*, 5 Mo. App. 56; *DeCelis v. Brunson*, 53 Cal. 372; *Spinks v. Davis*, 32 Miss. 152; *McArthur v. Fry*, 10 Kan. 233; *Herrick v. Catley*, 30 How. Pr. 208. In *MacDonald v. Wagner*, 5 Mo. App. 56, the court said: 'Part of the consideration of this note was plainly illegal. . . . An attorney cannot recover for legal services rendered by him both to plaintiff and defendant in the same suit. The plaintiff here discloses a case founded upon a cause of action which the law, from wise motives of public policy, forbids. The intentions of plaintiff were doubtless good, but a lawyer can under no conceivable circumstances recover for services rendered in the same suit to parties having opposing interests.'

"If the determination of this appeal rested solely upon the existence of this rule, we would have no hesitation in the matter; but the question arises as to whether the association might not, with full knowledge of the inconsistent employment accepted by appellant, yet waive the inconsistency and all right to refuse payment by reason of it; and, if this be so, there is the further question as to such a waiver having been effected by the resolution of August 7, 1897. We regard it as of some doubt whether the enforcement of this rule should be treated as a matter of public policy to be insisted upon by the court irrespective of questions of waiver, or as a matter merely of private interest, and subject to waiver by the party interested. If it be subject to waiver, and this board of directors had power to act in this behalf for the corporation, then we would be led to the conclusion that the resolution in question operated as such a waiver. But, while the authority upon the question is scant, yet we are led by the only authority we find, and by the reason of the rule, to conclude that it ought to be enforced, without regard to the resolution of the board of directors. Some decisions may be found which hold that when an attorney at law acts, with the consent of both adverse litigants, in the character of an umpire for the determination of their differences, there is then no inconsistency in such employment. But, where the employment for each is to protect the respective and conflicting interests as they may arise in the litigation, it is generally held to be against public policy to allow a recovery of compensation. In *Herrick v. Catley*, 30 How. Pr. 208; and in *MacDonald v. Wagner*, 5 Mo. App. 56, the client sought to be held in each instance was aware of the employment by the adverse litigant when the inconsistent employment was entered into; and in the *MacDonald Case* there was a very complete ratification by the giving of a promissory note for the fees charged after the services had been rendered; yet it was held that the contract could

not be enforced, as it was against public policy. We do not regard decisions in cases of agency of others than lawyers as being in point.

"It is argued very strenuously by counsel for appellant that, as matter of fact, the set of receivers whom appellant represented were not adverse in their interests to appellee. But the record shows differently, and the testimony of appellant is that they were 'antagonistic.' It is apparent that, while striving for his clients, the receivers, to maintain the validity of their appointment, he was opposing the interest of his client, appellee, which desired only to effect the discharge of all receivers. He was to be paid out of the same treasury, if at all, for each service. It was distinctly in the interest of his client, appellee, to prevent, if possible, the allowing to appellant of any fees as counsel for the receivers, against whose appointment it was contending. We think that the interests were in fact adverse. But if they were only apparently so from the record of the proceedings, and were in reality, as counsel insist, not so adverse but that counsel could reconcile them in working to one end, yet we are disposed to think that the rule would apply. If the record of the suit shows them to be adverse interests, it is against the reason of the rule to permit the same counsel to represent them, and therefrom have motive for attempting to make them work together. We are of opinion that, having accepted employment from the receivers, by whom he has been paid, appellant cannot now be permitted to recover from appellee for services rendered in the same controversy. The decree dismissing the petition is affirmed."

We concur in the views above expressed, and in the conclusion above reached. Accordingly the judgment of the Appellate Court is affirmed.

PEOPLE of the State of Illinois *ex rel.*
TRADERS' FIRE INSURANCE COMPANY of New York

v.

James R. B. VAN CLEAVE, Insurance
Superintendent.

(183 Ill. 330.)

1. Mandamus may be issued to compel the superintendent of insurance to license a foreign insurance company, when it has complied with the requirements of the statutes in the matter.
2. A foreign insurance company cannot be denied a license to do business by reason of the similarity of its name to that of a domestic corporation, under act May 31, 1879, § 1, providing that foreign companies may be licensed on com-

NOTE.—As to restrictions on business of foreign insurance companies, see State *ex rel.* Richards v. Ackerman (Ohio) 24 L. R. A. 298, and note; People *ex rel.* Stephens v. Fidelity & C. Co. (Ill.) 26 L. R. A. 295; Hoadley v. Purifoy (Ala.) 30 L. R. A. 351; Parker v. Lamb (Iowa) 34 L. R. A. 704; and Daggs v. Orient Ins. Co. (Mo.) 35 L. R. A. 227.

pliance with certain conditions, and 1 Starr & C. Ann. Stat. chap. 78, § 2, providing that no license shall be issued until all of the requirements have been complied with, although by § 4 of the latter act the superintendent of insurance has the right to reject any name or title applied for by any company, if it is too similar to one already appropriated, as this section refers only to domestic corporations.

(*Phillips, Carter, and Boggs, JJ., dissent.*)

(December 18, 1899.)

PETITION for writ of mandamus to compel defendant to issue a license to permit relator to transact business in the state. *Granted.*

The facts are stated in the opinion.

Mr. Myron H. Beach, for relator:

The insurance superintendent is under and in the executive, and not the judicial, department. His duties are ministerial, and not judicial. It is his duty to obey the law, and not to construe it.

A ministerial act has been defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of acts being done.

2 Bouvier, Law Dict. 416.

The "mandate of legal authority" is the statute defining and prescribing his duties.

The superintendent is vested with no discretionary or judicial power when an insurance company incorporated under the laws of another state or country applies for license in the manner prescribed by the law, if possessed of the actual capital required of similar companies formed under the provisions of the act approved March 11, 1869, and the acts subsequent and additional thereto or amendatory thereof.

Lemoine v. Ducote, 45 La. Ann. 857, 12 So. 939; *Tompkins v. Little Rock & Ft. S. R. Co.* 15 Fed. Rep. 6; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *People ex rel. Risk v. Fletcher*, 3 Ill. 482; *Ottawa v. People ex rel. Caton*, 48 Ill. 233; *St. Clair County v. People ex rel. Keller*, 85 Ill. 396; *Will County Supers. v. People ex rel. Highway Comrs.* 110 Ill. 511; *O'Rear v. Crum*, 135 Ill. 294, 25 N. E. 1097; *People ex rel. Payson v. Pavey*, 151 Ill. 101, 37 N. E. 691.

The courts are to derive their knowledge of the legislative intention from the words or language of the statute itself, which the legislature has used to express it, if a knowledge of it can be so derived.

Denn v. Reid, 10 Pet. 524, 9 L. ed. 519; *McCluskey v. Cromwell*, 11 N. Y. 601; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Gardner v. Collins*, 2 Pet. 93, 7 L. ed. 359; *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. ed. 550; *Sutherland, Stat. Constr.* § 236; *Alexander v. Worthington*, 5 Md. 485.

When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law; its consequences, if evil, can only be avoided by a change in the law itself, to 47 L. R. A.

be effected by the legislature, and not by judicial construction.

Arthur v. Morrison, 96 U. S. 108, 24 L. ed. 764; *Sutherland, Stat. Constr.* § 238.

The Traders' Insurance Company of this state cannot appropriate the word "traders" to its exclusive use.

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581; *Kochler v. Sanders*, 122 N. Y. 65, 9 L. R. A. 576, 25 N. E. 235; *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397; *Glen-don Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599.

Messrs. Edward C. Akin, Attorney General, and *Thomas Bates*, for respondent:

The statute applies to companies organized outside of the state of Illinois, and has the same force and effect regarding those companies which are organized or incorporated under the laws of any other state as it has to the insurance companies organized under the laws of the state of Illinois.

Starr & C. Stat. p. 1330, § 44, p. 1331, § 46; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 504, 40 Ill. App. 436, 30 N. E. 339; *Illinois Watch Case Co. v. Pearson*, 140 Ill. 429, 16 L. R. A. 429, 31 N. E. 400; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 439; *Holmes B. & H. v. Holmes B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *McLean v. Fleming*, 96 U. S. 252, 24 L. ed. 831.

The statute providing that the insurance superintendent shall have the right to reject any name or title of any company applied for, when he shall deem the name too similar to one already appropriated, or likely to mislead the public in any respect, puts it within the sound discretion of the insurance superintendent to determine whether a company applying for a license has a name too similar to one already appropriated, or likely to mislead the public in any respect, and to that extent it involves the exercise of a quasi-executive duty and the exercise of discretion or judgment; and the writ of mandamus will not issue in any case where the effect of it is to direct or control the judgment or discretion of an officer in the discharge of an executive duty, or a duty which involves the exercise of his discretion or judgment.

American Casualty Ins. & Secur. Co. v. Fyler, 60 Conn. 448, 22 Atl. 494; *State ex rel. Foreign Ins. Cos. v. Benton*, 25 Neb. 834, 41 N. W. 793; *State ex rel. Insurance Co. v. Moore*, 42 Ohio St. 103; *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265; *Western Home Ins. Co. v. Wilder*, 40 Kan. 551, 20 Pac. 265; *Re Hartford Life & Annuity Ins. Co.* 63 How. Pr. 54; *High, Extr. Legal Rem.* 2d ed. § 42, p. 47.

In all matters requiring the exercise of official judgment resting in the sound discretion of persons to whom the duty is confided by law, mandamus will not lie, either to control that discretion, or to determine the decision which shall be finally given.

Ottawa v. People ex rel. Caton, 48 Ill. 233; *Peoria School Inspectors v. People ex rel. Grove*, 20 Ill. 526; *People ex rel. Fuller v. Hilliard*, 29 Ill. 413; *St. Clair County v.*

People ex rel. Keller, 85 Ill. 396; *People ex rel. McKee v. Gilmer*, 10 Ill. 242; *People ex rel. Brokuo v. Highway Comrs.* 118 Ill. 239, 8 N. E. 684; *People ex rel. Corey v. Dover & O. Highway Comrs.* 158 Ill. 197, 41 N. E. 1105; *North v. University of Illinois Trustees*, 137 Ill. 296, 27 N. E. 54; *People ex rel. Hubbard v. Anthony*, 129 Ill. 218, 21 N. E. 780; *People ex rel. Sayer v. Garnett*, 130 Ill. 340, 23 N. E. 331; *People v. School Trustees*, 42 Ill. App. 60.

Wilkin, J., delivered the opinion of the court:

This is an original mandamus proceeding to compel the issuance of a license to the relator, the Traders' Fire Insurance Company of New York, by the superintendent of insurance, to transact business in this state. The petition is based upon § 2 of the act approved June 4, 1879, entitled "An Act for the Better Regulation of the Business of Insurance," etc. 1 Starr & C. Anno. Stat. 1st ed. p. 1331, chap. 73. Section 1 of that act prohibits any foreign insurance company from doing insurance business in the state until it has complied with certain requirements therein named, "in addition to those already imposed by existing law." Said § 2 then provides: "Upon complying with the requirements of section one (1) of this act together with all other requirements now imposed by existing law, the auditor of public accounts shall issue to such incorporated company, association, or partnership a license to transact its business in this state, and no such license shall be issued until all of said requirements shall have been complied with; and no such incorporated company, association, or partnership shall carry on the business for which it may have been incorporated, within this state until it shall have obtained such license," etc. The petition, by apt averments, sets forth that said insurance company had fully complied with all the requirements of the several provisions of our statutes in relation to insurance companies organized under the laws of other states or foreign governments, and that in January, 1898, it made application to the respondent, James R. B. Van Cleave, insurance superintendent of the state of Illinois, accompanied by the proper fee, for license, which he refused to issue. To the petition an answer has been filed, admitting the averments as to compliance with the laws of this state in all respects, and the making and refusal of the application, but setting up that there was organized in this state a corporation under the name of the "Traders' Insurance Company of Chicago," located in Chicago, which had been for many years, and was at the time, carrying on, under its said name, an insurance business in the state of Illinois; and basing the refusal to issue the license applied for upon that part of § 4 of said chapter 73 (1 Starr & C. Anno. Stat. 1st ed. p. 1311) which provides: "And the auditor of public accounts [the superintendent of insurance] shall have the right to reject any name or title of any company applied for, when he shall deem the name too similar to one already appropriated, or likely to mislead the public in any respect." To 47 L. R. A.

this answer a demurrer was interposed, and the cause is submitted on the issue thus formed.

The respondent insists that, under the foregoing language of § 4, he was clothed with a discretionary power to issue or refuse the application of the relator because of the similarity of its name or title to that of the Chicago company. On the contrary, the relator contends that the language of § 4 has no application whatever to the licensing of foreign corporations to do business in this state; and this is the only issue in the case.

For the purposes of this decision, it may be admitted that the name of the applicant, the "Traders' Fire Insurance Company of New York," is so similar to that of the "Traders' Insurance Company of Chicago" that the respondent would, if authorized to apply the provision of § 4 to applications for license by a foreign insurance company to do business in this state, be justified in refusing the application. The general rule is that mandamus will not lie to compel a public officer to do an act in the performance of which he is clothed with the exercise of discretionary power. There is an exception to this general rule, where it sufficiently appears that the refusal to act is arbitrary, or from a motive to accomplish his own personal or selfish ends; in other words, where there is a palpable abuse of his discretion. But that exception has no proper application here; the question being, Did the respondent have any discretionary power in the matter of the application? Where the duties are merely ministerial, mandamus is the appropriate remedy to compel their performance. The question must therefore be, Is that provision, conferring discretion upon the superintendent of insurance in the organization of domestic companies, applicable to the granting of license to foreign insurance companies to do business in the state?

In the legislation on the subject of the business of insurance within the state, two classes of companies are contemplated and provided for by the statute: First, those organized under the laws of this state; and, second, those organized under the laws of a foreign state or government. The above-quoted language in § 4 is, by its terms and its connection with the preceding language of that and the third section, applied to the organization of companies in this state, and has nothing whatever to do with their manner of doing business. This we regard as too clear to be the subject of controversy. As we understand the contention of respondent, his position is that inasmuch as § 1 of the act approved May 31, 1879 [1 Starr & C. Anno. Stat. 1st ed. p. 1330] entitled "An Act to Compel All Insurance Companies of Other States and Countries Doing Any Kind of Insurance Business in This State, Other than Life, to Comply with the General Fire and Marine Insurance Laws of This State," says "that every insurance company, or association incorporated by or organized under the laws of any other state, or any foreign government, must comply with the requirements of the general insurance laws of this

state, governing fire, marine, and inland navigation insurance companies, doing business in the state of Illinois;" and because § 2 of the act approved June 4, 1879, *supra* [p. 1331], says, "and no such license shall be issued until all of said requirements shall have been complied with,"—the provision in regard to the similarity of names of companies sought to be organized is obligatory upon foreign corporations as one of the "requirements" of the statute. It will be seen that the requirement of the act approved May 31, 1879, is that there shall be a compliance with the requirements of the general insurance law of this state governing fire, marine, and other insurance companies, not that they shall comply with the laws regulating the incorporation or organization of insurance companies in this state. And to the same effect is the plain meaning of § 2 of the act approved June 4, 1879, when read in connection with the preceding § 1. In no provision or requirement of the statute relating to the subject of admitting foreign companies to do business in this state is there anything said or implied as to the name of the applicant. It might be said that § 4 indicates the policy in this state to be that no two corporations doing an insurance business in the state shall have the same or similar names or names which are likely to mislead the public in any respect; but, conceding that to be true, we are at a loss to perceive how it can be maintained that the superintendent of insurance has a discretionary power to enforce that policy, in the absence of legislative enactment authorizing him to do so. To hold that he may do so, as the statute now stands, would be no more nor less than judicial legislation.

Counsel for respondent seem to think that support for their contention is found in the cases of *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339, and *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423, 16 L. R. A. 429, 31 N. E. 440, but we are unable to perceive wherein the matters there decided have any pertinency whatever to this question. Nor are the authorities cited from other states in point, for the reason that those decisions proceed upon the express or implied provisions of statutes vesting discretionary power in the officer, whereas here, as we have seen, § 4 having no application to the admission of foreign companies, all the duties imposed upon the superintendent are merely ministerial. On this proposition the case of *State ex rel. Atty. Gen. v. Fidelity & C. Ins. Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 31 N. E. 658, will be found in point.

It appears by the petition and answer that the practice by the respondent and his predecessor has heretofore been to admit companies organized under the laws of other states and governments without reference to the fact that their names or titles were similar or the same as those of other companies doing business in the state, or even those organized in the state and doing business. On behalf of the petitioner, this is urged as a construction of the statute, and of binding 47 L. R. A.

force upon the respondent; whereas, he attempts to distinguish those admissions from the present application by the fact that there no protest or objection was made to the granting of the license, while here, he says, the Traders' Insurance Company of Chicago did make its protest. We are not disposed to attach importance to what has heretofore been done. As already said, if discretionary power is given the superintendent, he had a right to refuse the application of the relator; if no such power is given, it was his duty to issue the license; and, in either case, what may have been done in other instances, by himself or predecessors, could in no way influence or control his action. Of still less influence upon his official conduct should have been the unwillingness of the other company that license should be granted.

The argument that it is unreasonable and inconsistent for the state to prohibit companies to organize in this state under the same or similar names, and at the same time admit foreign companies to do business here without reference to that fact, might be properly addressed to the legislature, but cannot control our decision. We are of the opinion that the relator is entitled to the relief here sought, and a writ of mandamus will accordingly be issued as prayed.

Writ awarded.

Phillips, Carter, and Boggs, JJ., dissent.

CHICAGO TITLE & TRUST COMPANY *et al.*, Appts.,
v.

Annie BROWN *et al.*

(183 Ill. 42.)

The probate of a will by a court having jurisdiction of the matter cannot be collaterally attacked years afterwards by a proceeding to annul it, merely because one of the two witnesses to the will was incompetent to attest it by reason of interest, and was therefore not a "credible witness" within the meaning of Rev. Stat. chap. 148, § 2, requiring attestation by "two or more credible witnesses."

(December 18, 1899.)

APPEAL by defendants from a decree of the Circuit Court for Cook County reversing a judgment of the Probate Court denying leave to file a petition to revoke probate of the will of William S. Brown, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. F. G. Gardner and S. S. Gregory for appellants.

Mr. F. M. Burwash, for appellees:

This instrument, lacking the statutory requisites of a will was void, and the probate court was without jurisdiction to admit it to probate, and its order doing so is void.

NOTE.—For conclusiveness of probate as *res judicata*, see *Sly v. Hunt* (Mass.) 21 L. R. A. 680, and note.

To validate the probate of a void will is to give the probate court power to make a will.

Wall v. Wall, 123 Pa. 545, 16 Atl. 598; *Boulby v. Thunder*, 105 Pa. 179; *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019; *Smith v. Stuckbridge*, 39 Md. 640; *O'Neill v. Smith*, 33 Md. 569; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280; *Bailey v. Osborn*, 33 Miss. 128; *Claggett v. Hawkins*, 11 Md. 387; *Thomas v. People use of Joiner*, 107 Ill. 517, 47 Am. Rep. 458; *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 484; *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734; *Clark v. American Surety Co.* 171 Ill. 235, 49 N. E. 481; *Munroe v. People*, 102 Ill. 406; *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111; *Holmes v. Field*, 12 Ill. 424; *Goudy v. Hall*, 30 Ill. 109; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Gay v. Minot*, 3 Cush. 352; *Peters v. Peters*, 8 Cush. 543.

This is a direct proceeding brought in the manner sanctioned by ancient and modern authority to revoke an erroneous probate.

21 Am. & Eng. Enc. Law, p. 381; 19 Am. & Eng. Enc. Law, p. 180; *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122; *Hamberlin v. Terry*, *Smedes & M. Ch.* 589; *Vance v. Upson*, 64 Tex. 476, 1 S. W. 179; *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49; *Roy v. Segrist*, 19 Ala. 810; *Re Lawrence*, 7 N. J. Eq. 215; *Schouler, Exrs. & Admsrs.* § 151; 3 Redf. Wills, p. 115; 1 Woerner, American Law of Administration, 469, 470, 497; *Life Asso. of America v. Fassett*, 102 Ill. 330; *Shepard v. Spear*, 140 Ill. 238, 29 N. E. 718.

The 7th section of the statute of wills is a grant of jurisdiction to chancery courts, with a limitation only on the grant, but not on any other jurisdiction, and is no bar to the action. It expressly excludes cases in which statutory formalities are not complied with.

Luther v. Luther, 122 Ill. 558, 13 N. E. 160; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *Spaulding v. White*, 173 Ill. 127, 50 N. E. 224; *Roe v. Taylor*, 45 Ill. 490.

No lapse of time will bar an inquiry whether a certain paper constitutes a will as to statutory formalities.

Claggett v. Hawkins, 11 Md. 381.

Craig, J., delivered the opinion of the court:

William S. Brown, late of Cook county, died on the 7th of January, 1891. On the 17th of February, 1891, Abby Maria Cowgill produced to the probate court of Cook county a paper purporting to be his last will and testament, and presented her petition to the probate court, praying that she be appointed executrix thereof. This alleged will gave Mrs. Cowgill a life estate in Brown's property, and the remainder to his sister, Mary A. Low. The will was signed and sealed by W. S. Brown on the 6th day of January, 1891, and attested as follows:

The above instrument, consisting of one sheet, was signed, sealed, published, and declared by the said William S. Brown as and for his last will and testament in presence of us, who, at his request and in his presence, 47 L. R. A.

and in presence of each other, signed our names as witnesses thereto on the day and date above.

Jno. E. Low, 925 Warren Ave.

Eben F. Runyan, Jr., 701 Walnut St.

The witnesses to the will were both examined in the probate court, and testified that the testator was of sound mind and memory; that he executed the will in their presence; and that they signed the instrument at his request, in his presence, and in the presence of each other. On the testimony of the subscribing witnesses, the probate court admitted the will to probate. On the 21st day of November, 1898, the appellees, being children of a surviving brother of the testator (who has, however, since died, leaving appellees as his heirs), exhibited their petition in the probate court to revoke and annul probate of this will, and to recall the letters testamentary issued to Mrs. Cowgill, on the ground that John E. Low, one of the witnesses to the will, was, at the time he attested it, the husband of Mary A. Low, named as residuary legatee in the will. The probate court denied the petition, but, upon appeal to the circuit court, a judgment was entered revoking the probate of the will, and declaring the will null and void. To reverse the judgment of the circuit court this appeal was taken.

Section 2 of chapter 148 of the Revised Statutes of this state declares: "All wills, testaments, and codicils, by which any lands, tenements, hereditaments, annuities, rents, or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses." These statutory requirements are indispensable, as has often been held by this court. *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Doran v. Mullen*, 78 Ill. 342. In *Rigg v. Wilton* it is said: "There are some indispensable requisites to the due execution of a will. It must be signed by the testator, or by someone in his presence and by his direction, and attested in his presence by two or more witnesses. A paper that has not thus been subscribed and witnessed has no force or effect as a will, under our statute. But as to all other questions affecting its validity, such, for example, as the sanity or capacity of the testator, no particular quantum of evidence is necessary on the trial of an issue, under the statute." The expression in the statute "credible witnesses" means competent witnesses. *Fisher v. Spence*, 150 Ill. 253, 37 N. E. 314. Here, one of the witnesses to the will, John E. Low, was the husband of Mary A. Low, to whom the property was devised, and, under the rule established in *Fisher v. Spence*, he was not a competent witness to prove the execution of the will. The will was not, therefore, attested by two credible witnesses, as required by the statute to entitle it to be admitted to probate.

It is, however, contended by the appellants that the probate court had jurisdiction of the

application to probate this will, with full power and authority to determine whether or not the paper tendered was in fact the last will and testament of William S. Brown, deceased, duly signed and attested as such, and that the decree of that court was not void for want of jurisdiction, but was effectual unless appealed against or attacked in some direct proceeding authorized by law. The jurisdiction of probate courts is fixed by § 20 of article 6 of the Constitution, and by the act to establish probate courts approved April 27, 1877, passed in pursuance of the Constitution. The section of the Constitution expressly empowered the legislature to provide for the establishment of probate courts in each county of the state having a population of 50,000, and provided that "said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts." The act conferred jurisdiction in the language of the Constitution. When, therefore, application was made to probate the will in question, the jurisdiction of the probate court to hear applications and admit wills to probate or refuse probate was beyond dispute. It is true that probate courts are courts of limited jurisdiction, but, when acting within the scope of their jurisdiction, as liberal intendments will be indulged in favor of their judgments as those of courts of general jurisdiction. *People use of Seaton v. Seelye*, 146 Ill. 189, 32 N. E. 458. In the case last cited *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233, was quoted as to jurisdiction, as follows (p. 221, 146 Ill., and p. 468, 32 N. E.): "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit,—to adjudicate or exercise any judicial power over them. The question is whether, in the case before a court, their action is judicial or extrajudicial,—with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged between the parties, and with which is the right of the case, is judicial action, by hearing and determining it." Bouvier defines "jurisdiction" as follows: "Jurisdiction: The authority by which judicial officers take cognizance of and decide cases; power to hear and determine a cause; the right of a judge to pronounce a sentence of the law in a case or issue before him, acquired through due process of the law."

If a court has jurisdiction of the subject-matter and the parties, where its judgment is called in question collaterally, errors, however gross, will not impeach or set aside the judgment. This rule is well understood and well established. Here the executrix named in the instrument purporting to be the will of William S. Brown presented it, as she was required to do by law, to the probate court of Cook county,—a court clothed with exclusive jurisdiction to take proofs of wills 47 L. R. A.

and admit them to probate. The will was in due form, and attested by two witnesses. These witnesses were brought into court, and examined by the court, and, upon hearing the evidence, the court admitted the instrument to probate as the last will of William S. Brown. There was nothing on the face of the will which in the least tended to show any defect in the execution or attestation of the instrument, nor, so far as appears, was there anything disclosed by the evidence heard by the court tending to show any want of due execution or attestation of the will. After the death of the testator, when the instrument in writing purporting to be his last will and testament had been presented to the court, executed by the testator, and attested by two witnesses, the court became clothed with jurisdiction to hear and determine the application for probate; and whether the decision reached by the court in admitting the will to probate was sound or erroneous, as the court had the power to hear and determine the application and enter the judgment of probate, we are not prepared to hold that the judgment may be attacked in a collateral proceeding. The probate court may have erred in holding that John E. Low was a credible witness. If that was true, any person interested had the right under § 14 of the statute of wills, to appeal to the circuit court, and there have the judgment of the probate court reviewed; or any person interested had the right, under § 7 of the same statute, to file a bill in chancery, at any time within three years from the date of probate, to contest the validity of the will. There were two remedies, either of which was ample to enable appellees to review the judgment of the probate court, but they failed to avail of either of these remedies, but, after a delay of seven years and a half, they instituted this proceeding to nullify the will and the probate thereof by a collateral attack. We do not think that the judgment of the probate court can be impeached in the mode here attempted, but, on the other hand, we are of the opinion that the weight of authority sustains the position that the judgment of probate is binding, and cannot be attacked in the mode proposed. *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; *Bailey v. Bailey*, 8 Ohio, 239; *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166; 2 Black, Judgm. §§ 635, 636; *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398; *Stanley v. Safe Deposit & T. Co.* 87 Md. 450, 40 Atl. 53. In the *Vanderpool Case* the court of appeals held that in a collateral proceeding a judgment of probate entered on the testimony of one witness was valid. In *Whitman v. Haywood* it was said: "All that was required was to show that an order for the probate of the will was made by a court having jurisdiction to make the order. If the evidence was not sufficient to authorize the judgment, the only way to avoid its effect was to pursue the remedies prescribed by the statute for that purpose. In a collateral proceeding the evidence upon which the will was established will not be considered, however defective it may seem." This was followed in *Halbert v. De Bode* (Tex. Civ.

App.) 28 S. W. 58. In the state of Georgia a different view has been taken of the question. In that state the statute requires wills to be attested by three or more competent witnesses. In *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019, a will attested by only one witness having been admitted to probate, it was held that the will and probate were void. In that case it was said: "A judgment of the court of ordinary, ordering the probate of such a paper attested by one witness only, gives that paper no effect as a will in any proceeding in which its validity may be called in question."

Much reliance is placed in the argument on *Thomas v. People use of Joiner*, 107 Ill. 517, 47 Am. Rep. 458, where it was held that a grant of administration on the estate of a person who was living, together with all acts done under such grant, was null and void. We do not regard the decision in that case as one controlling here. There the court had no jurisdiction, because there was no estate upon which letters of administration could be granted. There being no estate, there was nothing upon which letters of administration could be predicated. If there had been no instrument of writing executed by the testator purporting to be a will, there might be some similarity between the cases; but such was not the case. Here there was a written instrument, executed by the testator and attested by two witnesses, containing all the formalities of a will. Indeed, all the elements necessary to call the probate court into action were present.

It is, however, contended by the appellants that, under § 7 of the statute of wills, the judgment admitting the will to probate is binding and conclusive on all parties concerned. Section 2 of the statute of wills, after providing for the proof of wills, proceeds as follows: "And every will, testament, or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying, and assuring the land, tenements, and hereditaments, annuities, rents, goods, and chattels therein and thereby devised, granted, and bequeathed." Section 7, as it existed when this will was probated, is as follows: "When any will, testament, or codicil shall be exhibited in the county court for probate thereof, as aforesaid, it shall be the duty of the court to receive probate of the same without delay, and to grant letters testamentary thereon to the person or persons entitled; and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights of the respective persons interested therein: provided, however, that if any person interested shall, within three years after the probate of any such will, testament, or codicil, in the county court as aforesaid, appear, and by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or tes-

atrix or not; which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proved and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the state, or *non compos mentis*, the like period after the removal of their respective disabilities." By act approved April 11, 1895, this section was amended so as to make the limitation two years instead of three, and omitting the words "*femes covert*, persons absent from the state," after word "infants," in the saving clause. Appellees having been residents of Pennsylvania at the time and ever since the death of the testator, under the law as declared in *Wheeler v. Wheeler*, 134 Ill. 522, 10 L. R. A. 613, 25 N. E. 588, it is not claimed that they fall within any saving clause of the statute.

Courts of equity in this state have no jurisdiction to contest a will or impeach a judgment of probate, except such jurisdiction as has been conferred by the statute. Indeed, the statute conferring jurisdiction is the only source of power intrusted to a court of equity in this state. *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; 2 Freeman, Judgm. §§ 484a, 608. Such being the case, a court of equity can only entertain a bill in the mode and within the time prescribed by the statute, and no such bill has been filed in this case. It may, however, be said that courts of probate, as to matters committed to their jurisdiction, may exercise equitable powers. Conceding this to be true, and treating the proceeding instituted by appellees as a proceeding in the probate court in chancery, it cannot be sustained, because the jurisdiction of the court was not invoked within the time prescribed by the statute. If the probate court is clothed with equitable jurisdiction in a case of this character, that jurisdiction must be exercised in the same way and within the same time that the circuit court might entertain a bill, had one been filed in that court.

Treating the application, then, as one appealing to the equitable powers of the probate court, it cannot be sustained. Nor can it be sustained as an application to the probate court as a court of law. All courts, sitting at law or in equity, are clothed with power to revise, annul, and correct their judgments during the term at which they are rendered. But, after the term has closed, the judgments, unless in matters of form, cannot be changed or set aside. Treating the court of probate as a court of law, it had no jurisdiction to change the judgment of probate when application was made by appellees. The language of the statute is peculiar. It confers upon any person interested power, within three years after the probate, to appear, and by bill in chancery contest the validity of the will; but, if no such person shall appear within the time aforesaid, the probate, as aforesaid, shall be

forever binding. Doubtless the intention was to limit the time for an appearance in any court which might entertain an application.

In the state of Ohio, a statute was enacted almost exactly like ours, and in *Bailey v. Bailey*, 8 Ohio, 239, the question arose as to the effect of a probate of a will in that state. In disposing of the question, the court, among other things, said: "It may be said, however, that inasmuch as the fact appears upon the face of the bill of complaint that this will was not executed in conformity with our law, therefore the court may, with propriety, treat it as no will. Such, in the first instance, was the opinion of the court, but, upon further reflection, we have arrived at a different conclusion. The act of approval and ordering to record by the court of common pleas is a judicial act, and, as the legislature have declared the effect of that act unless the same shall be impeached within a specified time and in the prescribed form, we entertain the opinion that it cannot be impeached after that time nor in any other form." The doctrine of this case was reaffirmed in *Mosier v. Harmon*, 29 Ohio St. 220.

It is true that § 7 of our statute of wills is not strictly a statute of limitations, as held in *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885, and *Spaulding v. White*, 173 Ill. 127, 50 N. E. 224; but it is an act conferring jurisdiction on a court of equity, provided, however, the aid of the court shall be invoked within a specified time. While the act is one conferring jurisdiction, yet it may also be regarded as a statute of repose. In view of the large quantity of real estate transmitted annually by will, it is a question of great public importance whether the probate of a will shall remain open for contest three years, as provided by the statute, or whether the time shall remain at the option of the party who may seek to institute proceedings to contest. Doubtless the importance of the question was duly appreciated and considered by the legislature, as the time within which a contest might be instituted by bill was first fixed at five years, then reduced to three, and now to two years.

After a careful consideration of the record, we are satisfied that the probate court erred in admitting the will to probate. But the judgment was not void. Appellees might have set aside the probate by an appeal to the circuit court, as provided by statute, or by bill in chancery brought within the time provided in the statute, but they have no standing by application in the probate court brought seven and one half years after the will was admitted to probate.

The decree of the Circuit Court will be reversed, and the judgment of the Probate Court will be affirmed.

47 L. R. A.

Charles W. LASHER, *Plff. in Err.*,
v.

PEOPLE of the State of Illinois.

Edward C. REICHWALD *et al.*
v.

SAME.

(183 Ill. 226.)

1. An exception of dealers in grain, live stock, and dressed meats from the provisions of act April 24, 1899, requiring commission merchants in cities of more than 50,000 population to be licensed, is not unconstitutional as an arbitrary discrimination, since the classification in this case is a natural one, as the commission merchants subject to the act deal in the small products of the farm, while other laws provide for the inspection of grain, live stock, and dressed meats.
2. A statute providing that certain incorporated associations shall each select one of the members of a state board of inspectors from which commission merchants must procure licenses is in violation of Const. art. 4, § 22, which prohibits any law granting "to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever," since the power to appoint such inspectors, who are general officers of the state, must be deemed a franchise.

(December 18, 1899.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of acting as a commission merchant without procuring a license. *Reversed.*

The facts are stated in the opinion.

Messrs. Darrow, Thomas, & Thompson, for plaintiff in error:

Section 8 of the act for a violation of which plaintiff in error was found guilty is void because in contravention of § 2 of art. 2, and § 22 of art. 4, of the state Constitution, and of the 14th Amendment to the Federal Constitution.

Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Froser v. People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 160, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Section 3 of the act, which attempts to create a board of inspectors, with power to grant licenses, is void because repugnant to § 22 of art. 4, and § 10 of art. 5, of the Constitution; and therefore the act as a whole

NOTE.—For power to require licenses for business, see also State ex rel. Beck v. Wagner (Minn.) 46 L. R. A. 442, and footnote thereto.

is void, because that section is essential to the integrity of the act, and without it the legislative intention as evidenced by the entire act cannot be effectuated.

Bunn v. People ex rel. Lafin, 45 Ill. 397; *People ex rel. Graham v. Inglis*, 161 Ill. 256, 43 N. E. 1103; *People ex rel. Dunham v. Morgan*, 90 Ill. 558; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *State ex rel. Atty. Gen. v. Kennon*, 7 Ohio St. 546.

Messrs. **Charles S. Deneen, W. M. McEwen, and Edward C. Akin**, Attorney General, for defendant in error.

Cartwright, Ch. J., delivered the opinion of the court:

Plaintiffs in error in these two cases were defendants in the criminal court of Cook county under indictments charging them with the violation of "An Act to Regulate the Shipping, Consignment, and Sale of Produce, Fruits, Vegetables, Butter, Eggs, Poultry, or Other Products or Property, and to License and Regulate Commission Merchants and to Create a Board of Inspectors and to Prescribe Its Powers and Duties," in force April 24, 1899. The indictment against Charles W. Lasher charged him with soliciting consignments of butter and eggs for sale on commission, as a commission merchant, without procuring a license from the board of inspectors of the state of Illinois to carry on said business. Edward C. Reichwald and William G. Reichwald were charged in the indictment against them with receiving on consignment, for sale on commission, as commission merchants, certain green and deciduous fruits, consisting of grapes, plums, and peaches, without first procuring such license. The defendants were tried before the court without a jury, and they raised the question of the validity of the statute providing for a board of inspectors and a license to be issued by such board, both by motions to quash the indictments and by propositions of law submitted to the court. The charges in the indictments were proved on the trials, and were not disputed. The court held the law valid, fined the defendants, and entered judgments against them.

The 1st section of the act in question provides for making reports to consignors, and remitting to them the proceeds of sale, with itemized statements, and for keeping records of transactions. The 2d section imposes a penalty for violating any of the provisions of the act. Sections 3 to 8, inclusive, are as follows:

"Sec. 3. That a board of inspectors is hereby created, to be composed of one member from each of the following organizations: Illinois State Horticultural Society, Illinois State Dairymen's Association, Illinois State Retail Dealers' Association, Chicago Butter and Egg Board, and Chicago Branch of National League of Commission Merchants. In 47 L. R. A.

case any of the aforesaid organizations are not incorporated under the laws of the state of Illinois at the time of going into effect of this act, they shall not be disqualified from furnishing said members if the incorporation is completed on or before January 1, 1900. The members of said board of inspectors shall be selected from the membership of said organizations by the members thereof at some regular or special meeting at which there shall be a quorum, and shall serve for a period of one year. In case of the failure or refusal of any such organization to so elect a member of such board of inspectors, it shall be the duty of the remaining members of said board to fill such vacancy by the selection of some person representing the line of business the representative organization of which has failed or refused to so elect. Each member of said board shall receive as his compensation the sum of ten dollars (\$10) for each session attended, and ten cents per mile additional when required to travel a distance of more than ten miles to attend such meeting.

"Sec. 4. Said board of inspectors shall organize by electing from their number a president, a vice president, and a treasurer, and may appoint a secretary, and, if needed, two inspectors, such secretary and inspectors to be compensated by said board. It shall be the duty of the secretary to receive complaints regarding the disposition of the articles of country produce shipped on commission to licensed receivers, and instruct inspectors to investigate the same, and make a report to be submitted to said board at its next regular meeting.

"Sec. 5. Said board shall meet monthly on the second Wednesday of each month for the purpose of transacting such business as may come before them; and said board is hereby authorized to provide a room or place of meeting and for permanent headquarters in the city of Chicago at an annual rental of not more than seven hundred and fifty dollars (\$750), said rent to be paid from the funds of said board. A detailed statement of all expenditures of the board shall be made to the governor each year.

"Sec. 6. Every person, firm, or corporation in the state of Illinois, doing business in a city of more than fifty thousand population receiving on consignment for sale on commission butter, eggs, poultry, game, dressed calf, green and deciduous fruits, berries, and other commodities the product of the farm, with the exception of grains, live stock, and dressed meats, shall first procure from the board a license to carry on said business, for which said party or parties shall pay into the state treasury the sum of twenty-five dollars (\$25) annually, said license to be renewed annually.

"Sec. 7. The board shall have power to prescribe a system of books and accounts to be kept by licensed commission receivers, and said inspectors and members of said board,

or duly authorized agents of said board, shall have access to such books, accounts, and memoranda upon demand, and have power to send for books and papers, and examine under oath. Any refusal upon the part of said licensed dealers to exhibit such said books, accounts, or memoranda, when called upon to do so by such legally constituted authorities, shall forfeit the license held, which shall not be reissued inside of three months without unanimous consent of said board.

"Sec. 8. It shall be unlawful for any person, firm, or corporation to receive or solicit consignments of such country produce as is mentioned in this act without first obtaining such license, and violators shall be fined not less than \$50 nor more than \$200, and it shall be the duty of the state's attorney of the county wherein prosecutions are brought to prosecute such violations, and the board may, at its discretion, employ such counsel as they may deem necessary for the prosecution of such violation."

The remainder of the act makes provision for the prosecution of offenses and the revocation of licenses by the board, requires the payment of a fee of one dollar by any person making complaint, which is to be turned over to the treasurer of the state, and provides for the payment of expenses of the board out of the state treasury.

It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock, and dressed meats. The claim is that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock, and dressed meats. The state laws for the inspection of grain provide for the protection of shippers in that market, and there is also state inspection of live stock and dressed meats. The law which classifies small commission merchants engaged in the produce commission business rests upon a reasonable ground as a basis for the classification. Such a business may afford great opportunities for swindling, and be productive of great abuses, and the legislature may properly enact a law applying to cities of such size as in the legislative judgment would permit the growth and existence of such abuses.

Another ground of objection made to the act is that the provisions which create a board of inspectors with power to grant licenses, and which require commission mer-

chants to procure such licenses and impose a penalty for the failure to do so, are void, as repugnant to § 22 of article 4 of the Constitution, which prohibits the legislature from passing any law granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. The provisions in question are special in their nature, and the act names five corporations upon which it confers the power to appoint a board of inspectors to be selected from the membership of such corporations. If the power to appoint such a board of inspectors constitutes a franchise, then there can be no doubt that the legislature had no power to confer such a franchise upon the corporations named in the act. A "franchise" has been often defined, so that the meaning of the term is well settled. Blackstone's definition is: "A royal privilege or branch of the King's prerogative subsisting in the hands of a subject." 2 Bl. Com. *37. In this country it is a special privilege granted by the state, which does not belong to citizens of the country generally by common right. This is the distinguishing feature of a franchise. A right which belongs to the government when conferred upon the citizen is a franchise. No one can exercise the right of eminent domain, or establish a highway or railway and charge tolls for the same, without a grant from the legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the state grants such a right it is a franchise. *Chicago Bd. of Trade v. People ex rel. Sturges*, 91 Ill. 80; *People ex rel. Bardill v. Holtz*, 92 Ill. 426. In the former of these cases the distinction between a franchise and a privilege which belongs to the citizens of common right was pointed out, and in the latter case it was said: "If the constitutional convention and the general assembly used the term according with its strict legal import,—and we must suppose they did,—then, in this country, it can only embrace corporations, ferries, bridges, wharves, and the like, . . . and we may add the elective franchise, as it is granted by the Constitution to a portion of the people to elect their officers." A franchise must be granted by the legislature, and a municipal body cannot confer a franchise. *Chicago City R. Co. v. People ex rel. Story*, 73 Ill. 541; *Metropolitan City R. Co. v. Chicago West Div. R. Co.* 87 Ill. 317. Now, the power to appoint to office in a monarchy is a royal privilege or branch of the King's prerogative. It is an attribute of sovereignty, and does not belong to citizens generally, by common right. Blackstone includes this power among the prerogatives of the King, and says that offices are in his disposal as sovereign. 1 Bl. Com. 272. The power to appoint to office is within the definition of Blackstone, which was adopted in the cases above referred to. In this state the people, in their sovereign capacity, through the Constitution, conferred the elective franchise upon a portion of the citizens having certain

qualifications, as was said in *People ex rel. Bardill v. Holtz*, 92 Ill. 426. The general assembly was prohibited from exercising the power of appointment, and as to certain other officers the following provision was made: "The governor shall nominate, and by and with the advice and consent of the senate (a majority of all the senators selected concurring, by yeas and nays), appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the General Assembly." Const. art. 5, § 10. Appointment to office is a large part of the official power belonging to the governor, under our Constitution, as the chief executive. Under a somewhat similar prohibition against the exercise of the appointing power by the general assembly, it was held in *State ex rel. Atty. Gen. v. Kennon*, 7 Ohio St. 546, that the legislature had no power to confer upon three persons named by the legislature the power to appoint certain officers. No private corporation and no individual has the power of appointment to any office as a matter of common right, and cannot have any such power, except by virtue of a legislative grant.

In *People ex rel. Bardill v. Holtz*, 92 Ill. 426, it was held that an office is not a franchise, and it is argued that consequently the power to appoint to office is not a franchise, privilege, or immunity. It does not follow that because the office is not a franchise the power to appoint to it is not. The power of appointment to an office and the office itself are entirely distinct and of a different nature. A citizen may hold the title to an office, and perform its functions, but the power to create the office, and designate such functions, and fill the office, must rest in the government or some governmental agency.

But it is said that these inspectors are not officers of the state, because they exercise their duties within the limits of cities of more than 50,000 population, and that we have sustained laws investing officers of the judicial department with the power to appoint local or municipal officers. These inspectors are authorized to perform their duties throughout the state wherever there is a city of more than 50,000 population. A law applying to cities of such size is considered general, operating throughout the state, because its provisions will apply wherever there may be such a city. These officers are required to report to the governor each year, their license fees and fees for complaints are turned into the state treasury, and the expenses are paid out of the state treasury. Our Constitution defines an "office" as follows: "An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when

that purpose is accomplished." Const. art. 5, § 24. These officers serve for the period of one year, and are appointed annually. The board is a state board, and is so described in each indictment. The cases relied upon to sustain this law relate to local and municipal officers, and do not hold that the legislature may vest the power of appointment in private corporations. The power in each case was vested in a branch of the state government. The statute passed upon in *People ex rel. Dunham v. Morgan*, 90 Ill. 558, authorized the judges of the circuit court of Cook county to fill vacancies in the offices of South Park commissioners, and the election law which was sustained in *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, and 8 N. E. 788, provided that the judge of the county court might appoint election commissioners. The question mainly discussed in those cases was whether the power of appointment could be exercised by the judicial branch of the government, and in each case the law providing for the appointment was adopted by a vote of the municipality affected. With reference to the appointment of South Park commissioners, it was said that the power might, no doubt, be sustained, on the ground that its exercise was the act of an individual who was the incumbent of the office of judge; but that statement, if entirely accurate, should be taken with reference to a case where the people had adopted a law containing a provision for such an appointment. The case was decided, and the law sustained, on the ground that the legislature might authorize a judicial officer to exercise the power as to a local officer. We have not been referred to any case where the legislature has attempted to confer the power of appointment upon a private corporation. So far as appears, such a law is without precedent in this state. In *Bunn v. People ex rel. Laffin*, 45 Ill. 397, it was held that the commissioners appointed under the act for the erection of a new state house were not officers, but employees of the state; and in *Kilgour v. Drainage Comrs.* 111 Ill. 342, and *People ex rel. Graham v. Inglis*, 161 Ill. 256, 43 N. E. 1103, it was held that the legislature might impose new duties upon officers already elected, and that the imposition of such new duties was not the appointment of an officer. They have no bearing on the question involved here.

The board of inspectors provided for by this act are general officers of the state, and it seems beyond question that the power to appoint them is a franchise, which the act in question attempts to grant to five corporations. The legislature was powerless to clothe these corporations with an attribute of sovereignty by granting to them this special privilege. The criminal court was wrong in holding the provisions in question to be valid. We see no objection to the 1st and 2d sections of the act, which are separable from the invalid provisions.

The judgments are reversed.

MISSOURI SUPREME COURT.

E. L. HOPE, *Respt.*,

v.

E. W. FLENTGE, *Appt.*

(140 Mo. 390.)

1. A recount of the ballots of a precinct will not be ordered because of rejected ballots, if there is no way of identifying what ballots, if any, were rejected.
2. The decision of the trial court as to the residence of voters will not be disturbed when supported by their testimony, and the question is one of fact into which the intention of the parties largely enters.
3. A voter is imperatively required to cross out all but one of the groups of candidates upon his ballot, by Rev. Stat. 1889, § 4781, as amended by the act of April 18, 1893, which declares that "he shall prepare his ballot by crossing out the groups he does not wish to vote."

4. A single name in one of the columns for party tickets on an official ballot, other columns of which have full lists of candidates, is a "group" within the meaning of a statute requiring the voter to cross out the groups he does not wish to vote.
5. Leaving two columns uncrossed on an official ballot, in violation of a statute which requires the voter to cross out the groups he does not wish to vote, renders the ballot void as an entirety, and not merely as to the offices for which candidates are named in each column, although there is but one name in one of the columns, while in the other column there is a full list of candidates.
6. Aid to a voter in casting his ballot, given by the judges of election without requiring a preliminary oath from him as the statute requires, does not make his vote invalid in the absence of any fraud on his part,—at least if the voter was one who was entitled to such assistance on making the oath.

NOTE.—Marking official ballot.

- I. Validity and construction of law.
- II. Official marks.
 - a. General rule.
 - b. Printer's marks.
 - c. Failure to indorse ballot.
 - d. Erroneous or mistaken marking of ballot by official.
 - e. Correction of errors.
- III. Voter's marks.
 - a. Preliminary statement.
 - b. Failure to indicate intent.
 - c. Failure to use cross.
 - d. Imperfect cross.
 - e. Device other than cross.
 - f. Blots.
 - g. Superfluous lines or marks.
 1. Distinguishing marks.
 2. Harmless marks.
 - h. Mark with wrong implement.
 - i. Mark in wrong place.
 1. On back of ballot.
 2. Out of square.
 3. On wrong side of name.
 4. Not opposite candidate's name.
 - j. Conflicting marks.
 - k. Alteration of ballot.
 1. Erasure of names.
 2. Addition of names.
 - l. Attempted erasure of vote mark.
 - m. Partial failure to vote.
- I. Validity and construction of law.

The statutes providing for an official ballot and requiring some method of official identification and some uniform style of indicating the voter's choice, have generally been upheld by the courts, unless their provisions were such as to interfere with the rights of the voter.

An act passed for the purpose of securing the freedom of elections and preserving the purity of the ballot box does not interfere with the privileges and immunities of the citizens in violation of the 14th Amendment of the United States Constitution, where it does not prevent the voter from casting his ballot fairly. *Cook v. State* (1891) 90 Tenn. 407, 13 L. R. A. 183, 16 S. W. 471.

The constitutional guaranty of the right to vote by ballot is not contravened by a statute requiring the use of an official ballot instead of one furnished by the voter himself, but which the voter marks and prepares so as to show his

choice. *State ex rel. Runge v. Anderson* (1898) 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482.

An election law compelling a vote by ballot in absolute secrecy, providing for the marking of the ballots in a designated manner, requiring their rejection for failure to comply therewith, and disfranchising no one, does not conflict with the Kansas Constitution requiring all elections by the people to be by ballot, as the legislature may, within the terms of the Constitution, adopt such reasonable regulations and restrictions as may be deemed necessary to prevent intimidation, bribery, and fraud provided the voting be by ballot, and the persons casting the same may do so in secrecy. *Taylor v. Bleakley* (1895) 55 Kan. 1, 28 L. R. A. 683, 39 Pac. 1045.

A statute is not unconstitutional as discriminating between voters because it permits a straight ticket to be cast by simply placing a cross opposite the party emblem, whereas one desiring to vote for any number of candidates of a party less than all is required to place a cross opposite the name of each candidate, and to write in the name of any candidate not on the ticket for whom he may wish to vote. *Ritchie v. Richards* (1896) 14 Utah, 345, 47 Pac. 670.

A clause of a statute providing for the placing at the head of the ticket of the names of parties which have filed certificates of nomination, and for voting for all candidates of such party by placing a cross in a margin to be left after the party name similar to that opposite the names of candidates, is unconstitutional as discriminating against classes of voters, where it may result in the disfranchisement, as to some offices, of voters marking their ballots opposite the head of a party not having a full ticket, by reason of a further provision that a ballot marked opposite a party name shall not be counted if stamped in any other place. *Eaton v. Brown* (1892) 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250.

An act requiring the voter to mark for himself the name or names of the candidates for whom he wishes to vote does not "infringe the rights of the voter under Tenn. Const. art. 4, § 1, by imposing upon him the requirement of education in addition to the constitutional requirements. *Cook v. State* (1891) 90 Tenn. 407, 13 L. R. A. 183, 16 S. W. 471.

The Australian ballot law, adopted in New Jersey, which provides that if any ballots shall

7. The mere failure of an election officer to perform some prescribed duty, in the absence of any fraud or imposition practised upon the voter, will not deprive him of his ballot unless the language of the statute allows no other alternative.
8. The fact that election judges went into the booths with electors in violation of the statute will not render the ballots void if there was no design to influence the electors unduly, unless they were in fact imposed upon or some advantage taken of them.

(*Barclay, Ch. J., and Macfarlane and Robinson, JJ., dissent.*)

(June 29, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Cape Girardeau County in favor of contestant in a proceeding to contest the alleged election of contestee to the office of collector of the revenue of Cape Girardeau county. *Affirmed.*

The facts are stated in the opinions.

have thereon any mark, sign, designation, or device other than permitted by the act, whereby it may be identified or distinguished from other ballots cast, such ballots shall be void, is not unconstitutional on the ground that a voter may be deprived of his vote by reason of marks or irregularities getting upon the ballot in its preparation, and by the fraud or neglect of the person charged with their preparation, where the guards and restrictions placed around their preparation are of the most explicit and stringent kind, and ample provision is made for the correction of such mistakes, as it is to be presumed that such duty will be properly performed. *State, Ransom, Prosecutor, v. Black* (1892) 54 N. J. L. 446, 16 L. R. A. 769, 24 Atl. 489, 1021.

The requirement of the indorsement of the initials of an election inspector or judge of elections upon the back of ballots is not an unreasonable or unconstitutional restriction of the right of suffrage. *Miller v. Schallern* (1899) 8 N. D. 395, 79 N. W. 865; *Lorin v. Seitz* (1899) 8 N. D. 404, 79 N. W. 869.

The requirements of the Australian ballot law adopted in Nebraska, that the names or signatures of two judges of election shall be written on the back of each ballot to be used, which shall be so folded by the voter as to disclose these signatures, and shall not be deposited by the judges unless so marked, and that, in canvassing, the ballots not so marked shall be void and not be counted, are clearly but regulative, and to assist in the honest, intelligent exercise of the right to vote, and are not violative of the constitutional provision that all elections shall be free, and there shall be no hindrance or impediment to the right of a voter to exercise the elective franchise. *Orr v. Bailey* (1899; Neb.) 80 N. W. 495.

The court distinguishes the case of *Moyer v. Van de Vanter* (1895) 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60, which held that the provision of § 891, Wash. Gen. Stat., that any ballot which is not indorsed with the initials of any inspector or election judge shall not be counted, is unconstitutional as depriving the voter, without fault on his part, of the right guaranteed by the Constitution to vote at all elections.

The ground of distinction was that in the Nebraska case the voter was charged with a duty which would disclose the absence of the proper indorsement, while in the Washington 47 L. R. A.

Messrs. B. F. Davis, E. D. Hays, and Wilson Cramer, for appellant:

Contestee's motion for an order on the county clerk to open and recount all of the ballots cast for him at Appleton and Friedheim precincts should have been sustained.

1 Rev. Stat. 1889, p. 1077, § 4721; *Sono v. Williams*, 130 Mo. 530, 32 S. W. 1016.

A. N. Payne and E. W. Nelson, both of whom came from other counties to attend the Southeast Missouri Normal School at Cape Girardeau, and were students at the time, were not qualified voters.

Mo. Const. art. 8, § 7; *Re Goodman*, 140 N. Y. 284, 40 N. E. 769; *Re Garvey*, 147 N. Y. 117, 41 N. E. 439.

The voter who accepts assistance when not entitled is *particeps criminis*, and should lose his vote.

Sess. Acts 1893, § 1; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 538, *sub nom. Ellis ex rel. Reynolds v. May*, 25 L. R. A. 325, 68 N. W. 483.

case there was nothing to show that he was so charged, or that anyone but the official had any duty with respect to the indorsements.

It has been held, however, that the provision of a statute requiring the numbering of ballots and the placing of the same number opposite the name of the voter on the poll list so as to permit of identification in case of a contest is invalid, as it violates the provision of the Utah Constitution, that all elections shall be by secret ballot. *Ritchie v. Richards* (1896) 14 Utah, 345, 47 Pac. 670.

In regard to the construction of the law, it is said in *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116, that there is a clear distinction between the provisions and prohibitions in election laws which are personal to the elector, if he violates which, it is his own fault, and those which apply to executive officers over whose conduct he has no control, the former being generally mandatory and the latter directory, unless otherwise expressly or by necessary implication so declared by statute.

In *Jones v. State ex rel. Wilson* (1899; Ind.) 55 N. E. 229, it is said that the purpose of all the election laws is to secure electors the correct expression of their choice in the selection of public servants, and that irregularities on the part of election officers, not going to the time or place or other vital matter of the election, or their omission of acts not declared to be essential to the validity of the election, are to be held directory only in support of the voter's right to have his ballot counted as cast.

The Maine statute, requiring ballots to be marked by a cross in the appropriate margin or place opposite and to the right of the candidate, or opposite and to the right of a party designation, is mandatory, and requires a substantial compliance therewith as to the form and location of such mark. *Curran v. Clayton* (1893) 86 Me. 42, 29 Atl. 930.

In the election contest of *Glenn v. Wightman*, referred to in 55 Kan. 10, in the opinion to *Taylor v. Bleakley* (1895) 55 Kan. 1, 28 L. R. A. 683, 39 Pac. 1045, it is said in the report of the election committee, which was adopted by the legislature without dissent, that the great innovation upon the prior law, made by the Australian ballot, is that the intention of the voter shall be ascertained by the application to the ballot of the directions contained in the statute, and the provisions of the statute

The court erred in refusing to receive evidence offered by contestee to show that at Neely's Landing and Crump precincts the Democratic judges of election entered the booths and assisted voters named in the preparation of the ballots.

Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *People ex rel. Nichols v. Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624, 29 N. E. 327; *Woodward v. Sarsons*, L. R. 10 C. P. 733.

The intention of the several electors casting the 48 rejected ballots to vote for contestee is clear, and should not be defeated by their failure to properly designate their choice for sheriff.

Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61; *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127; *Kreitz v. Behrensmeyer*, 125 Ill.

141, 17 N. E. 232; *Blankinship v. Israel*, 132 Ill. 514, 24 N. E. 615; *State ex rel. Stearns v. Poworthy*, 29 Neb. 341, 45 N. W. 632; *Wimmer v. Eaton*, 72 Iowa, 374, 34 N. W. 170; *Brown v. McCullom*, 76 Iowa, 479, 41 N. W. 197.

The section of the statute in reference to the marking of ballots is purely directory; it nowhere provides that a ballot not prepared as directed shall not be counted.

Sess. Acts 1893, § 3; *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *Lankford v. Gebhart*, 130 Mo. 621, 32 S. W. 1127.

Messrs. J. W. Limbaugh and W. H. Miller, for respondent:

Ballots marked rejected are presumed to have been properly rejected, and the burden of proof is on the party claiming that they were illegally rejected.

Zeiler v. Chapman, 54 Mo. 502.

directing the manner in which the voter shall express his choice are mandatory.

In *Jones v. State ex rel. Wilson* (1899; Ind.) 55 N. E. 229, it is said that all provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void.

The Illinois election law, requiring ballots to be marked with a cross in the appropriate margin or place, is only directory, and not mandatory; and if the voter's intention can be gathered from his ballot without laying down a rule which may lead to the destruction of its secrecy, such intention should be given effect. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

In *Jennings v. Brown* (1896) 114 Cal. 307, 34 L. R. A. 45, 46 Pac. 77, it is said that while the provisions of the election laws are mandatory they should be liberally construed.

The intention of the voter when not in violation of the election law should govern if that intent is made apparent by the ballot itself. *Re Election in 20th Ward No. 2* (1894) 8 Pa. Dist. R. 120.

The Indiana statute prescribing the manner of marking or stamping ballots, and forbidding the counting of any ballot bearing distinguishing marks or mutilations, is mandatory, and not merely directory. *Sego v. Stoddard* (1893) 136 Ind. 297, 22 L. R. A. 468, 36 N. E. 204; *Sego v. State ex rel. Stoddard* (1894) 136 Ind. 700, 36 N. E. 208.

The provision of the Illinois ballot law of 1891, that if a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine his choice for any office to be filled, his ballot shall not be counted for that office, means that if the voter's choice can be ascertained from his ballot it shall be counted if it can be done consistently with the other provisions and the object of the act, and does not change the rule that the voter shall not be deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

In *Hehl v. Guion* (1900; Mo.) 55 S. W. 1024, it is said that a statute requiring the judges of 47 L. R. A.

election to write their names or initials on the back of each ballot with ink or indelible pencil before delivering it to the voter, is not mandatory in the sense that the elector is to be deprived of his franchise and the candidate of a vote otherwise lawful unless its terms have been literally complied with, nor as but merely directory in the sense that it may with impunity be disregarded by the election officers; but the purpose, which is to secure the return to the judges of the same paper given to the voter, should control.

II. Official marks.

a. General rule.

As indicated by the decisions *supra*, the inclination of the courts is to hold that failure by the officials to comply strictly with the provisions of the law in reference to the preparation of the ballot for the voter will not render the ballot void, unless, as in *SLAYMAKER v. PHILLIPS*, the statute so requires it, or unless a count of the ballots notwithstanding such failure will interfere with some of the fundamental principles of a pure and secret ballot.

b. Printer's marks.

Blurred ink marks as if made with a printer's quad on ballots do not require their rejection in the absence of any proof that they were marked for identification, as such marks by themselves are as consistent with mistake as design. *People ex rel. Hasbrouck v. Dutchess County Supers.* (1892) 135 N. Y. 522, 32 N. E. 242.

Ballots on which marks are accidentally caused in printing should be counted. *State ex rel. Phelan v. Walsh* (1892) 62 Conn. 260, 17 L. R. A. 364, 25 Atl. 1.

c. Failure to indorse ballot.

The absence of the official mark from a ballot marked by the voter does not vitiate it, where, in delivering the ballot to the voter, two were inadvertently torn from the block together the official mark placed on the back of the upper one only, and the voter's mark made on the face of the lower one. *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, Wigmore, p. 195.

The omission from a few ballots of the signature of the election officer, the ballots being numbered as required by law, does not invalidate the election, as his signature was not essential. *Re Lloyd* (Victoria, 1867) 5 W. W. & A.B. (L) 226, Wigmore, p. 195.

Ballots not marked with the initials of the

The court committed no error in refusing to disfranchise the various voters so challenged by contestee, because of a failure on the part of the election judges to perform a statutory duty, there having been no charges of fraud made in the notice served, nor, for that matter, at the trial.

Bowers v. Smith, 111 Mo. 45, 16 L. R. A. 754, 20 S. W. 101.

Statutes regulating elections should be given such constructions as will secure more firmly the rights of electors conferred by the Constitution and express more accurately the will of the people, and not such as to allow statutory regulations to be so applied as to endanger the right of suffrage by putting the result within the control of ignorant, careless, or dishonest officials, and beyond the reach of the courts or the people.

Whipley v. McKune, 12 Cal. 352; *Fowler*

election officer are not invalidated thereby, where the irregularity occurred on all ballots at the polling place where they were cast, without reference to a particular candidacy, and was evidently the result merely of the election officer's ignorance. *Ex parte Tremblay* (1887) 18 Quebec L. R. 64, Wigmore, p. 195.

The mere fact that the judges of elections failed to indorse ballots with their names or initials, or indorse them in pencil not indelible, or that part only of the judges indorsed them, does not require the rejection from the count of such ballots received and deposited by the judges under the Missouri statute providing that each ballot shall be indorsed with the names or initials of all the judges of election with ink or indelible pencil before delivery to the voter, the purpose of which is to secure the return to the judges of the same paper delivered to the voter, where the statute does not expressly declare that ballots not so indorsed shall not be counted, but only that the judges shall not deposit them. *Hehl v. Gulon* (1900; Mo.) 55 S. W. 1024.

The absence of the election officer's initials does not vitiate the ballot, the statute not expressly creating such a cause of invalidity. *White v. Mackenzie* (1875) 20 Lower Can. Jur. 22, Wigmore, p. 195; *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 195.

The requirement of the Missouri statute, that no judge of election shall deposit any ballot upon the back of which the names or initials of the judges do not appear, is mandatory, and ballots indorsed with the name or initials of only one judge of election are invalid, and cannot be counted. *McKay v. Miner* (1900; Mo.) 55 S. W. 866.

A ballot not bearing the indorsement of the judges of election cannot be counted under the Iowa statutes, providing that one of the judges shall give to the voter one ballot, on the back of which such judge shall indorse his initials in such a manner that they may be seen when the ballot is properly folded, and that no ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of the act shall be counted. *Kelso v. Wright* (1900; Iowa) 81 N. W. 805.

A ballot not bearing the initials of the election officer is invalid unless clear proof of its genuineness is given. *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, Wigmore, p. 195.

The provision of § 525 of the North Dakota Revised Codes, that in the canvass of votes any ballot which is not indorsed as provided by the official stamp and the initials of an inspector or judge of elections, shall be void, and shall 47 L. R. A.

v. State ex rel. George, 63 Tex. 30, 3 S. W. 255; *Cooley*, Const. Lim. §§ 612, 771; *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754, 20 S. W. 101; *Hall v. Schoenecke*, 128 Mo. 668, 31 S. W. 97; *Hanscom v. State ex rel. Lockhart*, 10 Tex. Civ. App. 638, 31 S. W. 547; *Rev. Stat.* 1889, § 4784, as amended in acts 1891, p. 134.

All those ballots upon which the "Independent Ticket" was not erased were properly rejected, because the voting was not done in the manner prescribed by statute, not being in one group.

Rev. Stat. 1889, § 4773, as amended in acts 1891, p. 135.

The court committed no error in holding that Nelson and Payne, the two students at Southeast Missouri Normal School, were competent and qualified voters, the question of their residence being one of fact.

not be counted, is mandatory, and requires the rejection of ballots not in conformity therewith. *Miller v. Schallern* (1899) 8 N. D. 395, 79 N. W. 865; *Lorin v. Seitz* (1899) 8 N. D. 404, 79 N. W. 869.

A ballot in an envelope not bearing the official indorsement is illegal. *Mallett v. Plumb* (1891) 60 Conn. 352, 22 Atl. 772.

The requirement of the Australian ballot law adopted in Nebraska, that the names or signatures of two judges of election should be written on the back of each ballot to be used, and that a ballot not so indorsed shall be void, and shall not be counted, is mandatory, and requires the rejection of ballots containing the initials of but one judge of elections. *Orr v. Bailey* (1899; Neb.) 80 N. W. 495; *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

A ballot not bearing the official indorsement of the judges of election as required by statute should be rejected. *Kelly v. Adams* (1899) 183 Ill. 193, 55 N. E. 837.

Ballots not bearing the official stamp are properly rejected. *Hanscom v. State ex rel. Lockhart* (1895) 10 Tex. Civ. App. 638, 31 S. W. 547.

The court on a recount properly refuses to count an unnumbered ballot in excess of the number of votes cast as shown by the poll list which the election officers should have rejected, under the statute providing that if the ballots shall be found to exceed the number of names entered on each of the poll lists the judge of election shall reject the ballots if any be found upon which no number is marked. *Blankinship v. Israel* (1890) 132 Ill. 514, 24 N. E. 615.

A ballot without the official marks on the back is void. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 195.

Unnumbered ballots found in the ballot box cannot be counted. *Hughes's Election*, 3 Lack. Jur. 313 (Brightly, Pa. Dig. p. 3396).

Ballots cast at an election under the Texas act of 1892 prohibiting the marking of ballots by the elector or anyone so that they may be afterwards identified, in order to be counted must be numbered as required by the statutes passed in pursuance of the state Constitution, which provides that all elections shall be by ballot, and the legislature shall provide for the numbering of tickets, as the act of 1892 is incomplete in itself, and was intended simply as an additional means to prevent fraud and preserve the purity of the ballot, and did not affect such provision. *State ex rel. Barry v. Connor* (1893) 86 Tex. 133, 23 S. W. 1103.

Hall v. Schoenecke, 128 Mo. 668, 31 S. W. 97; *Lankford v. Gebhart*, 130 Mo. 622, 32 S. W. 1127.

Gantt, J., delivered the opinion of the court:

This is a case of contested election under the laws of this state for the office of collector of the revenue of Cape Girardeau county, to which appellant, Flentge, received the certificate of election at the general election held November 3, 1896, the official count by the county clerk showing that appellant and contestee received 2,449 votes and the contestor and respondent 2,440 votes. The official ballot for said election in said county contained eight distinct tickets, grouped under the following different headings or captions: "Democratic Ticket," "Republican Ticket," "People's Ticket," "Prohibition

"Ticket" (nominated by electors), "Socialist Labor Ticket" (nominated by electors), "Palmer-Buckner National Democratic Ticket" (nominated by electors), "National Ticket" (nominated by electors), and "Independent Ticket" (nominated by electors). Edward W. Flentge was the Republican candidate for collector, and E. L. Hope was the nominee of both the Democratic party and the People's party. In the time allowed by statute the respondent, Hope, gave notice of contest, assigning two grounds: First, that twelve persons whose names were given, and charged to have voted for Flentge, the contestee, were not legal voters; second, that by mistake of the election officers, forty votes cast for contestor, Hope, at Steimel precinct, were not counted for him; and thereupon in due time the contestee, Flentge, served the contestor with notice of a counter contest,

d. Erroneous or mistaken marking of ballot by official.

The stamping of all the ballots by the election officer before the opening of the poles in order to save time, the ballots all being kept in his possession until the delivery of each one to the voters, although a serious irregularity, does not infringe the principles of the ballot act so as to render the election invalid. *Hamilton v. Police Comrs.* (1875) 2 Ct. of Sess. 299, *Wigmore*, p. 196.

The vote of an election precinct will not be rejected because the poll clerks, instead of each writing his name on the ballots, by agreement divided the ballots between them, and each signed his own name and that of the other clerk to his share of the ballots in the presence of each other and of the other election officers, as such duty is a ministerial one which may be delegated, and the signing is a substantial compliance with the West Virginia statute requiring each poll clerk to write his name on the back of each ballot under the printed words "poll clerks." (By divided court.) *Snodgrass v. Wetzel County Ct.* (1897) 44 W. Va. 56, 20 N. W. 1035.

The marking on the ballot paper by the returning officer of the number of the voter in good faith and with anxious desire to do his duty, and the subsequent erasure of such marks so as to leave no trace thereof, with the assent of the agents of both parties, on the closing of the polls and opening of the ballot boxes, after having become satisfied that such marking was incorrect, does not invalidate the election, where the secrecy of the ballot was not infringed thereby,—especially in view of the provision of § 80 of the Dominion election act, declaring that no election shall be invalid by reason of noncompliance with the provisions of the act, if it appears that the election was conducted in accordance with the principles laid down in the act, and that such noncompliance or mistake did not affect the result of the election. *Hawkins v. Smith* (1884) 8 Can. S. C. 676.

Ballots on which the initials of a deputy returning officer are not put on the back as required by statute, but on the counterfoil, which was removed and destroyed by him before depositing the votes, are not invalidated thereby, as such marking enables the deputy returning officer to identify the ballots returned by the voters as those given out by him, the sole purpose of the statutory provision being to enable such officer to so identify the ballots, and the statute not requiring the rejection of ballots not initialed, but only of ballots not supplied

by the officer. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

Ballots marked with the initial of the returning officer on the counterfoil, instead of on the back of the ballot, are valid, as such marking serves the purpose of the statute to identify the ballots returned by the voters as the same ballots given out by the officer. *Hawkins v. Smith* (1884) 8 Can. S. C. 676.

A ballot marked with the initials of two election judges of the same political party in ignorance of, and without wilful disregard of, the requirements of § 51 of the Minnesota election law of 1891, that two of the judges of opposite political parties shall place their initials on the back of all ballots before they are used by the voter, should be counted, as the statute is simply directory in view of the omission of the words "of the same political party" from § 56, providing that no ballot which has not the initials of two of the election judges on the back shall be placed in the box. *State ex rel. Braley v. Gay* (1894) 59 Minn. 6, 60 N. W. 676.

The fact that the stamp required to be placed on the back of official ballots was not placed thereon before they were delivered to the elector, but was done when they were returned to be deposited in the ballot box, was but an irregularity which could not vitiate them in the absence of any fraud. *Moyer v. Van de Vanter* (1895) 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60.

The writing of the initials of the poll clerks upon the outer upper righthand corner of each ballot before it was delivered to the voter, instead of upon the outer lower left-hand corner, does not nullify the election. *Jones v. State ex rel. Wilson* (1899; Ind.) 55 N. E. 229.

Ballots properly marked with a cross cannot be rejected because of indorsements made by the election officer on the back thereof after they were delivered to them by the voters and before they were placed in the ballot box, to the effect that they were objected to and sworn in, and without participation therein by the voter, on the ground that such indorsement might serve as a distinguishing mark. *Gill v. Shurtleff* (1899) 183 Ill. 440, 56 N. E. 164.

Ballots marked with the initials of an election inspector in the lower right-hand corner instead of in the upper left-hand corner, as required by the Michigan statute, should not be rejected on a recount by the board of canvassers, although the statute further provides that in the canvass of votes any ballots not indorsed with the initials of the inspector as provided, and any ballots bearing any distinguishing mark or mutilation shall be void, and shall not be counted, where they were so marked by mis

the grounds of which are: (1) That twenty-three persons, named, who voted for respondent, were not legal voters. (2) That at fourteen specified precincts a certain number of legal and valid ballots cast for appellant were unlawfully rejected, and not counted for him. (3) That the judges of election unlawfully failed to count forty-one votes cast for him at Steimel precinct. (4) That the ballots of Robert Foster and others (twenty-six in number), cast and counted for respondent at Neeley's Landing precinct, were illegal and void, because the Democratic judge of election entered the booths, and assisted in the preparation of said ballots. (5) That the ballots of W. F. Points and others (sixty in number), cast and counted for respondent at Burfordsville precinct, were illegal and void, because prepared by the judges of election without oath being first

made by the electors as to their inability to read or write, etc. (6) That the ballots of Ed. Turner and William Welch, cast and counted for respondent at the courthouse precinct, were illegal and void, because prepared by the judges without an oath of disability on the part of the electors. (7) That the ballots of Hy. Penturf and others (seventy in number), cast and counted for respondent at Crump precinct, were illegal and void, because prepared by the judges of election without an oath of disability by the electors, and because the Democratic judge of election entered the booths, and assisted in the preparation of the ballots. At various precincts in the county the election officers refused to count and rejected those ballots which contained two groups unscratched. Thus those in which the Democratic or Republican group and the Inde-

take of the inspector, were counted without protest from any source, and the ballots when folded could not be told from a folded ballot with the initials in the upper right-hand corner, as the provision as to the exact location of such initials is directory. *Horning v. Burgess* (1898) 119 Mich. 51, 77 N. W. 446.

A ballot bearing the same number as another ballot one number higher or lower than the number opposite the name of the voter of such duplicate ballot on the poll lists should be counted where it is identified by the voter who cast it, and there is no ballot in the box corresponding to his number on the poll lists which number is the one required to be placed by the election officers upon the ballot, as such statutory requirement is directory, and does not require the disfranchisement of a voter because of a mistake of the election officer. *Blankinship v. Israel* (1890) 132 Ill. 514, 24 N. E. 615.

The fact that a ballot was marked with a restrictive indorsement instead of a general indorsement, as required by the Oregon election law if the voter is qualified to vote for county officers, does not prevent its being counted for county candidates properly marked thereon, where the ballot was placed in the general box, and not in the box in which ballots so restrictively indorsed are required by statute to be placed. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

A ballot bearing a number which appears to be 193 should be counted as the ballot of a voter whose number on the poll list is 561, which is the number required by statute to be placed on his ballot by the election officers, where no ballot is to be found in the box corresponding with his number on the poll list, and all other ballots have been accounted for, as such statutory requirement is directory, and does not require the disfranchisement of the voter for a mistake of the election officers. *Blankinship v. Israel* (1890) 132 Ill. 514, 24 N. E. 615.

That part of the ballots cast were marked with too high numbers does not render void other ballots numbered in conformity to the statute, so as to invalidate the election. *People ex rel. Bradshaw v. Bidelman* (1893) 60 Hun. 596, 23 N. Y. Supp. 954.

Ballots marked with the same number should be counted under the Texas Revised Statutes requiring each ballot to be numbered to correspond with the voter's number on the poll list, and declaring that no ballot not numbered shall be counted, where it does not appear that there were not two names upon the poll list in each case having the same number. *Gray v. State* 47 L. R. A.

ex rel. Langham (1899) 92 Tex. 396, 49 S. W. 217.

A ballot marked with a blue pencil mark through the number on it is properly counted, where such number corresponds with the poll list, and there is no other ballot which had on it that number. *Hanstom v. State ex rel. Lockhart* (1895) 10 Tex. Civ. App. 638, 31 S. W. 547.

That a ballot bears an additional number to the one which corresponds with the poll list, thus identifying it as the proper number, does not require its rejection. *Ibid.*

That ballots indorsed with the initials of judges, which, though they are not required, are not prohibited, are also indorsed by election officers with the words "voted," "sworn," "lost certificate," or "duplicate," or with pencil marks or numbers after the ballot has left the voter's hands, is not ground for rejection of the ballot when not done for the purpose of distinguishing the ballot from others, and there is no express provision requiring their rejection therefor. *Ibid.*

Ballots numbered, without the knowledge of the electors casting them, by the election judges by reason of a misunderstanding of the law on their part, are properly counted for the respective parties. *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116.

Official ballots of one political party, cast in certain election districts and bearing the official indorsement for other districts because delivered to the wrong districts by the county clerk, cannot be counted, as such ballots are not properly indorsed and are readily distinguishable by reason of such indorsements from other ballots cast in the same districts within the New York ballot reform act, the object of which was the enforcement of the secrecy of the ballot, and which provided that no ballot should be deposited not properly indorsed or which has any distinguishing marks on the outside thereof, and that no ballot not bearing the official indorsement shall be counted except in certain cases, although it results in the disfranchisement of many voters. *People ex rel. Nichols v. Onondaga County Canvassers* (1891) 129 N. Y. 395, 14 L. R. A. 624, 29 N. E. 327.

Ballots cast in one voting precinct having an official indorsement for another precinct are properly rejected under the New Jersey ballot reform law providing that if any ballot shall have on its back any designation other than permitted thereby, whereby it may be distinguished from other ballots cast at that election, it shall be void, as, if that law as amended prescribes a designation which does not include

pendent group were, neither, scratched. This action forms the basis of the second ground of contest in the counter contest of the appellant, Flentge. Copies of the official ballot and of the rejected ballots accompany this statement. On the application of the contestor, Hope, there was a recount by the county clerk of the ballots cast at Steimel precinct, and, on the application of contestee, a recount of all the precincts. The county clerk made separate certificates under the two orders. At the January term, 1897, a trial was had, and a judgment rendered in favor of the contestor, Hope, the court finding that he had received a majority of twelve votes. A motion for new trial was made and overruled, and an appeal taken to this court.

Upon the record in the cause, appellant, Flentge, submits for review the following

voting precincts such indorsement is not permitted by it, and if the law does prescribe the designation of voting precincts, the indorsement is one which could and might plainly distinguish such ballot from other ballots cast at the same election. *Lippincott v. Felton* (1898) 61 N. J. L. 291, 39 Atl. 646.

The word "excise" not being the legal official indorsement of a ballot for town purposes, excise ballots used for other town purposes by pasting in the names of candidates therefor should not be counted, as they do not contain the proper legal indorsement of town ballots, which was an essential feature under the New York ballot reform law of 1890 as amended in 1891, providing that no ballot that has not the printed official indorsement shall be counted. *People ex rel. Sherman v. Person* (1892) 64 Hun. 327, 19 N. Y. Supp. 297.

Official ballots, invalid because bearing the indorsement for districts other than those in which they are voted, cannot be considered as unofficial ballots within the New York ballot reform act permitting the use and counting of unofficial ballots where the official ballots have not been delivered in time or have been destroyed or stolen since delivery. *People ex rel. Nichols v. Onondaga County Canvassers* (1891) 129 N. Y. 395, 14 L. R. A. 624, 29 N. E. 327.

As the use of ballots officially indorsed "excise" to vote for other town offices instead of the properly indorsed "town" ballots, would furnish an easy means of identification and destroy the secrecy contemplated by the New York ballot reform law, ballots so used by pasting the names of other town candidates thereon should not be counted. *People ex rel. Sherman v. Person* (1892) 64 Hun. 327, 19 N. Y. Supp. 297.

The writing of the name of the voter upon the back of his ballot is a marking for identification in clear violation of the Minnesota election law, which provides that no voter shall divulge to anyone within the polling place the name of any candidate for whom he intends to vote or has voted, requiring their rejection. *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116.

The writing of the voter's name upon the back of a ballot, it not appearing by whom it was written or that it was done for the purpose of identification, or that the ballot was folded so that the name could be seen, does not require the rejection of the ballot under the Missouri election law of 1891 providing that two of the judges of election shall write their names or initials on the back of ballots furnished voters, and that no other writing shall be on the back except the number of the ballot, as that 47 L. R. A.

points: (1) The act of the court in overruling the motion for a recount of the votes at Friedheim and Appleton precincts. (2) The ruling on the vote of Robert Bueltemann. (3) The ruling on the votes of A. N. Payne and E. W. Nelson. (4) The refusal of the court to count for him the forty-eight rejected ballots. (5) The refusal of the court to receive evidence to prove that the judges entered the booths to assist in making ballots cast for contestor. (6) The refusal of the court to permit proof of ballots cast for contestor having been marked by the election judges without requiring from the electors an oath of disability.

1. For a proper appreciation of the first assignment it will be necessary to recite the substantial facts in full. The certificate of the county clerk made in obedience to the writ obtained by the contestee recited a re-

provision refers to the time the ballot is delivered to the voter, and should only be considered as giving direction to the election officers in respect to the discharge of their duty, and is not mandatory upon the voter. *Lankford v. Gebhart* (1895) 130 Mo. 621, 32 S. W. 1127.

Marking the voter's number on the ballots when given out by the officer makes them void, under a statute prohibiting marks by which they can be identified. *Aylesworth v. White, Hodgins, Elect. Cas.* 764, 10 Am. & Eng. Enc. Law, 2d ed. p. 716.

e. Correction of errors.

Ballots on which the election judges change the initials of a candidate solely for the purpose of correcting a mistake therein do not thereby lose their character of official ballots so as to require the rejection of the vote of the township in which they were used. *Cook v. Fisher* (1896) 100 Iowa, 27, 69 N. W. 264.

Ballots on which the judges of election have changed the initials of a candidate for the sole purpose of correcting a mistake therein do not contain identifying marks requiring their rejection. *Ibid.*

The striking out with ink of an unnecessary letter in the name of a candidate before any of the ballots were cast, for the purpose of correcting the spelling thereof, does not prevent the counting of ballots so marked. *State ex rel. Phelan v. Walsh* (1892) 62 Conn. 260, 17 L. R. A. 364, 25 Atl. 1.

Ballots marked with a cross near a party emblem indicating an intention to vote for all candidates named thereunder cannot be rejected as to a candidate whose name was improperly printed thereunder by the county clerk where no objection was made by the contestor before the election, as could have been made under the provisions of the election law, and there is no mark opposite the name of any other candidate for the same office, indicating an intention not to vote for such candidate. *Allen v. Glynn* (1892) 17 Colo. 338, 15 L. R. A. 743, 29 Pac. 670.

III. Voter's marks.

a. Preliminary statement.

Almost every conceivable mark which a voter could make or omit to make has been the subject of discussion in the various cases which have been before the courts. The voters have neglected to make such marks as to indicate their intent either wholly or partially, have marked in the wrong place, with the wrong kind of marks or with conflicting or contradic-

EXHIBIT B.

Exhibit "A" was the same as this except that it was unmarked.

count of all the rejected ballots at the precincts named in the writ except the precincts Friedheim and Appleton. As to these he certified: "Friedheim precinct, Apple Creek township. In this precinct I find no rejected ballots." "Appleton precinct, Apple Creek township. In this precinct I found one rejected ballot, No. 127, which I also rejected because the same was not a proper ballot, but was a 'Cash Book' supplement." The Cash Book is the title of a newspaper in said county. On the 8th of January, 1897, contestee filed his motion for an order requiring the clerk to open and recount all the ballots in said precincts of Appleton and Friedheim. The cause assigned was that the election officers had failed to mark the rejected ballots so that they could be identified, but had strung them on the wire with the ballots they had counted. The poll books

tory marks, have made distinguishing marks and marked with the wrong implement; but through it all runs the rule of construction against disfranchisement if such construction can be given without violating some rule of law or policy.

b. Failure to indicate intent.

Ballots without any marks to indicate the voter's wish in any particular are not votes in any sense. *People ex rel. Beasley v. Sausalito* (1895) 106 Cal. 500, 89 Pac. 937.

Ballots not marked with a cross either in the party title or opposite the names of candidates cannot be counted for the candidates of the only party whose ticket is printed thereon on the ground that the failure to write names in the blank column showed the voter's intention to vote for such candidates, but they should be returned as blank ballots, under the New York election law, providing that if it is impossible to determine the elector's choice for an office his vote shall not be counted for that office, but shall be returned as a blank vote, as the marks prescribed by such law are the only means by which it permits the voter's intention to be ascertained. *People ex rel. Damon v. Fessenden* (1898) 31 App. Div. 371, 52 N. Y. Supp. 324.

A ballot marked with a cross deliberately made by the voter in the blank space for presidential electors under the words "vote for three," and not opposite the name of any candidate whatever, should be rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked with a cross in each circle at the head of three party tickets, and with crosses in the voting spaces before the names of various candidates of two of such tickets, there being no apparent reason for the marking of the cross in the circle at the head of the third ticket, is a void ballot, and cannot be counted under the New York election law, which declares a void ballot to be one upon which there shall be found any mark other than the cross mark made for the purpose of voting, and that no vote for any candidate thereon shall be counted. *Re Holmes* (1899) 61 N. Y. Supp. 775.

A ballot marked with a cross equally near to the name of two candidates for an office cannot be counted for either candidate. *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116.

Ballots marked with crosses directly on the line between candidates for the same office and in such a position as to prevent the court from determining for what candidate the same were intended to be cast, are not invalid, but 47 L. R. A.

showed there were more votes cast at said precincts than the sum of the votes for contestant and contestee. This motion was overruled, and contestee duly saved his exceptions. Conceding, as the appellant does, that there was no way of identifying what ballots, if any, were rejected by the election officers, and the county clerk having already made two examinations and two certificates of the facts as to the condition of the contents of the ballot box, we are at a loss to see what beneficial result could have accrued to either side by another recount. We do not understand that his return to the effect that "the rejected ballots are not so marked as to be identified" is questioned, and, even if it were, the law stamps it as *prima facie* true. Contestee having adopted this return as true, it must have seemed to the circuit court, as it certainly does to us, that an-

should not be counted for that office. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

Unless the cross is unmistakably above or below the line separating the names of two candidates so marked, the ballot is bad. *Walsh v. Montague* (1888) 15 Can. S. C. 495.

A ballot marked to the right of the names of two candidates with a large cross partly in the square of each candidate should be counted for the candidate in whose square appears the larger part of the cross and the point of intersection of the lines forming it. *McLaren v. Milne Home* (1881) 44 L. T. N. S. 280, 3 O'Malley & H. 178.

Ballots marked with crosses placed immediately between the printed names of candidates are invalidated thereby. *State ex rel. McMillan v. Sadler* (1899. Nev.) 58 Pac. 284.

A ballot having a cross under the device of one party, but which is also immediately across the top of the small square to the right of the name of a candidate of another party, should be counted for that candidate. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

A ballot marked with a cross on the line between the names of two candidates, the upper name not being marked in any other way, cannot be counted for either. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

Ballots on which, under the name of the candidate of one party for a certain office the name of a candidate of another party is written and a cross is made in the space therefor not squarely opposite the name written in but extending somewhat below the name of the candidate of that party, should not be counted for either, as the voter's intention cannot be determined therefrom. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

A ballot cannot be excluded on the ground that part of the cross is on the line below, where it appears that the greater part of the cross is above the line. *People ex rel. Beasley v. Sausalito* (1895) 106 Cal. 500, 89 Pac. 937.

A ballot so marked that the square opposite each of the candidates on one ticket was touched with the stamp substantially complies with the Indiana election law requiring the stamping of such squares, and does not contain a distinguishing mark, although the square opposite the name of one candidate on another ticket was also similarly touched by the stamp. *Bechtel v. Albin* (1892) 184 Ind. 193, 33 N. E. 967.

A ballot marked with a cross directly on the line between the names of two candidates for an office cannot be counted for that office, as it

other examination would necessarily disclose the same facts. The mere fact that there was a difference between the votes cast for contestor and contestee and the whole number of ballots returned to the county clerk would not indicate to the county clerk the particular ballots not counted by the judges, nor whether those not counted were for contestor or contestee. In *Sone v. Williams*, 130 Mo. 530, 32 S. W. 1016, it was ruled that, while the circuit court might order a second recount, it was not a matter of course, and when, upon the first count, the fullest opportunity had been given for examination of the ballots, and a second recount was sought upon mere belief and surmise only, it was properly denied. In this case the appellant had had the benefit of two counts, and no good purpose could have been subserved by still another recount in

the face of the admission that when made there would be no means of identification of the ballots rejected. This assignment cannot be sustained.

2. The challenges of E. W. Nelson and A. N. Payne were based upon the want of legal residence in the county. These parties testified to a residence of more than twelve months in the state and more than sixty days in the county, and that they had their home in the county. It was a question of fact in which the intention of the parties largely entered, and the circuit court found they were residents within the meaning of the law, and that finding we will not disturb. *Lankford v. Gebhart*, 130 Mo. 622, 32 S. W. 1127; *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97.

3. The exclusion of the forty-eight ballots for contestee on which there were two

is impossible to determine for which candidate the voter intended to vote. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked in the space containing instructions to the right of the names of two opposing candidates and about where the line between them would appear if extended, from which it is impossible to determine the voter's choice, cannot be counted. *State ex rel. Hyland v. Peter* (1899) 21 Wash. 243, 57 Pac. 814.

A ballot marked with a cross to the left of, and through, the line separating the names of two candidates for the same office, the crossing point of which is within the space occupied by the candidate of a party for whose other candidates a voter has voted, may be considered as indicating the voter's choice for that candidate, and the ballot cannot be counted for the other candidate. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

c. Failure to use cross.

A ballot on which the names of all the candidates except those of one party are erased, but upon which there is no cross in the circle at the head of such party ticket, nor to the left of the name of any candidate, cannot be counted for the candidates of that party. *McKittrick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23.

The provision of the Australian ballot law adopted in Nebraska, that votes shall be marked with a cross, is mandatory, and ballots on which the name of a candidate is written under the appropriate head without placing opposite his name the required cross cannot be counted for such candidate. *Martin v. Miles* (1896) 46 Neb. 772, 65 N. W. 889.

A ballot on which the name of a candidate for an office is pasted over the name of another candidate therefore under one of the regular party tickets cannot be counted for him, where there is no cross made either in the square opposite his name or under the party title, as required by statute, although the instructions appended to the ticket say that to vote for a candidate not on any ticket write or place the name of such candidate thereon opposite the name of the office, but further direct the voter in all cases to stamp a cross in the circle under the name of the party at the head of the ballot. *People ex rel. Oatman v. Fox* (1897) 114 Mich. 652, 72 N. W. 611.

But it has been held that official ballots containing but a single name for each office should be counted, although not stamped with a cross as required by statute, where the failure in no way hazards the rights of anyone, and the 47 L. R. A.

stamping in such case would not add to the certainty of the voter's intention. *Johnson v. Casnovia Canvassers* (1894) 101 Mich. 187, 59 N. W. 412.

d. Imperfect cross.

A ballot marked with a cross, although it is not as perfect as it might be, should be counted. *People ex rel. Bantel v. Morgan* (1897) 20 App. Div. 48, 46 N. Y. Supp. 898.

A ballot on which appears a cross in a party circle marked with a straight line opposite the name of a candidate of another party, evidently made with the purpose of forming a cross, which was accidentally left unfinished, is not vitiated thereby. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

A ballot marked for a candidate by a cross composed of a heavy line and a light line crossing each other within the space occupied by his name and extending above such space and below into the next candidate's space with heavy lines along side of and connected with the light line of the cross so as to constitute but one mark should be counted for that candidate, under the Oregon statute, which provides that a ballot shall be counted for officers where it is possible to determine the voter's choice, where he also voted for all the other candidates of the same party. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

A cross-mark made by a diagonal line joined at the top forming an acute angle like that of the large letter A, and which are crossed by a line nearly horizontal, is a valid mark under the New York election law. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Ballots on which lines can be seen to cross when put under the microscope should be counted, as, if the lines cross in the slightest degree, they form a cross mark within the terms of the New York statute. *Ibid.*

The marking of a ballot in the proper places but with a very heavy cross does not indicate an intention to distinguish it from other ballots, or show any wilful or wanton disregard of the election laws forbidding distinguishing marks, which will require its rejection. *State ex rel. Hyland v. Peter* (1899) 21 Wash. 243, 57 Pac. 814.

A ballot marked with an incomplete cross-mark made by one straight line joined by a second straight line at right angles is not invalid under the New York statute. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Ballots marked with crosses which are not

groups, the Republican and the Independent, not scratched, presents the decisive question in this cause. Section 4781, Rev. Stat. 1889, was repealed by the act of April 4, 1891, and a new section, bearing the same number, adopted in its stead. The new section reads: "On receipt of his ballot the elector shall forthwith and without leaving the polling place, retire alone to one of the places, booths, or compartments provided to prepare his ballot. He shall prepare his ballot by crossing out the groups he does not wish to vote and then make all changes on one group by striking out the name or names of candidates he does not wish to vote for and write the name or names of his choice underneath so that the remaining part shall express his vote upon the questions submitted," etc. This new § 4781 was again amended by an act of the general assembly ap-

proved April 18, 1893, so as to read as follows: "On receipt of his ballot the elector shall forthwith and without leaving the polling place, retire alone to one of the places, booths, or compartments provided, to prepare his ballot. He shall prepare his ballot by crossing out the groups he does not wish to vote by drawing a line or lines lengthwise through a part or all of the column of names in the rejected groups—a partial erasure of a group by lines lengthwise of the column or in any other manner than by the erasure of a name to substitute another to be taken as a rejection of the whole group, and then make all changes on one group by striking out the name or names of candidates he does not wish to vote for and write the name or names of his choice underneath so that the remaining part shall express his vote upon the question submitted. After preparing

perfect, but nevertheless sufficient, are properly counted. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 189.

The marking of a ballot with a cross of irregular shape is valid. *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190.

Any mark, however crude and imperfect in form, if it is apparent that it was honestly intended for a cross-mark and for nothing else, must be given effect as such under the Minnesota statutes requiring ballots to be marked with a cross. *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116.

See also *infra*, g, 2.

e. Device other than cross.

Whenever the marking of a ballot evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to mark the cross, but there was also an intention so to mark the paper that it could be identified; but if the mark indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law directs, as by making a straight line, or a round O, such noncompliance renders the ballot null. *Hawkins v. Smith* (1884) 8 Can. S. C. 678.

Ballots marked with an imperfect circle resembling the letter "O," made with a black lead pencil either within the circle at the head of a party ticket, or before the names of candidates, is void, and should not be counted, under the New York election law declaring that if there shall be found on any ballot any other mark than the cross mark made for the purpose of voting such ballot shall be void, and upon such ballot no vote for any candidate thereon shall be counted. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

A ballot marked with circles within the circle at the head of one party ticket instead of with a cross, and by a cross at the right of the name of a candidate for one office on another ticket instead of to the left, as required by the South Dakota statute, cannot be counted for such candidate, nor for a candidate on the ticket marked in the party circle. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180.

The marking of a ballot with a circle or an oval instead of a cross is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190; *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190; *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284, 47 L. R. A.

The marking of a ballot with a circle with two lines beneath it is invalid. *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190.

But in another case it was held that the fact that a ballot paper is marked with a circle instead of a cross does not invalidate the vote. *Buckrose Case*, 4 O'Malley & H. 110, 6 Mews' Eng. Digest, col. 124.

Ballots marked with an x instead of a cross cannot be counted. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

The marking of a ballot with a single line instead of a cross is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190; *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190; *Olmstead v. Carpenter* (1879) Hodgins, Elect. Cas. 531, Wigmore, p. 190; *Robertson v. Adamson* (1876) 3 Ct. of Sess. 978, Wigmore, p. 190; *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, Wigmore, p. 190; *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190.

A ballot marked with a straight line under a party title, instead of the cross as required by statute, cannot be counted. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

Ballots marked with perpendicular or vertical lines are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 N. W. 284.

Ballots marked with a straight line over the word "no" are properly rejected. *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 768.

Ballots marked with a straight line either in the circle at the head of a party column or opposite the names of candidates cannot be counted under the Pennsylvania election law of 1893 requiring the marking of ballots by a cross, as such provision is mandatory. *Pike Election* (1896) 5 Pa. Dist. R. 519; *Long v. Kochenderfer* (1894) 3 Pa. Dist. R. 678.

But in *Middendorf's Case* (1894) 4 Pa. Dist. R. 78, it was held that ballots marked with a single stroke in the square opposite the names of candidates or in the circle at the head of a party column should be counted, the intention of the voter being clear from the face of the ballot, although the Pennsylvania election law of 1893 directs the marking of ballots with a cross.

A ballot marked in the proper places with a perpendicular stroke from which it is possible to determine the voter's choice, and marked for no more persons than the voter has the right to vote for, should be counted, although the Pennsylvania election law of 1893 requires bal-

his ballot the elector shall fold the same so that the face of the ballot will be concealed and the initials of the judges may be seen. He shall then vote forthwith and before leaving the polling place," etc. This law of 1893 was in force when the general election of 1896 was held, and by it the validity of ballots cast at that election must be determined. This section imperatively requires the voter to cross out every group but one, and on that one he must do his voting, and make his scratches, if he desires to make any. Its provisions are stringent, plain, and mandatory. Nothing but an official ballot so prepared was a lawful ballot under the act of 1893. The learned counsel for contestee relies upon § 4678, Rev. Stat. 1889, to uphold the validity of these rejected ballots. This section was first adopted March 23, 1863, and has been retained in all the gen-

eral revisions down to and including that of 1889. When that section was adopted, we had not adopted the Australian ballot system. There was but one group upon any ballot. It had reference to the system of balloting then in vogue, and to those cases only in which the elector by oversight or mistake inserted two names for the same office on his ticket. That section is not applicable to the amended law which provided for grouping the various candidates upon one ballot, and requiring all his voting to be done under one caption, and in one group.

But it is urged that, granting that it is the evident purpose of the law that the voter should cross out every group save the one on which he does his voting, his neglect to do so will not render his ballot so unlawful that it must be rejected; that this provision is merely directory, and not mandatory. Many

lots to be marked with a cross, where the only grounds specified in such act for rejecting the ballots are that more names have been marked for an office than the voter has the right to vote for, or that it is impossible to determine his choice for an office; in which cases the ballot shall not be counted for such office. *Hempfield Election* (1894) 8 Pa. Dist. R. 499.

Ballots marked with a figure 1 in the square opposite the name of the candidate, instead of with a cross as required by the Pennsylvania statute of 1898, are illegal, and should be rejected. *Re Flynn's Election* (1897) 181 Pa. 457, 37 Atl. 523.

Ballots marked with a horizontal line within the circle at the head of a party column, instead of with a cross as required by the Pennsylvania election law of 1893, cannot be counted. *East Coventry Election* (1894) 8 Pa. Dist. R. 377.

Ballots marked, not with a cross, but with a perpendicular pencil mark in the proper place for the names of all candidates intended to be voted for, are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The marking of a ballot with several small lines not forming a cross is invalid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, *Hodgins, Elect. Cas.* 517, *Wigmore*, p. 190; *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, *Wigmore*, p. 190.

The marking of a ballot with small light curved lines touching a principal line like branches is invalid. *Ibid.*

The marking of a ballot with a horizontal line with a spiral down and across is invalid. *Ibid.*

The marking of a ballot with a spiral uniting two vertical bars is invalid. *Ibid.*

A ballot marked with a straight line drawn diagonally across the square at the right of a party name at the head of a ticket, instead of with a cross as required by statute, should be rejected. *Curran v. Clayton* (1893) 86 Me. 42, 29 Atl. 930.

A ballot marked with a short diagonal line opposite the name of a candidate, instead of with a cross as required by the South Dakota statute, cannot be counted for such candidate. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180.

The rejection by the court from a count, of ballots having but a single diagonal mark in the square, was not questioned by the contestant, in *Gill v. Shurtleff* (1899) 183 Ill. 440, 56 N. E. 164.

Whether or not there is a deliberate departure from the prescribed manner of marking ballots, or a merely accidental or careless depart-

ure, is a question of fact for the trial court, where the marks placed by the voter in some of the squares do no more than have one line crossing the other, leaving it doubtful as to whether it is a cross, and in one square they just meet so that it is not a cross, and does not indicate a choice or vote for the particular candidate. *Voorhees v. Arnold* (1899) 108 Iowa, 77, 78 N. W. 795.

A ballot marked with several straight lines, each extending beyond the lines of the circle, some of them crossing in the center of the circle and others not at nor so near the center, together forming a somewhat star-shaped figure, violates the Nebraska statute providing that ballots shall be marked with a cross, and shall not contain identifying marks, and should not be counted. *Mauck v. Brown* (1899; Neb.) 81 S. W. 313.

A ballot on which the word "yes" is written under the name of one candidate for an office, and the word "no" under the name of another candidate therefore, does not require the rejection of the vote as to other candidates on the ballot, under the Missouri election law of 1891, which contains no prohibition thereof requiring its rejection for failure to conform thereto. *Lankford v. Gebhart* (1895) 130 Mo. 621, 32 S. W. 1127.

A mark not a cross requires rejection of the ballot, under the Nevada statute providing for the marking of ballots by a cross, and that any other names, words, or marks shall invalidate them. *Dennis v. Caughlin* (1893) 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 738.

Ballots marked with the letter "D" or "A D" in the official heading thereof, scratched over deliberately with a lead pencil, are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

A ballot marked with two lead pencil lines commencing in the circle preceding the party designation and running nearly perpendicular through such circle and through each of the squares opposite the names of candidates, such lines being at some points coincident and at others separated, but without a cross or anything approaching one in the circle or square opposite a candidate's name, does not comply with the Illinois ballot law, and cannot be counted for a candidate of that party. *Apple v. Barcroft* (1895) 158 Ill. 649, 41 N. E. 1116.

A mark on a ballot bearing no resemblance to a cross, and showing no attempt to make a cross, will not permit the counting of a ballot. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

Ballots marked with the letter S and a vertical line drawn through it are invalid. *State*

cases are to be found in which the courts have drawn a distinction between mandatory and directory statutes and provisions of statutes. Without stopping now to cite the various decisions, we think it can be safely asserted that, where the provision of a statute is the very essence of the thing which it requires to be done, it is imperative or mandatory. Little assistance can be derived from the generalization of authors or courts on the subject. When the legislature has made such particular, stringent provisions as to the duty of the voter as in this § 4781 as amended in 1893, we hold the statute is mandatory or meaningless. Three times in six years the legislative mind was directed to the subject of the preparation of the voter's ballot. With a design and purpose of securing to the voter his independence and freedom in the exercise of his political rights, protect him from fraud and intimidation, the legislature adopted, and from time to time has amended, this Australian ballot law. The language is imperative. It

says "he shall cross out the groups he does not wish to vote;" directs how he shall do it. To hold such language merely directory would frustrate the essential principle of the law. Contemporaneous construction has been that the judges reject all ballots on which two groups remain unscratched, and such, in our opinion, is the evident meaning of the law. The force of this contention, however, is sought to be broken by the fact that the Independent group contained only one name. We hold that "a group," in this section, consists as well of one name under a distinct caption as it would if there had been a name for each office on the ballot; and if we would reject the latter so we must the former. By leaving two of the "groups" unscratched or unerased in any manner whatever, these voters, in the contemplation of law, voted two tickets, as much so as if they had each deposited two distinct ballots under the system previous to the adoption of the Australian ballot. The erasures on the Republican ticket may be evidence that they

ex rel. McMillan v. Sadler (1899; Nev.) 58 Pac. 284.

Ballots marked with a letter "N" and a horizontal line drawn across the same are invalid. *Ibid.*

Ballots marked with two vertical lines not forming a cross are invalid. *Ibid.*

A ballot marked with two parallel horizontal lines across the circle at the head of a party ticket should be rejected. *Christopherson v. Manistee* (1898) 117 Mich. 125, 73 N. W. 445.

Ballots marked with an ordinary business-check mark are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The marking of crosses before the names of all candidates but one for a certain office, or the crossing out by pencil lines of all names for an office but one, in an attempt by the voter to follow the prior law which required the elector to express his preference by canceling or marking out the names of those who were not his choice is not sufficient to permit the counting of such ballots by the candidate before or on whose name no mark is made, under a law requiring the voter to make a mark to the left of the candidate for whom he desires to vote, although it further provides that if it is possible to ascertain the voter's choice as to part of the officers on a ballot it shall be counted, as the requirement as to marking is mandatory. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

Ballots marked with horizontal lines, or capital W and horizontal lines crossing it, are invalidated thereby. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

A ballot containing no other marks than marks opposite the name of a candidate more nearly resembling a spider than anything else cannot be counted by him. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 43 Pac. 169.

Ballots marked with stars, and with marks resembling spiders, are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The marking of a ballot with a star or asterisk is invalid. *White v. Mackenzie* (1875) 20 Lower Can. Jur. 22, Wigmore, p. 190.

A ballot marked opposite the name of a candidate with three straight lines so as to distinctly make a star should be rejected, it being apparent from the color and uniformity of the lines, and their course and direction, that it was deliberately and intentionally made. 47 L. R. A.

Sweeney v. Hjul (1897) 23 Nev. 409, 48 Pac. 1036, 43 Pac. 169.

A ballot must be marked with a cross in order to be counted, under the Rhode Island election law of 1889, providing that the elector shall prepare his ballot by marking in the appropriate margin or space a cross opposite the name of the candidate of his choice for each office to be filled. *Re Vote Marks* (1890) 17 R. I. 812, 21 Atl. 962.

A ballot marked opposite the name of a candidate with a perpendicular mark with horizontal marks crossing the same at the top and bottom should be rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036.

A ballot containing opposite the name of a candidate marks of an impossible description that cannot be called a cross cannot be counted. *Ibid.*

Ballots marked in a party circle with several marks crossing each other at various angles are valid. *People ex rel. Obert v. Bourke* (1900) 68 N. Y. Supp. 906.

A ballot not marked with a cross or crosses made substantially thus: "+," and placed substantially within the circle or square or squares printed at the places designated, should not be counted under the Iowa statutes. *Whittam v. Zahorik* (1894) 91 Iowa, 23, 59 N. W. 57.

Ballots clearly marked within the space occupied by the name of a candidate either by a cross or a single line are properly counted for that candidate under the Oregon statute, which does not specify the kind of mark to be used, although it provides that the mark shall be to the left of the name of the candidate, in view of the provision that if it is possible to determine the elector's choice for a part of the officers the ballot shall be counted for such part. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

Ballots are not invalidated by the marking of the letters "Y," "T," inverted "T," "V," inverted "V," or making a mark resembling the figure "4" in attempting to make a cross. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The marking of a ballot with a line like the figure 1 with a loop at the top is valid. *Robertson v. Adamson* (1876) 3 Ct. of Sess. 978, Wigmore, p. 190.

A ballot marked in the proper compartment with a straight line met perpendicularly by another straight line should be allowed. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247

intended to vote that ticket, but the total absence of any mark or scratch whatever upon the Independent ticket as unerringly indicates an intention to vote that ticket also, and no voter is allowed to vote two tickets, and when he does there is no way to determine what his intention is, and both must be rejected. There is no occasion whatever for bemoaning the supposed wrong inflicted upon "the freeman" by so doing. The "freeman" who has sense enough to scratch six "groups" or "columns" of candidates out of eight ought to be presumed to have enough to scratch the seventh when that "group" or "column," as in this case, gives warning of its presence by its caption in heavily leaded type; and, if he has not, he ought to seek the assistance of the judges to teach him how to scratch. Another reason why these ballots should be rejected is that the failure to cross out all the groups but one is the act of the several voters themselves. The ballot was in the form prescribed. It was furnished by the judges and

their initials were upon it. No act of the officers contributed to the violation of the statute, but the voter, through inattention, ignorance, or purposely, failed to mark out one of the groups, and can complain of no one if he thereby lost his vote. He is in no position to ask protection from the ignorance or fraud of the officers. If he was illiterate, the law provides that the judges should instruct him in preparing his ballot. We hold that the forty-eight ballots upon which the Independent and Republican groups remained uncrossed or erased were properly rejected by the circuit court. As already said, the statute is peremptory, and the entire ballot is rendered illegal and void when the plain, positive requirements of the law are disregarded by the voter, as was done in the case of these forty-eight ballots, and its illegality is not confined to the office of sheriff, as contended for by contestee.

4. The circuit court refused to hear evidence that at Burfordsville and Crump precincts the judges of election assisted in mak-

The marking of a ballot with a cross formed like an anchor is valid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, *Hodgins, Elect. Cas.* 817, *Wigmore*, p. 190.

A ballot marked only with a straight mark in the square at the top of a party column should be counted, as the North Dakota statutes as amended require the marks to be placed in the square at the top of a party ticket, or a cross or mark in the square opposite the names of candidates. *Houser v. Pepper* (1890) 8 N. D. 484, 70 N. W. 1018.

Ballots marked with an inverted V are valid. *Hawkins v. Smith* (1884) 8 Can. S. C. 876.

The marking of a ballot with two strokes to the right of the name of a candidate, but not in the square, is valid. *Anstruther v. Williamson* (1896) 13 Ct. of Sess. 877, *Wigmore*, p. 190.

At school board elections in English boroughs a voter has the option of placing on the ballot paper opposite the name of any candidate for whom he intends to vote either crosses or figures to signify the number of votes he intends to give to such candidate. *Morris v. Beves* [1897] 1 Q. B. 449, 66 L. J. Q. B. N. S. 299, 77 L. T. N. S. 120.

Ballots at school-board elections in English boroughs are valid, whether marked with crosses opposite the names of candidates or with figures, if the voter's intention can be ascertained with reasonable certainty, and it does not appear that he intended to give a greater number of votes than there were members to be elected, under a general order of the educational department declaring that elections shall be held in accordance with the ballot act of 1872, which directs a voter to vote by placing a cross on the right-hand side of the ballot paper opposite the name of each candidate for whom he votes, but containing the additional proviso that the voter is entitled to a number of votes equal to the number of members to be elected, and may give them all to one, and may place against the name of any candidate for whom he votes the number of votes he gives such candidate, in lieu of a cross. *Phillips v. Goff* (1886) L. R. 17 Q. B. Div. 805, 55 L. J. Q. B. N. S. 512, 35 Week. Rep. 197, 50 J. P. 614.

2. Blots.

The marking of a ballot with a cross in ink and a duplicate blurred cross in the next candidate's square, made by folding the ballot before

dry, is valid. *Reg. v. Wilson*, 1 Austr. Jur. Rep. 150 (Victoria; 1870) *Wigmore*, p. 190.

The marking of a ballot with a cross in ink, with a duplicate blurred cross in the next candidate's square, made by folding the ballot before dry, is valid. *Grant v. McCallum* (1876) 12 Can. L. J. 118, *Wigmore*, p. 190.

A ballot marked with a solid irregular black figure instead of a cross should be counted, the marking appearing to have been done with a stencil by twisting or turning it in the voter's hand, as the intention of the voter is manifest. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

Ballots marked with a large blue daub or red blur in the circle at the head of a party ticket, probably made in an attempt to stamp a cross therein with the official stamp, are properly counted for a candidate of that party. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180.

Marks made with ink, although somewhat blurred and not forming a cross, but which nevertheless show an attempt on the part of the voter to make such a mark, may be counted. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

Crosses indiscriminately appearing upon the face of ballots, where it is evident that such crosses were simply the impressions of crosses made with a soft lead pencil, and caused by the folding of the ballots, do not invalidate them. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

Crosses found on the back of ballots do not invalidate them where it is apparent that the same were made from the impressions of the pencil in the attempt of the voter to properly mark his ballot resting upon a stained or dirty board. *Ibid.*

Ballots somewhat defaced by ink blots which do not appear to have been made intentionally or for the purpose of marking the ballots, but seem to have been the result of accident caused mainly by the use of poor paper for the official ballots, are properly counted. *Church v. Walker* (1897) 10 S. D. 90, 72 N. W. 101.

That the impressions of the stamp within the squares containing the emblem of a party are not very clear or distinct, or are somewhat blurred as if made with a tremulous hand, does not require the rejection of the ballots as containing distinguishing marks. *Zels v. Passwater* (1895) 142 Ind. 375, 41 N. E. 796.

Ballots marked with blurred spots plainly

ing out ballots without requiring a preliminary oath as required by § 4784, Acts 1891, p. 135, as amended April 18, 1893 (Laws 1893, p. 164). That section provides: "Any elector who declares under oath to the judges of election having charge of the ballot that he cannot read or write or that by reason of physical disability he is unable to mark his ballot may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting in the manner hereinbefore provided." It will be observed that the notice of counter contest nowhere charges that the electors named therein fraudulently accepted assistance without having previously taken the required oath, nor that, as a matter of fact, they could read or write, or were not so disabled they could not mark their ballots. We are asked to hold the failure of the judges to require such a preliminary oath shall disfranchise the ignorant voter whose illiteracy compels him to call upon them for

assistance. Though too ignorant to mark out his own ballot, he is required to instruct the judges in their duties by insisting they must first administer the oath to him. While this statute requires the judges to assist any elector who declares under oath that he cannot read or write, it does not say they shall not assist others that they know of their own knowledge cannot read or write. Such cases must often occur, and, while the judges should require the oath if they are doubtful of the elector's inability, still it would be a harsh construction to rule that they were guilty of conduct which should disfranchise the voter if they failed to require such oath, when they well know he could neither read nor write. When it is remembered that our election judges are required to be chosen from the opposing political parties, and our precincts are small, the opportunities for fraud in a voter thus assuming ignorance are so very slight that we cannot believe the legislature could have intended to attach such a penalty for the simple act of aiding

made by a lead pencil which may have been made for the purpose of canceling a cross, but which might have been made also for identification, should be rejected under the Nevada statute providing that any names, words, or marks except as the act provides shall invalidate the ballot. *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 768.

Marks or blurs accidentally made in attempting to correct a mistake, or additional lines used in attempting to make more certain or clear a cross poorly made by reason of unskilfulness or carelessness, and not indicating an intention to identify the ballot, will not avoid it, but it should be counted. *Ibid.*

A ballot stamped at the proper place with the official stamp is not invalid because the cross strokes were blurred. *People ex rel. Beasley v. Sausallito* (1895) 106 Cal. 500, 39 Pac. 937.

A ballot which is marked in the margin opposite the name of one candidate only by an irregular blot without the semblance of a cross, apparently made with the same ink with which the other ballots are marked, and on which no mark or stamp appears in the margin, is not marked with a cross as required by law, and should be rejected. *Lay v. Parsons* (1894) 104 Cal. 661, 38 Pac. 447.

A ballot marked with a blot in the center of a ticket instead of being marked with a cross as required by the Michigan statute, cannot be counted. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A ballot which is disfigured by the partial erasure of a cross placed after the name of a candidate is properly rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot disfigured by the voter deliberately and intentionally attempting to scratch out and obliterate with a pencil a cross made opposite the name of a candidate thereon, should not be counted. *Ibid.*

g. Superfluous lines and marks.

1. Distinguishing marks.

There is a practical agreement that distinguishing marks will render the ballot void; but it is not always easy to tell what is a distinguishing mark.

What constitutes an identifying mark is generally a question of fact for the trial court. *Keiso v. Wright* (1900; Iowa) 81 N. W. 805.

In some cases identifying marks on ballots 47 L. R. A.

are so apparent or conclusively identifying that the court may say as matter of law that they may be used for that purpose, and hence the ballots should be rejected under the Iowa statutes requiring their rejection where marked in any other way than as prescribed so that they may be used for the purpose of identifying the ballots; and in other cases where it is doubtful whether they could be so used it is a question of fact for the jury. *Voorhees v. Arnold* (1899) 108 Iowa, 77, 78 N. W. 795.

A ballot on which a mark or character is used, which, though indicating an intention to vote a particular party ticket or for certain candidates, at the same time serves the purpose of indicating who voted it, thereby furnishing the means to designing persons of evading the law, will be rejected under the Illinois ballot law, although nothing is said in that act about distinguishing marks. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

Ballots in envelopes on which the names of the voters casting them are written or on which other distinguishing marks appear are illegal under the Connecticut secret ballot act of 1889, providing that if any envelope or ballot shall contain any mark or device so that the same may be identified in such a manner as to indicate who cast it the ballot shall not be counted. *Mallett v. Plumb* (1891) 60 Conn. 352, 22 Atl. 772.

A ballot paper marked on the back with the figure 33 was, in the absence of any showing that the voter could be identified by the writing, allowed. *Buckrose Case*, 4 O'Malley & H. 110, 6 Mews' Eng. Digest, col. 124.

A ballot marked with a cross in the party circle, and with a cross opposite the name of each candidate on the same ticket except one, under whose name were written the words "anybody but him," contains identifying marks within the prohibition of the Nebraska statute, and should not be counted. *Mauck v. Brown* (1899; Neb.) 81 N. W. 318.

Voting twice upon the same ballot for a candidate by placing a cross opposite his name printed thereon in two places, contrary to law, does not in and of itself constitute a distinguishing mark which requires rejection of the entire ballot so far as it relates to that office, where over 400 ballots were so marked. *Sawin v. Pease* (1895; Wyo.) 42 Pac. 760.

A ballot marked with a cross in a party circle, and containing the word "against" writ-

a voter to cast his ballot without requiring him to declare under oath what they already knew beforehand. Suppose an elector with both arms cut off, or afflicted with palsy or blindness, presents himself, and asks to have his ballot prepared by the judges; are we to say that the judges must go through the empty form of administering the oath as to his physical disability? I think, most clearly, not. But, in any event, the mere failure of the officer to perform some prescribed duty, in the absence of any fraud or imposition practised upon the voter, will not deprive him of his ballot unless the language of the statute allows no other alternative. We think the court correctly held the evidence inadmissible under the allegations of the notice in the counter contest.

5. Again, it is urged that the court erred in not permitting the contestee to show that in the case of certain electors the Democratic judges went into the booths, and assisted certain electors therein named. Section 4784, a part of which has already been

ten under the name of a candidate for an office of another party, and the word "for" written under the name of a candidate for the same office of the party in whose circle the cross is made, contains identifying marks within the prohibition of the Nebraska statute, and should not be counted. *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

A ballot properly stamped for a candidate, but on which there is also a distinct cross opposite a blank line lower down, cannot be counted for him, as such mark vitiates the ballot, under the California Political Code declaring that no voter shall place any mark upon his ballot by which it may be afterwards identified, and that ballots not made as provided shall be void and not counted. *Lauer v. Estes* (1898) 120 Cal. 652, 53 Pac. 263.

The marking of a cross opposite the names of all candidates of both parties and opposite the name of one party at the head of the ticket, the marks thus opposite candidates being all placed inside of the square therefor, and the one opposite the party named inside of the circle therefor, as required by statute, does not constitute an identifying mark,—especially in view of the provision of the statute that the unnecessary marking of a cross in a square by a marked party circle shall not affect the validity of the vote. *Kelso v. Wright* (1900; Iowa) 81 N. W. 805.

A ballot regularly stamped for the number of presidential electors for whom the voter is entitled to vote, on which at a point lower down and opposite certain other candidates for presidential electors there is a mark apparently made with ink, there being nothing to show that it was accidental, is vitiated thereby under the California Political Code, declaring that no voter shall place any mark on his ballot by which it may be afterwards identified, and that ballots not made as provided shall be void and not counted. *Lauer v. Estes* (1898) 120 Cal. 652, 53 Pac. 263.

Unauthorized marks on ballots to be identifying must be deliberately made, and not be merely accidental or a mere effort to correct what may be thought to be an improper marking, in order to require a rejection of the ballots, under the Iowa statute requiring a rejection where marked in any other way than as prescribed, so that the mark may be used to identify the ballots. *Voorhees v. Arnold* (1899) 108 Iowa, 77, 78 N. W. 795.

47 L. R. A.

copied, contains this proviso: "Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges after reading to the elector the contents of the ballot shall without leaving their respective positions prepare such ballot as the elector may dictate." Acts 1893, p. 164. Here, again, was a positive violation of the law. The judges had no right in the booths, and yet there is no allegation that this misconduct was in furtherance of a design to unduly influence these electors, or that they were in fact imposed upon, or any advantage taken of them, by the judges. The judges rendered themselves amenable for a violation of the law, but the question here is, Shall this unlawful action of the judge disfranchise the illiterate voter for whose protection the statute made provision? Must he suffer because those designated by the law to instruct him violate the law? To so hold would es-

Ballots marked with a cross in the square opposite an office for which the name of no candidate is printed thereon are properly excluded as containing identifying marks. *Ibid.*

A ballot marked with a cross under a party name with a half circle around it and a figure 9 written in the square under another party name should not be counted, as the figure used could not have been appropriate nor intended to express any intent of the voter. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A ballot on which there are printed the names of candidates for two separate townships should not be counted where it is marked by a voter of one township with a cross opposite the names of some of the candidates for office in the other township, as such marks are distinguishing marks in violation of the Nevada statute. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 109.

A ballot marked with a cross, but also with the letter "H" in the circle at the head of a party ticket, contains identifying marks in violation of the Nebraska statute, and cannot be counted. *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

The marking of a ballot with a cross with "Cu" above it is invalid. *Robertson v. Adamson* (1876) 3 Ct. of Sess. 978, Wigmore, P. 190.

A ballot marked with a diagonal black line in one of the spaces for the writing in of the name of a candidate in the blank column renders the ballot void, there being no apparent reason therefor except that it was deliberately made for the purpose of identification. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Ballots with words written thereon in all cases where it is apparent that the words were written by the elector, or by some person unauthorized, before the same were cast by the elector, are invalidated thereby. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The indorsement of the word "Eagleham" upon a ballot is a clear violation of the provision of the Nebraska statute that no elector shall place any mark upon his ballot by which it shall be afterward identified as the one voted by him, and it should be rejected. *Spurgin v. Thompson* (1898) 37 Neb. 89, 55 N. W. 297.

A ballot marked with a cross-mark in the voting place opposite the name of a candidate, and with a diagonal black pencil mark deliber-

tablish a precedent which unscrupulous partisan officials might seize upon to nullify a perfectly fair and honest election. It is a sound distinction of the law which disfranchises a voter for his own failure to obey the plain and positive rules adopted to secure an honest expression of the will of the people, and that which refuses to punish him for the neglect or misconduct of an officer, over whose conduct he has no control, as to some provision which the legislature has not deemed of sufficient importance to declare that a noncompliance therewith shall avoid the election or render a ballot illegal and void. This objection cannot, for these reasons, be sustained.

6. There was a misnomer of Robert Bueltemann in contestor's notice. The notice gave his name as Henry Bueltemann. The circuit court unquestionably had the power to have permitted an amendment of the given name, and to have heard the testimony as to his nonresidence. As the exclusion of

this voter does not determine the contest, it is not necessary to discuss the point further. The right to amend in election contests was fully considered and affirmed by this court in *Nash v. Craig*, 134 Mo. 347, 35 S. W. 1001. By the official count respondent received 2,440 and appellant 2,449 votes. It was admitted that by the official count of Steimel precinct respondent received 104 votes and appellant 308 votes. According to the recount of Steimel precinct, respondent, or contestor, received 139 and appellant 325 votes, a gain of 35 votes for contestor, and of 17 votes for contestee. The court made a finding that eight ballots counted for contestee were cast by illegal voters, among whom was Robert Bueltemann. No exceptions were taken to this finding save as to Robert Bueltemann, so that the total vote of contestee must be reduced by eight on this account. It was shown that two illegal votes were cast for contestor by McGuire and Wilson, and these must be deducted

ately made in the space occupied by his name on the right side thereof apparently for the purpose of identification, should be rejected under the New York election law providing that it shall not be lawful to make any mark upon an official ballot other than the cross mark used for the purpose of voting, which must be placed in the circle or voting spaces to the left of the names of candidates, and that any ballot containing any other mark shall be wholly void, and no vote thereon shall be counted. People *ex rel.* Pierce v. Parkhurst (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Ballots marked with more than a single cross under a party heading do not properly express the voter's intention, and should be excluded. Atty. Gen. *ex rel.* Scott v. Glaser (1894) 102 Mich. 405, 61 N. W. 651.

A ballot on which the voter has indiscriminately placed crosses on various parts thereof is properly rejected. Sweeney v. Hjul (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot which bears opposite the name of one of the candidates a perpendicular mark is invalid, and cannot be counted. *Ibid.*

Ballots with equation marks between the printed names of the candidates and the party designation are invalid. State *ex rel.* McMillan v. Sadler (1899; Nev.) 58 Pac. 284.

Ballots on which the elector has voted for the proper number of candidates for some office, and also placed an additional cross in the proper place after the blank space left for the writing in of the name of any candidate nominated to fill a vacancy, are invalidated thereby. *Ibid.*

A cross with a large figure 1 placed thereafter invalidates the ballot. *Ibid.*

A ballot marked with two distinct crosses immediately under the names of candidates cannot be counted. Sweeney v. Hjul (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked with a cross near the center and top thereof and immediately under the cross printed thereon, and with a cross in the blank space beneath the name of a candidate, and with another cross near the middle of the ticket and immediately following the words "for members of assembly," is void and properly rejected. *Ibid.*

The marking of a ballot with a cross, with additional marks of various sorts, is invalid. Cameron v. McLennan (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

The marking of a ballot with a cross with small lines running in several directions is invalid. L. R. A.

valid. Dionne v. Gagnon (1883) 9 Quebec L. R. 20, Wigmore, p. 190.

Ballots marked with a cross in the proper place, but inclosed with the letter "O" or circular lead pencil mark, are invalid. State *ex rel.* McMillan v. Sadler (1899; Nev.) 58 Pac. 284.

Writing a word instead of employing a cross as required by statute is ground for rejection of ballots so marked. Dennis v. Caughlin (1895) 22 Nev. 447, 20 L. R. A. 731, 41 Pac. 768.

The writing on a ballot opposite the word "yes" on a proposed constitutional amendment submitted of a word which may be read "yes" or "yet" tends to indicate the voter's choice and may hardly be considered a distinguishing mark which will prevent the ballot being counted, in a contest between candidates for an office also voted for in the same ballot. Parker v. Orr (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

A ballot properly marked in a party circle with a cross, but having also the word "yes" written in the square of one of the tickets, should be rejected as containing an identifying mark. Whittam v. Zahorik (1894) 91 Iowa, 23, 59 N. W. 57.

The writing of the word "democratic" at the head of a ticket, making a single mark through the circle or square, making a circle or other irregular character within the circle or square, making a cross opposite the names outside the square and signing the name of the voter to the ballot, are all modes of marking which disregard the directions of the Illinois ballot law requiring a cross to be placed in the appropriate margin or place opposite the name, and furnish the means whereby the secrecy of the ballot could be destroyed, and require the rejection thereof. Parker v. Orr (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

Ballots on which the words "voted" or "voted for" are written after the name of a candidate contain a distinguishing mark by which they might be identified, and should not be counted. Van Winkle v. Crabtree (1899) 34 Or. 462, 55 Pac. 831.

A ballot marked only by the words "against incorporation" written in lead pencil at the bottom entirely below the printed matter, instead of being marked with a cross put on with the official stamp, should be excluded where there is no provision for that method of voting except for a candidate for an office whose name is not

from his total. The following tabular statement shows the result:

	Hope.	Flentge.
Recount	2,440 35	2,449 17
	<hr/> 2,475	<hr/> 2,466
Deducted illegal voters	2	8
	<hr/> 2,473	<hr/> 2,458

Majority, 15.

If to this we add the result ascertained by the recount for appellant, and consider the whole of that return in evidence, we would have added to the above totals the following:

Hope.	Flentge.
2,473	2,458
42	54
<hr/> 2,515	<hr/> 2,512

Majority, 3.

on the ballot. *People ex rel. Beasley v. Sausville* (1895) 106 Cal. 500, 39 Pac. 937.

Ballots marked on the outside with the letters "O. K." in lead pencil contain a device, and cannot be counted under N. C. Code, § 2687, prescribing that ballots shall be without device, the purpose of which is to preserve the secrecy of the ballot and protect the voter from intimidation. *Baxter v. Ellis* (1892) 111 N. C. 124, *sub nom.* *State ex rel. Baxter v. Ellis*, 17 L. R. A. 382, 15 N. E. 938.

Ballots marked with the letters O. K., rendering it possible to identify them, are void, and cannot be counted, under the Oregon election law prescribing a punishment for the elector who places a distinguishing mark upon his ballot whereby it may be identified, although it does not in positive terms provide that such ballot shall be void. *Van Winkle v. Crabtree* (1899) 84 Or. 462, 55 Pac. 831.

Ballots on which are written across amendments the words "rats" or "don't want any king" should be excluded as containing distinguishing marks, as such expressions were not used and could not be used for the purpose of expressing the voter's preference for a certain candidate. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346.

The indorsement by a voter on the back of a ballot of a statement of inability, for certain reasons, to register, and that he lives in the ward and is entitled to his franchise there, is a distinguishing mark, within the Washington statutes declaring void ballots having marks upon them by which they may afterwards be distinguished. *State ex rel. Hyland v. Peter* (1899) 21 Wash. 243, 57 Pac. 814.

Ballots marked with a circle within the party circle and about half as large, and also with a cross which is partly in and on the inner pencil circle and the ends of which extend into the larger and true circle, violate the provision of the Nebraska statute that no voter shall place identifying marks upon his ballot. *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

The placing of a cross in the marginal space at the right of the name of a candidate, instead of in the square at the right thereof, does not require the rejection of the ballot on the ground that the mark so placed may serve to distinguish it, where the statute does not require the placing of the cross in the square, but merely that it shall be placed after the name of the

As it does not change the result, we have not considered whether the whole certificate is a part of the record or not. As appellant challenges and objects to it, we leave it out of consideration. The result is, respondent was elected collector of the revenue by a majority of fifteen votes.

The judgment is affirmed.

Sherwood, Burgess, and Brace, JJ., concur.

Barclay, Ch. J., dissenting:

In the third section of the foregoing learned opinion, our Brother Gantt holds that nearly fifty voters must lose their votes cast at the election of 1896. All these voters had prepared and voted ballots on which the entire Republican ticket remained unscratched, and on which were noted their votes upon the several constitutional amendments in the same (the Republican) column. All the other tickets on the papers were crossed out by pencil marks, except the "Independent Ticket," on the extreme right of

candidate voted for. *Tebbee v. Smith* (1895) 108 Cal. 101, 29 L. R. A. 673, 41 Pac. 454.

A ballot stamped in the square containing the device at the head of one ticket, and also between the name of that party at the top of the ticket and to the left of the name of a candidate on the same ticket, violates the provision of the Indiana election law forbidding a stamp elsewhere on the ticket when stamped in the square containing the device, unless there be no candidate for some office in the list under the stamped device, and forbidding distinguishing marks, and cannot be counted. *Sego v. Stoddard* (1893) 136 Ind. 297, 22 L. R. A. 408, 36 N. E. 204; *Sego v. State ex rel. Stoddard* (1894) 136 Ind. 700, 36 N. E. 208.

Ballots marked with a cross under one party name, but also with two marks similar to commas under another party name, should be excluded, as such marks could not have been used to have expressed the voter's intention. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A single short line in a party circle on a ballot marked with a cross in another party circle is a mark other than a voting mark, within the New York election law declaring that any ballot on which appears any mark other than the cross-mark used for the purpose of voting shall be void, and no vote thereon shall be counted. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

Ballots marked, not only with the necessary cross under a party name but also containing various other crosses, should be rejected as containing distinguishing marks. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 396, 405, 61 N. W. 648, 651.

The marking of more names for a certain office than there are persons to be elected to that office does not require the rejection of ballots so marked from the count as to other offices, on the ground that they contain identifying marks within the statutory provision forbidding the placing of identifying marks upon ballots by voters, in view of another provision that where a voter marks more names than there are persons to be elected to an office, his ballot shall not be counted for such office. *Day v. Gunning* (1899; Cal.) 59 Pac. 196.

Ballots having more than one stamp mark in the large space inclosing the device of a party contain distinguishing marks, and cannot be

the ballot. (It appears elsewhere in the case that the same ruling will probably annul a large number of Democratic ballots, marked in a similar way. Those ballots will be again referred to.) The so-called "Independent Ticket" consisted of the name of one candidate for sheriff, printed near the bottom of the column. The column was otherwise totally blank. Yet because that ticket was not erased the votes of all those who overlooked or ignored it (and who thought they had expressed their votes for other offices by proper marks on the ballot paper) are to be totally nullified by the ruling of our learned associates. To such a judgment we enter our most respectful, but emphatic, dissent; it seems to us a departure from valuable principles (heretofore announced in this state and elsewhere) governing the exercise of the electoral franchise. Whenever a ruling is proposed, the effect of which is to deprive a large number of citizens of their highest privilege as freemen, any court should, before indorsing it, be very sure, indeed, that the ruling is sound, and

that it correctly declares the true intent of the law that is supposed to point to such a result.

1. Section 4781 (as amended by laws 1893, p. 156) has been already quoted. It directs the voter how to indicate the vote which he is entitled to cast. The prime object of the section is to point out how the voter may express his choice on all "the questions submitted." Its object is not to set a trap to catch him, and prevent his voting. The gist of the legislation (as to the mode of marking the ballot) is found in the statement that the voter is to prepare his ballot so that the part which remains "shall express his vote upon the questions submitted." He is directed to put his vote into one column, with a view, no doubt, to facilitate the labors of the election officers in counting the votes. But the law does not say that if the voter leaves any names in other columns he is to lose his entire vote. On the contrary, he is authorized in positive terms to leave plenty of unscratched names on other columns of the paper, if he makes a "partial erasure"

counted under the Indiana election law, which contemplates the making of but one stamp mark in a square, and provides that ballots containing distinguishing marks shall not be counted. *Sego v. Stoddard* (1893) 136 Ind. 297, 22 L. R. A. 468, 86 N. E. 204; *Sego v. State ex rel. Stoddard* (1894) 136 Ind. 700, 86 N. E. 208.

A stamp at or in a square opposite which there is no candidate's name, that office being left blank, is a distinguishing mark which will prevent the counting of the ballot, as the only squares which can be lawfully stamped under the Indiana election law are the squares opposite the candidates' names on the various tickets, and the square inclosing the device of the party. *Ibid.*

A cross placed in the voting space before the words on a ticket "no nominations" is not a cross mark "used for the purpose of voting," and ballots so marked are therefore void under the New York election law of 1896, which provides that any ballot shall be void and no vote thereon shall be counted on which any mark shall be found other than the cross mark "used for the purpose of voting." *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

Ballots stamped in the square opposite the device of the party, and also in the squares opposite any or all of the candidates in the same party or in any other party when that ticket presents a full list of candidates for the various offices, cannot be counted, as they violate the Indiana election law, providing that if the voter stamps the large square inclosing the device of a party he cannot stamp elsewhere on the ballot unless there be no candidate for some office in the list printed under such device, in which case he may vote for that office by stamping the square to the left of the name of any candidate for that office on any other list, and further providing that a stamp in violation thereof shall be treated as a distinguishing mark, and forbidding the counting of any ballot containing a distinguishing mark. *Sego v. Stoddard* (1893) 136 Ind. 297, 22 L. R. A. 468, 86 N. E. 204; *Sego v. State ex rel. Stoddard* (1894) 136 Ind. 700, 86 N. E. 208.

Two entirely separate and distinct impressions of the stamp within the square containing the emblem of a party constitute a distinguishing mark requiring its rejection. *Zeis v. Passwater* (1895) 142 Ind. 375, 41 N. E. 796. 47 L. R. A.

2. Harmless marks.

Unauthorized marks not of a character to be readily used for the purpose of identification, or some slight mark inadvertently placed on the ballot by reason of the voter's unskilfulness, do not require the rejection of the ballot; but where the unauthorized marks are made deliberately, and may be used for the purpose of identifying the ballot, it should be rejected. *Whittam v. Zaborik* (1894) 91 Iowa, 23, 59 N. W. 57.

Pencil or other marks which may be placed upon a ballot by mistake or for the evident purpose of making the voter's intention plain or correcting a mistake should not be considered as such distinguishing marks as will avoid the ballot, under Wash. act 1895 prohibiting distinguishing marks, which only amended, and did not repeal Wash. Gen. Stat. § 413, declaring that no ticket shall be lost for want of form if the judges can determine to their satisfaction the person voted for and the office intended, and in view of the further provision of the act of 1895 that if a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be counted as to such part. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346.

Marks on ballots, for the existence of which a reason is or may be suggested consistent with honesty and good faith, will rarely be allowed to invalidate a ballot unless it appears that it was in fact used for corrupt purposes; but marks for the existence of which no such reason can be suggested will, if unexplained, generally be presumed to be for corrupt purposes. *State ex rel. Phelan v. Walsh* (1892) 62 Conn. 260, 17 L. R. A. 364, 25 Atl. 1.

The marking of a ballot by a cross with lines at the ends of the arms is valid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190; *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

The marking of a ballot by a cross with a double leg is valid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190.

The marking of a ballot with a cross having two vertical lines is valid. *Dionne v. Gagnon* (1893) 9 Quebec L. R. 20, Wigmore, p. 190.

Ballots marked with two or more crosses is

of those columns. The law says, further, that he may express his intent to reject the other "groups" "in any other manner than by the erasure of a name to substitute another." A rejection of part of a column (other than that indicating the voter's choice) "is to be taken as a rejection of the whole group." The amendments of § 4781 in 1891 and in 1893 disclose that the legislative intent has been directed towards diminishing the risk of disfranchising citizens on account of omissions to conform strictly to the letter of the law in marking their ballots. As the statute now reads, the vital and paramount ideas of § 4781 are that the voter shall clearly indicate some one column as the one of his choice, and in marking his choice shall have the right to vote (in that one column) on all questions submitted. In the case in hand the purpose of these citizens to vote the Republican ticket is perfectly clear, unless the failure to erase the Kage "group" defeats that purpose. If each of these voters had proceeded to draw a pencil mark lengthwise along some part of the

blank space in the Kage "group," we presume that the supreme difficulty which has been experienced in discovering the voter's intention would disappear! But the voters did not apprehend the importance of such an act!! Not being posted in the niceties of election law, nor appreciating the possibilities involved in its construction, they did not take the precaution to erase any part of the blank of which that column was chiefly composed. Hence they are now told that they must lose their votes for the important state and national offices which the blank space on the Kage "group" is supposed to represent!!! These voters lose their votes, not only as to the one county office named in that "group," but also as to all other offices which they had a right to take part in choosing at that election!!!! Just here it may be proper to inquire what was the true standing of the Independent ticket on which Mr. Kage's name appeared. In the learned opinion of our associate it is held that the name and the caption constitute a "group" (with in the meaning of § 4781), the failure to

one square, or with a cross having two horizontal lines instead of one, should be counted if otherwise regular, as these are not such distinguishing marks as invalidate the ballots in the absence of evidence of intent to distinguish them. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

The marking with a double cross opposite the name of candidates of ballots otherwise regular in form does not require their rejection as containing distinguishing marks. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346; *Hawkins v. Smith* (1884) 8 Can. S. C. 676; *contra: State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284; *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

So, ballots marked with two or more crosses or a number of crosses in a bunch, instead of one, should be rejected under the Nevada statute providing that any names, words, or marks except as in the act provided shall invalidate the ballot. *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 768.

A ballot marked with a horizontal line opposite the name of a candidate, and with two crosses opposite the name of another candidate, should not be counted. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

The marking of a ballot with a cross having several heavy transverse strokes is valid. *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, *Wigmore*, p. 190.

The marking of a ballot with a cross made of repeated heavy strokes is valid. *Ibid.*

Ballots are not invalidated by double crosses or stars, the evident result of an attempt to retrace lines composing a cross, or an attempt to retrace such lines by one with a nervous hand or upon a rough board. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

The marking of a ballot with a cross in the square of one candidate and an obliterated mark opposite another name is valid. *Grant v. McCallum* (1876) 12 Can. L. J. 113, *Wigmore*, p. 190.

The marking of a ballot with three crosses, one in the right-hand column, one on the name of the candidate, and one in the left-hand column, is valid. *Ibid.*

Ballots marked with crosses in the squares opposite the names of candidates on the ticket, and in the squares opposite all the blank spaces for writing in names, one of which contains

also a cross in the square at the head of the column in which the names are marked, are properly counted under the North Dakota statutes prohibiting identifying marks, but not providing that ballots so marked shall be void and not counted in the absence of any proof that they were in fact marked for the purpose of identification, as such marks do not in themselves show that they were intended as distinguishing marks. *Hovser v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

So, a ballot marked with a cross within the square opposite the name of a candidate and also to the left of the same square is properly counted. *Ibid.*

Ballots marked with a cross under each of the names of two separate parties should be counted where the two tickets are identical. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

Ballots marked with a cross opposite the name of the same candidate for the same office in two different columns should be counted for him, as such double marking is merely surplusage, and such ballots should not be considered as marked ballots in view of the provision of the New York election law covering a similar case, where the ballots are so marked for opposing candidates for the same office, that ballots shall not be wholly vitiated thereby, but merely not counted for that office, and the ballots shall be returned as blank votes as to such office. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 86, 50 N. E. 425.

A ballot containing the names of four candidates, two of whom are to be elected, which is marked with a cross after one candidate of one party, with a cross after one candidate of another party, and with a slight straight pencil line in the compartment of the other candidate of the latter party, should be counted for the candidate of the latter party in whose compartment appears the cross. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

A ballot marked with two crosses within the circle at the head of a party ticket is properly counted for a candidate thereunder, under the South Dakota statute requiring it to be marked with a cross in the circle or at the left of the candidate's name. *Farmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186.

The marking of a ballot with two lines crossing at a very acute angle is valid. *Grant v.*

erase some part of which renders the whole ballot null and void. In our opinion, that ticket is simply what it purports to be, namely, an official statement of an independent nomination for sheriff. It is not a column printed for use in voting for any other office than the one mentioned therein. Leaving that name un erased on a ballot otherwise correct (in indicating an intent to vote another column) certainly amounts to nothing worse than a vote for two persons for the office of sheriff. It ought not to annul the vote as to other offices not referred to in the so-called "Independent Ticket." Under the election law in force in Missouri before the Australian ballot system was adopted, a ballot containing a vote for two persons for the same office was considered invalid only as to that office. Rev. Stat. 1889, § 4678. While the section just cited may, perhaps, be superseded by the new statute under which the ballots are furnished by the state, and not by the voter, yet the above-mentioned principle of construction of ballots is nothing more than the statement of a just general rule in the American law of elec-

tions, and is as applicable to the Australian law as it was applicable to similar language on ballots under the former law, in the absence of anything in the existing statutes to show a different purpose. *Atty. Gen. v. Ely*, 4 Wis. 420; *Perkins v. Carraway* (1881) 59 Miss. 222. Section 4773 (as amended by Laws 1891, p. 134) provides how the ballots shall be printed. It makes a plain distinction between "groups" of nominations and the separate names required to be printed in case of independent candidacies. The officer who prepared the ballots in question in this case evidently did not consider the separate name of Mr. Kage as a full ticket. The election was to choose a great number of public officers. Every voter was entitled to vote for Federal electors and congressman, as well as for state and county officers. Every voter was entitled to the privilege of having the ballots printed so that he might exercise that right. But the Kage ticket contains no other names whatsoever. It does not even contain blanks for votes for any of the other offices to be filled. It has no provisions for any vote on the proposed amendments to the

McCallum (1876) 12 Can. L. J. 113, Wigmore, p. 190.

Ballots marked with two cross marks in the voting space opposite the name of a candidate are not invalidated thereby. *People ex rel. Pierce v. Farkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Trifling marks, evidently made by accident while making the cross mark, do not invalidate the ballot. *Ibid.*

A ballot marked with a cross mark with a third line crossing it, thus making the cross mark composed of three lines instead of two, is not invalidated thereby, where the extra line is evidently made as a part of the cross. *Ibid.*

Accidental pencil marks do not invalidate ballots. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

Crosses made by curved or irregular lines, and evidently the result of nervous or physical infirmity or roughness of the board upon which the ballot was placed for marking, do not invalidate the ballot. *Ibid.*

The marking of a ballot with a line or lines with several lines crossing irregularly is valid. *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190.

The marking of a ballot with a cross in pencil outside of a party circle in which a cross is stamped with the official stamp should be presumed to have been inadvertently done, and should be counted unless the ballot has been marked intentionally in such a manner as to enable a third person to determine from an inspection of it without further aid that the same was deposited by a particular person. *Church v. Walker* (1898) 10 S. D. 460, 74 N. W. 198.

Crosses made with a slight hook at one or the other end of the lines forming them do not invalidate the ballot. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

Ink blots and several pencil check marks near the names of some candidates of one party which appear to have been accidental do not render invalid a ballot properly marked by a cross in the square containing such party's emblem. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6. In this case, however, the ballot was counted under this ruling for a candidate of that party near whose name none of such pencil marks appeared.

A mark satisfactorily appearing to have been 47 L. R. A.

made inadvertently, and not for an evil purpose, is not within the meaning of the Nevada statute providing that any names, words, or marks, except as in the act provided, shall invalidate the ballot, and should not be construed as an identifying or distinguishing mark. *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 731, 41 Pac. 768.

A ballot marked with an irregular pencil mark over the names of candidates for an office which was clearly made accidentally and not deliberately is properly counted. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

b. Mark with wrong implement.

A ballot faintly marked in the proper square by several marks or strokes slightly indented upon the paper but not discolored the paper. It not appearing that they had been made with a lead pencil, or whether they had been made with a blunt knife or piece of wood or other instrument, is not so uncertain but that it should be counted. *McLaren v. Mline Home* (1881) 44 L. T. N. S. 289, 3 O'Malley & H. 178.

But in New York it has been held that a ballot marked in the circle at the head of a ticket as if by some sharp instrument not a pencil is vitiated thereby under the New York election law providing that it shall be unlawful to mark a ballot other than with a pencil having black lead, and that ballots otherwise marked shall be void, and that no vote thereon shall be counted. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

A ballot marked by a pencil cross instead of ink as required by the Australian ballot law adopted in Nebraska, should be counted, as that provision is directory only. *State ex rel. Wagoner v. Russell* (1892) 34 Neb. 116, 15 L. R. A. 740, 51 N. W. 465; *Spurgin v. Thompson* (1893) 37 Neb. 39, 55 N. W. 297.

Ballots marked with a cross made with pencil or ink of any color are to be counted provided they are in other respects regular, the provisions of the Kentucky statute that all marking upon the ballot shall be made with black ink stencil being directory merely. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

The marking of a ballot with ink, where the

organic law. Yet the latter are required to be printed on each ballot to be voted. Laws 1895, p. 171, § 4753. That section also contains a useful hint of legislative intent, touching the effect of errors in preparing ballots, by the declaration that ballots not prepared in conformity to the requirements as to constitutional amendments "shall not be counted on the proposition thereby submitted;" implying that such error shall not make the ballot invalid as to the other issues submitted at the same time. It is manifest that the officer who made up the Independent ticket, and caused it to be printed, did not intend to multiply Mr. Kage into the dimensions of a national, state, and county group. Had the officer entertained such a purpose, would he not have put upon that ticket the necessary printed matter for votes on "all the questions submitted," which is the only limit of the voter's range of choice in the column (or group) he is entitled to vote at a general election? Can the voters be justly blamed (and condemned to lose their votes for other offices) because they took the same view of the Kage ticket that

the official who arranged the ballot did? It is expressly declared by the ballot law (Rev. Stat. 1889, § 4765) that no person shall be "published as a candidate for more than one office." Surely, Mr. Kage was not in the political filed for every office to be then filled!! On his column all the other offices were represented by blank space only. To hold that such blank space is a group (as to the many offices then subject to vote) seems to us to do violence to the very terms of § 4781, which sanctions such a marking of the official ballot actually voted as shall show the voter's choice on all "the questions submitted." In the Cape Girardeau cases (now before the court) it is not claimed by anyone that votes of the kind under discussion are valid for the office of sheriff. It is only insisted that they are good as to the other offices in the full column duly indicated as the choice of each voter. In our opinion, they are good to that extent at least. The acknowledged spirit of the American law before the acceptance of the Australian system required effect to be given to the intention of the voter as depicted on his ballot,

statute directs the voting mark to be made with a pencil, does not avoid the ballots. *Grant v. McCallum* (1876) 12 Can. L. J. 113, *Wigmore*, p. 190.

The law requiring a voter to mark his ballot by means of a stamp by putting a cross opposite the name of each candidate thereon for whom he intends to vote is mandatory. *Lay v. Parsons* (1894) 104 Cal. 661, 33 Pac. 447.

A ballot on which the only marks are made with a lead pencil, and not with the official stamp as required by statute, should be excluded. *People ex rel. Beasley v. Sausalito* (1895) 106 Cal. 500, 39 Pac. 937.

Ballots marked with a purple lead pencil instead of black lead pencil, as required by the New York election law, are void, and cannot be counted. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

Ballots marked with ink or with blue or purple pencil instead of with black lead pencil, as required by statute, are invalid, and cannot be counted. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284; *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 781, 41 Pac. 768; *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

Ballots marked with a lead pencil cross instead of ink, as required by statute, but which are otherwise regular as to form, do not contain distinguishing marks within the provision that no elector shall place any mark upon his ballot by which it may afterward be identified as the one he voted. *State ex rel. Waggoner v. Russell* (1892) 34 Neb. 116, 15 L. R. A. 740, 51 N. W. 465.

1. Mark in wrong place.

1. On back of ballot.

The marking of a ballot with a cross on the back opposite the name of a candidate is invalid. *Olmstead v. Carpenter* (1879) *Hodgins*, *Elect. Cas.* 581, *Wigmore*, p. 190.

But it has also been held that the marking of a ballot with a cross on the back thereof opposite the name of a candidate is valid. *Grant v. McCallum* (1876) 12 Can. L. J. 113, *Wigmore*, p. 190.

A ballot marked with a cross on the back over the name of a candidate cannot be counted for 47 L. R. A.

him. McLaren v. Milne Home (1881) 44 L. T. N. S. 289, 3 O'Malley & H. 178.

A ballot paper was rejected which had been marked with a cross on the back opposite one of the names, and could be seen through the paper, and a ballot paper marked on the front in the usual way was allowed, though there was a cross on the back opposite the other candidate's name. *Buckrose Case*, 4 O'Malley & H. 100, 6 *Mews' Eng. Digest*, col. 124.

The marking of a ballot with two lines on the back opposite the candidate's name is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, *Wigmore*, p. 190.

Ballots marked with a cross on the back thereof in a place corresponding with the division containing the name of a candidate on the face of the ballot cannot be counted as marked for him. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

The marking of a ballot with a straight line on the back is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, *Wigmore*, p. 190.

2. Out of square.

In order to permit the counting of a ballot the voter's intention must be manifested by a cross substantially in the place designated showing an honest intent to follow the directions of the law. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

The Indiana election law requiring voters to indicate their choice by stamping the square immediately preceding the names of the candidates for whom they wish to vote, or by stamping the square opposite a party title, does not require the placing of the stamp exactly in the center of the square, but if there is manifestly an effort to comply in good faith with the statutory requirements in the attempted exercise of the right it is sufficient. *Bechtel v. Albin* (1892) 134 Ind. 193, 33 N. E. 967.

That a cross mark is partly within and partly without the voting space does not render the ballot invalid. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

A ballot on which the voter's choice is design-

even though the expression of that intent might be, in some degree, irregular, unless the irregularity violated some fundamental principle of the secret ballot, or was expressly declared by law to be fatal to the vote. *Gumm v. Hubbard* (1889) 97 Mo. 311, 11 S. W. 61; *Brown v. McCollum* (1889) 76 Iowa, 479, 41 N. W. 197. The new law gives no sign of any purpose to change that just and fair rule for dealing with the very serious topic of popular elections. On the contrary, the leading decisions construing that law in other jurisdictions indicate that its true spirit and purpose are best expressed by adhering to that rule. Hence it has been held that the intent exhibited by irregular marking of the ballot will be respected, provided it does not infringe on the prohibition against distinguishing marks, and is not distinctly forbidden. Both the foreign and American courts have sanctioned many irregular markings in obedience to the well-recognized doctrine that the paramount object of such a law is to get at and effectuate the intention of the voter. *Reg. v. Bagley* (1870) Macas. (N. Z.) 836; *Phillips v. Goff* (1886) L. R. 17 Q. B. Div. 805; *Miller v. Pennoyer* (1893) 23 Or. 364, 31 Pac. 830;

Coleman v. Gernet (1893) 3 Pa. Dist. R. 500; *Johnson v. Casnovia Canvassers* (1894) 101 Mich. 187, 59 N. W. 412; *Boyd v. Mills* (1894) 53 Kan. 594, 25 L. R. A. 486, 37 Pac. 16; *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002; *Page v. Kuykendall* (1896) 161 Ill. 319, 32 L. R. A. 656, 43 N. E. 1114. In the very case at bar the learned opinion of the majority of the court declares (in the fifth paragraph) that the fact that judges of election entered the booths and assisted electors to prepare their ballots cannot be shown with a view to invalidate any part of the vote cast. Yet such action by the election judges is expressly forbidden by § 4784, as amended by Laws 1893, p. 164. And in the fourth paragraph of the same learned opinion the omission of the oath required of voters is held to have no prejudicial bearing on the result, although such oath is positively commanded by the terms of the section last above cited. We believe the same general principle of aiming at the substance, instead of mere form, in dealing with elections, should also be so applied as to preserve the rights of those citizens whose eyes were not keen enough to notice that there was something in the deep

nated by placing a cross, not in the square prepared for that purpose opposite the emblem of that party, but $\frac{1}{4}$ of an inch to the right of such square, is properly counted for the candidates of that party. *Young v. Simpson* (1895) 21 Colo. 460, 42 Pac. 666.

The marking of a ballot with a cross on the right but in the compartment with the candidate's name is valid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

Ballots marked with a cross opposite and to the right of the name of a candidate should not be rejected because such cross is made in the same column or compartment with the candidate's name, to the left of the vertical line instead of to the right of such line in the compartment formed by it and the horizontal lines to the extreme right of the ballot paper. *Re Athlone Election Petition* (1874) Ir. Rep. 8 C. L. 240.

The marking of a ballot with a cross on the left in the column reserved for numbers is valid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

A cross made in the marginal space at the right of the name of a candidate, instead of in the square at the right of such name, sufficiently complies with a statute requiring that the voter shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote, although the statute, by requiring the clerk in printing the ticket to place upon it a direction to stamp a cross in such square in order to vote for the person, contemplates the making of the mark in the square. *Tebbee v. Smith* (1895) 108 Cal. 101, 29 L. R. A. 673, 41 Pac. 454.

The marking of a ballot with a cross on the right of, but in the compartment with, the candidate's name is valid. *Robertson v. Adamson* (1876) 3 Ct. of Sess. 978, Wigmore, p. 190.

A ballot marked with a cross directly opposite and near the name of a candidate, and not in the marginal place designated for it in the ballot, should be counted for such candidate in view of the provisions of the Nebraska statute that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention

such part should be counted. *Spurgin v. Thompson* (1893) 37 Neb. 39, 55 N. W. 297.

A ballot on which it is clear that the voter honestly attempted to conform to the statute by making a cross in the proper place, although with more or less imperfect success, should be counted. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

Ballots marked with proper crosses not in the square prepared thereon in printing, but after and to the right of the names of candidates voted for, are valid, and should be counted. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

A cross marked in the space where the title of the office was printed, and directly above the name of the candidate, would be counted. *Hughes's Election*, 8 Lack. Jur. 813, Brightly, Pa. Dig. p. 3396.

A ballot marked with a cross, not in the party circle as required by statute, but near it and in the space wherein such circle was placed at the top of a party ticket, should be counted for a candidate of that party as indicative of the voter's intention, within the further provision of the statute that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be counted as to that part. *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

Ballots on which a cross is placed in the margin immediately to the right of a candidate's name instead of in the square to the right of the space in which his name and residence appear should be counted for him under the Pennsylvania election law of 1891, which did not provide for the printing or use of such a square, but only that a sufficient margin should be left to the right of the candidate's name in which the voter could mark a cross to express his choice. *Weidknecht v. Hawk* (1893) 3 Pa. Dist. R. 123.

Ballots marked opposite the name of an office instead of in the square opposite the name of the candidate, as required by the Pennsylvania election law of 1893, should nevertheless be counted, where the voter's intention is clear from the face of the ballot itself. *Middendorf's Case* (1894) 4 Pa. Dist. R. 78.

Ballots marked with a cross in a vacant space to the right of the name of a candidate

blank of the Kage ticket that demanded their attention, under penalty of disfranchisement.

2. We would further respectfully insist that the view above given of this case is but an application of the principle announced by a majority of the court in banc in the twelfth paragraph of the opinion in *Lankford v. Gebhart* (1895) 130 Mo. 621, 32 S. W. 1127. We think that principle is correct, and that it should not be discarded.

3. It is claimed by respondent that, even if the Republican ballots (whose effect we have discussed) are counted, the respondent would still be elected, because he received some 40-odd Democratic ballots, which were rejected in the final figures, on account of a like failure of the voters to cross out the Kage ticket. The difficulty with that contention is that the ballots needed to produce the result claimed are not before this court. They are not called for by the bill of exceptions, nor are they referred to therein in a way to disclose the facts relied upon by respondent. So we cannot consider them, unless the return of the county clerk to the order for a recount of the ballots may be looked at as part of the record proper in the cause,

which respondent thinks is permissible. The county clerk's return is mentioned as being before the circuit court at the trial, but its terms are not recited (nor is enough of its purport given) in the bill of exceptions to show how many Democratic votes were rejected on a similar ground to that which caused the rejection of the Republican votes already mentioned. The return to an order for a recount is not of itself a part of the record proper. It is evidence for certain purposes (Rev. Stat. 1889, § 4726), but can be made available on appeal only by taking the appropriate steps to bring it into the record. We cannot tell (with the certainty necessary to a final count) how many Democratic ballots (on which the Kage ticket was not scratched) were rejected at the trial. And hence the record does not show that the error of rejecting the Republican ballots was harmless. We believe that the circuit judgment should be reversed, and the cause remanded for a new trial, and therefore dissent from the judgment announced by the majority of the court in banc.

Macfarlane and Robinson, JJ., join in this opinion.

or to the right of a designation, although not in the space prepared for that purpose, should be counted for such candidate or the candidates of such party under the Pennsylvania ballot law of 1891, which directs the voter to prepare his ballot by marking a cross in the appropriate margin or space to the right of the candidate's name, or the party designation. *Loucks' Case* (1893) 3 Pa. Dist. B. 127.

A ballot marked immediately to the right of names of candidates instead of in the spaces provided therefor to the right of such names, is properly counted. *State ex rel. Hyland v. Peter* (1890) 21 Wash. 248, 57 Pac. 814.

Ballots marked with a cross in the margin to the right of and opposite a candidate's name should be counted, although not marked in the square, as the Rhode Island election law of 1889 makes no provision for squares, but only for the printing of the ballots with a sufficient margin to the right of the name of each candidate, and directs that the voter shall prepare his ballot by making a cross in the appropriate margin or space. *Re Vote Marks* (1890) 17 R. I. 812, 21 Atl. 962.

Ballots marked with stencil crosses, some of which are imperfectly made, at the head of a particular party column, although outside of the square containing the party device, are to be counted for the candidates of that party. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

A ballot on which the stamp touched slightly the lower side of the square at the head of a party title substantially complies with the Indiana election law requiring a ballot to be stamped on the square. *Bechtel v. Albin* (1892) 134 Ind. 193, 33 N. E. 967.

The provisions of the New York election law that voters desiring to vote a straight ticket may do so by placing a cross mark in the circle at the head of the party ticket, or on the left and opposite the name of each and every candidate of such party in the blank space provided therefor, are mandatory, and require the rejection of ballots marked with a cross in the space under the device of an independent party above the words "Independent ticket," where there was no circle there because of a provision of the law that in the column for independent

nominations the circle should be omitted. *People ex rel. Shafer v. Moody* (1897) 45 N. Y. Supp. 606.

Ballots marked with a cross before the name of a candidate, but outside of the voting space, are invalid, under the New York election law requiring all ballots to contain a blank "voting space" inclosed by heavy dark lines at the left of the name of each candidate, and declaring it unlawful to place the statutory cross-mark upon the ballot in any other place than the circle at the head of each column or in the voting space provided, although it further provides for the printing of instructions upon the stubs attached to the ballots to the effect that the voter shall make the cross "before the name" of each candidate when voting a split ticket as the latter provision, while silent as to the voting space, is not contradictory to the former, inasmuch as the cross may be made before the name and at the same time in the voting space. *People ex rel. Wells v. Collin* (1897) 19 App. Div. 457, 46 N. Y. Supp. 701, Affirmed in *People ex rel. Wells v. Elmira*, 154 N. Y. 750, 49 N. E. 1102.

A cross placed upon a ballot outside the voting space in which the voter is required by statute to place such cross in order to vote a split ticket is not a cross mark "used for the purpose of voting," and ballots so marked are therefore void under the New York election law, which provides that any ballot shall be void, and no vote thereon shall be counted on which any mark shall be found other than the cross mark "used for the purpose of voting." *Ibid.*

The Kansas statute, which provides that if the voter fails to mark the ballot as required by another section of the act, for an office to be filled, his ballot cannot be counted for that office, is mandatory, and requires the rejection of ballots marked with a cross other than substantially in or upon the square or place designated by such other section. *Taylor v. Bleakley* (1895) 55 Kan. 1, 28 L. R. A. 683, 39 Pac. 1045; *Richardson v. Jamison* (1895) 55 Kan. 18, 39 Pac. 1050.

The provision of the Indiana election law requiring the voter to indicate the candidates for whom he desires to vote by stamping the square

SOUTH DAKOTA SUPREME COURT.

Michael McMAHON, *Respt.*,

v.

Charles C. POLK, *Appt.*

(10 S. D. 296.)

1. An appeal from the judgment alone in a contested election case will take to the supreme court the written evidence on which the findings of fact are based.
2. An omission to state, in a contest of election to the office of state's attorney, that plaintiff was learned in the law, which is a constitutional qualification for the office, will be cured by an allegation in the answer that plaintiff was at the time of the election the legally qualified and acting state's attorney.
3. Residence in a military reservation of the Federal government will not give one a right to vote at a state election held in the county where the reservation is located.
4. More than one cross at the head of party tickets on the same ballot will annul it, although one of the parties had no candidates for offices named on the ticket.
5. A ballot is not vitiated by the fact that the cross is blurred as though by ink from a rubber stamp, if the outline of a per-

fect cross is traced or indicated by pencil marks.

6. That the lines forming the cross extend slightly beyond the line of the circle will not vitiate the ballot.
7. A vote should be counted which contains a cross opposite the name of a candidate, although it is partially obscured by a heavy printed line on the paper.
8. A cross made by a rubber stamp provided for the purpose is sufficient.
9. A ticket is not vitiated by the fact that besides the cross within the circle another appears just outside the circle, as though made by inadvertently placing the stamp upon the paper.
10. A mark opposite the name of a candidate, and the erasure of his rival's name, in addition to the mark in the circle, will not vitiate the ballot, where there is nothing to show a design to thus mark the ticket for the purpose of invading the secrecy of the ballot.

(November 19, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Meade County in

immediately preceding their names, or, if he desires to vote for all candidates of one party or group and no other, by placing the stamp on the square preceding the title under which the candidates for such party or group are printed, are mandatory, and ballots containing impressions of the stamp of one party, but at varying distance from the title square, cannot be counted. *Bechtel v. Albin* (1892) 184 Ind. 193, 83 N. E. 987.

The provision of the Indiana election law requiring the voter to indicate his choice by stamping the square, and which further declares that a stamp placed upon a ballot which does not touch a square thereon is a distinguishing mark which will prevent the counting of the ballot, is mandatory, and in order that the voter may have his ballot counted at all he must touch some one of the squares with the stamp. *Parvin v. Wimberg* (1891) 130 Ind. 501, 15 L. R. A. 775, 30 N. E. 790.

A ballot marked with a cross at the head of a party ticket, but not within the circle as required by the South Dakota statute, cannot be counted for a candidate on the ticket so marked. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180; *Parmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186; *McKittick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23.

A ballot marked only with a cross at the head of a party column about $\frac{1}{2}$ an inch to the left of the square for voting the party ticket cannot be counted under the North Dakota statutes, requiring the marking to be done in the square. *Howser v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

A ballot marked with crosses immediately above the names of candidates is properly rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked with crosses opposite the names of various candidates of two different parties, but placed either to the right or to the left of, and outside of, the squares opposite such names, cannot be counted under the North Dakota statute requiring the marking to be done in the squares. *Howser v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

Ballots marked in the vacant space on the ex-

treme lower right-hand corner not opposite the name of any candidate cannot be counted. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked by a cross above and one beneath a candidate's name should be rejected where the statute requires it to be marked with a cross in the appropriate margin or place at the right of such name. *Curran v. Clayton* (1893) 86 Me. 42, 29 Atl. 930.

A ballot marked with a cross placed above the name of a candidate, and not in the appropriate margin or place at the right thereof as required by statute, should be rejected. *Ibid.*

The marking of a ballot by a cross opposite the words "vote for one" in the space above a party designation, one line of which extends down into the space occupied by the designation, is not such a marking of such designation as will permit it to be counted for the candidate whose name is opposite it. *State ex rel. Hyland v. Peter* (1899) 21 Wash. 243, 57 Pac. 814.

A ballot marked with a cross in the vacant space below the name of the candidate thereon should be rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

Ballots marked to the left of, or over, any part of a name on the official ballot, cannot be counted under the Rhode Island election law, which requires the voter to prepare his ballot by making a cross in the appropriate margin or space to the right of the candidate for each office to be filled. *Re Vote Marks* (1890) 17 R. I. 812, 21 Atl. 962.

Ballots marked with a cross placed at the right of a blank space below the names of candidates of an official ballot cannot be counted under the Rhode Island election law of 1899, which requires that the elector shall prepare his ballot by marking in the appropriate margin a cross opposite the name of the candidate of his choice for each office to be filled. *Re Ballot Marks* (1893) 18 R. I. 822, 27 Atl. 608.

A ballot marked with a cross to the left of the word mayor, and above the place where it should have been marked if desired to vote for the candidate of the party for that office, instead of to the right of his name as required by

favor of plaintiff in an action brought to contest defendant's election to the office of state's attorney. *Reversed.*

The facts are stated in the opinion.

Messrs. Rice & Polley and C. C. Polk,
for appellant:

The notice of contest at the time of this objection contained no allegation that the plaintiff possessed the qualifications to hold the office of state's attorney under the provisions of the Constitutions of this state, in that it contained no allegation that he was "learned in the law."

S. D. Const. art. 5, §§ 24, 25.

Contestant amended his notice over objection on December 30, which amendment was allowed by the court at the hearing. This was error.

Gillespie v. Dion, 18 Mont. 183, 33 L. R. A. 703, 44 Pac. 954; *Batterton v. Fuller*, 6 S. D. 257, 60 N. W. 1071.

Charles D. Minard was a soldier stationed at Ft. Meade on November 3, 1896. He first enlisted in the army in 1892, at Cleveland, Ohio; came to Ft. Meade in 1894; was granted a furlough in August, 1895, and a discharge in November, 1895; resided in Meade county until February, 1896, when he

again enlisted. He was a resident of Meade county under any contention at the time of his enlistment in February, 1896, and the fact of his enlistment did not take away such residence, and on November 3, 1896, the date he voted, he had been a resident for nine months, and had a right to vote.

People ex rel. Budd v. Holden, 28 Cal. 124; *Darrugh v. Bird*, 3 Or. 240; *Wood v. Fitzgerald*, 3 Or. 573; *Paine, Elections*, § 71.

Where two tickets are marked with a cross in the circle at the top of each, and one of the tickets contains the name of a candidate for a particular office, and the other does not contain the name of a candidate for that office, the ballot should be counted for the candidate whose name appears.

Parker v. Orr, 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

The faint outlines of a cross at the head of the People's Party ticket, Exhibit "11," which indicates clearly an erasure of that cross by the voter, did not vitiate the ballot.

State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 Pac. 346.

Exhibit "1," Bryant precinct, was marked with two crosses within the circle at the

the Pennsylvania ballot law of 1891, cannot be counted. *Loucks' Case* (1893) 3 Pa. Dist. R. 127.

Ballots marked with a cross alongside and outside of the circle at the head of a party column, instead of within it as required by the Pennsylvania election law of 1893, cannot be counted. *East Coventry Election* (1894) 3 Pa. Dist. R. 377.

Ballots marked with crosses to the right of and opposite the names of candidates of a party, but in the portion of the ticket provided for the insertion of additional names instead of in the appropriate margin, cannot be counted under the Pennsylvania ballot law of 1891. *Loucks' Case* (1893) 3 Pa. Dist. R. 127.

Ballots marked with a cross placed in the space between the heavy lines separating the columns of the candidates of each political party cannot be counted under the Pennsylvania election law of 1893 requiring the voter to mark a cross in the appropriate margin or place opposite the name of the candidate of his choice, and designating the appropriate margins in the directions as to the form of the ballot as "a square of sufficient size at the right of the name of each candidate and inside the line inclosing the column." *East Coventry Election* (1894) 3 Pa. Dist. R. 377.

Ballots marked with a cross in the letter "O" of the printed word "official" are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

Ballots marked with a cross between the name of the officer to be elected and the instruction "vote for one," etc., are invalid. *Ibid.*

Ballots marked with a cross opposite the blank space immediately below the name of the candidate in the square immediately under the square opposite his name instead of in the latter square as required by the Pennsylvania statute of 1893, are illegal, and should be rejected. *Re Flynn's Election* (1897) 181 Pa. 457, 37 Atl. 523.

Ballots marked with crosses immediately to the left of names of candidates voted for are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

As a ballot marked with a cross at the head of a party ticket, but not within the circle, as 47 L. R. A.

required by the South Dakota statute, is equivalent to no marking, such ballot should be counted for the candidate of another party opposite whose name a cross is placed. *McKittrick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23.

A ballot marked with a cross in the vacant space near the center of the first column on the left-hand side of a ticket between the words "for presidential electors" and the words "vote for three" is void and illegal, and properly rejected. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 109.

Ballots marked with crosses, not after the name of any candidate to be voted for, but placed after the designation of the office, are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

A ballot marked with a cross mark made wholly outside of the voting space and wholly within the space occupied with the name of the candidate should be rejected under the New York election law declaring that it shall not be lawful to make any mark thereon other than a cross mark used for the purpose of voting, and that only in the circle or voting spaces at the left of the names of the candidates. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

A ballot marked with a cross in the square to the right of the first candidate's name on one party ticket, and marked nowhere else, should be counted for that candidate alone, although probably intended for the entire ticket on which his name appears. *Houston v. Steele* (1896) 98 Ky. 596, 34 S. W. 6.

Ballots must be marked by a cross in the circle placed at the head of the ticket, or in the squares opposite the names of candidates, and in no other way, under the Iowa statutes. *Voorhees v. Arnold* (1899) 108 Iowa, 77, 78 N. W. 795.

A ballot marked with a cross outside of the square under a party title, the square being inclosed in a large circle, instead of being marked in such square as required by statute, cannot be counted. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A vote was disallowed where a ballot paper was marked with a cross immediately upon the name of the candidate. *Buckrose Case*, 4

head of the Republican ticket, and was properly declared to be a vote for appellant.

Ibid.; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 190.

Exhibit "b" contains a cross within the Republican circle, made with lead pencil, and consists of irregular lines, but they form a cross in the center of the circle, and nothing else can be made of it.

Parker v. Orr, 138 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180.

Exhibit "a" contains a cross in the Republican circle and one to the right of the name of C. C. Polk, where it appears on the ballot, and was valid.

Parmley v. Healy, 7 S. D. 401, 64 N. W. 186.

Messrs. M. McMahon and McLaughlin & McLaughlin, for respondent:

To entitle appellant to a review of the evidence in this court, to determine the sufficiency of the same to justify the findings of the court, a motion for a new trial must have been made and denied in the court below.

Evenson v. Webster, 3 S. D. 382, 53 N. W. 747.

And this court will not review the evidence

to determine its sufficiency to support the findings, and will only consider on this appeal the sufficiency of the findings to sustain the judgment.

Ibid.; *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332.

No motion for a new trial having been overruled, and there being, as in this case, no error assigned in overruling a motion for a new trial, it will be presumed that the findings and decision are warranted by the evidence.

Barnard & L. Mfg. Co. v. Galloway, 5 S. D. 203, 58 N. W. 565; *Norwegian Plow Co. v. Bellon*, 4 S. D. 384, 57 N. W. 17; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466.

By a residence within the military reservation, one does not acquire an elector's franchise in this state.

McCrary, Elections, § 89; *Re Highlands*, 48 N. Y. S. R. 795, 22 N. Y. Supp. 137, cited in note to § 89, McCrary, Elections; *Biddle v. Wing*, Clark & H. Contested Elect. Cas. 504.

The provision as to how ballots are to be marked is plain on its face, and in construing the marks the trial court simply carried out the clearly expressed legislative purpose

O'Malley & H. 110, 6 Mews' Eng. Digest, col. 124.

2. On wrong side of name.

A ballot cannot be rejected because marked with a cross within the margin of the line to the left and immediately before the names of candidates, where the statute does not designate whether the cross shall be placed to the right or the left of the candidate's name, but only provides that the voter shall prepare his ballot by placing a cross opposite the name of each candidate of his choice. *Young v. Simpson* (1895) 21 Colo. 460, 42 Pac. 666.

The marking of a ballot with a cross on the left in the same compartment as the candidate's name is valid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190.

The marking of a ballot with a cross placed indefinitely to the left is invalid. *Robertson v. Adamson* (1876) 3 Ct. of Sess. 978, Wigmore, p. 190; *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190; *Grant v. McCallum* (1876) 12 Can. L. J. 113, Wigmore, p. 190.

But in another case it was held that the marking of a ballot with a cross placed indefinitely to the left is valid. *Dionne v. Gagnon* (1883) 9 Quebec L. R. 20, Wigmore, p. 190.

The marking of a ballot with a cross on the left in the same compartment as the candidate's name is valid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

The marking of a ballot with a straight line to the left is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190.

Where a voter has made his cross at the left of a candidate's name instead of at the right, his intention is sufficiently clear, and the ballot should be counted. *Sharon Hill Election*, 3 Lack. Jur. 286, 5 Del. Co. Rep. 381, Brightly, Pa. Dig. p. 3396.

A ballot marked with a cross opposite and to the left of a candidate and within his party column, instead of to the right opposite his name in the appropriate margin or place as required L. R. A.

quired by the Nebraska statute, should be counted for him as clearly expressing the voter's intention, within the provision of a statute that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be counted as to that part. *Mauck v. Brown* (1899; Neb.) 81 N. W. 313.

It is said in *Re Election in 20th Ward*, No. 2 (1894) 3 Pa. Dist. R. 120, that a mark to the left side of a candidate's name, which as plainly indicates the purpose of the voter as a mark to the right side as required by the Pennsylvania election law of 1891, is good, as the declaration therein that the mark shall be placed to the right side is a mere direction to the voter to mark the name, and to have uniformity in marking for the convenience of the election officers.

But it was held in *Loucks' Case* (1893) 3 Pa. Dist. R. 127, that ballots marked with a cross to the left of the party name at the head of the group, instead of to the right as required by the Pennsylvania ballot law of 1891, cannot be counted.

Ballots in all respects perfect except that the cross was placed to the left of the names voted for instead of to the right, plainly showing the voter's intention, should be counted, under § 413 of Wash. Gen. Stat., amended by the act of 1895, providing that no ticket shall be lost for want of form, and for the counting of ballots or parts of ballots where it is possible to determine the voter's intention therefrom. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346.

The marking of a ballot with crosses both to the right and left is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 190.

A ballot containing two party designations and one blank heading at the extreme right with a circle at the left of each heading in which the cross is to be placed, which is marked only by a cross in the circle to the left of the blank heading, cannot be counted as a vote for the party to the right of whose designation the circle so marked is located. *Patterson v. People ex rel. Allen* (1895) 65 Ill. App. 651.

A ballot marked with a cross, not in the appropriate place opposite the name of a candi-

and intent. Its provisions as to marking are mandatory.

Tebbe v. Smith, 108 Cal. 101, 29 L. R. A. 673, 41 Pac. 454; *Taylor v. Bleakley*, 55 Kan. 1, 28 L. R. A. 683, 39 Pac. 1045, and note to same case in 49 Am. St. Rep. 240; *Richardson v. Jamison*, 55 Kan. 16, 39 Pac. 1050; *Whittam v. Zahorik*, 91 Iowa, 23, 59 N. W. 57; *State ex rel. Hagge v. Hagen*, 91 Iowa, 501, 60 N. W. 108; *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775, 30 N. E. 790; *Curran v. Clayton*, 86 Me. 42, 29 Atl. 930; *Re Vote Marks*, 17 R. I. 812, 21 Atl. 962; *Atty. Gen. ex rel. Scott v. Glaser*, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828; *Sego v. Stoddard*, 136 Ind. 297, 22 L. R. A. 468, 36 N. E. 204; *Bechtel v. Albin*, 134 Ind. 193, 33 N. E. 967; *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447; *Vallier v. Brakke*, 7 S. D. 343, 551, 64 N. W. 180, 1119; *Re Contested Election*, 165 Pa. 233, 27 L. R. A. 234, 30 Atl. 955; *People ex rel. Boasley v. Sausakito*, 106 Cal. 500, 39 Pac. 937; *Church v. Walker*, 10 S. D. 90, 72 N. W. 103.

To permit the ballot to be marked in a different manner from that prescribed would be to enable the voter to place a distinguishing mark upon his ballot, thereby depriving it

of its secrecy, and frustrating the object sought to be obtained by the system.

McCrary, Elections, 4th ed. § 720; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; *Whittam v. Zahorik*, 91 Iowa, 23, 59 N. W. 57; *Atty. Gen. ex rel. Scott v. Glaser*, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828; *Church v. Walker*, 10 S. D. 90, 72 N. W. 103; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180.

A ballot with a straight diagonal line through the circle is rejected. A ballot with a circle within a circle or disfigured by an emblem is rendered void.

Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180; *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1037.

In the circle of Exhibit "x" at the head of the "Republican" ticket is a plain cross in red ink, and over that a cross made with lead pencil. On this ticket in five other places there is a double marking—a red cross made with the official stamp and one over that made with a lead pencil. Such marking is not according to law. There is no authority for counting it. It was marked for identification, and its secrecy was destroyed.

Parmley v. Healy, 7 S. D. 401, 64 N. W. 186; *Church v. Walker*, 10 S. D. 90, 72 N. W.

date, but to the right of such candidate's name and between his name and the square opposite the name of the candidate of another party, cannot be counted for that party. *Apple v. Barcroft* (1895) 158 Ill. 649, 41 N. E. 1116.

A ballot marked with a cross under a party name at the head of a ticket, and at the left of the name of a candidate of another party, cannot be counted, as the Maine statute requires the cross to be placed in the appropriate margin or place to the right of the party name or the name of any candidate. *Curran v. Clayton* (1893) 86 Me. 42, 29 Atl. 930.

Under the Pennsylvania act of 1891 it was held that a cross mark at the left of the name, although partly within the space containing the name, was too vague and indeterminate to be counted. *Hughes's Election*, 3 Lack. Jur. 813, *Brightly*, Pa. Dig. p. 3396.

A ballot marked with a cross in a party circle, and with a cross opposite the name of a candidate of another party for an office, the name of the candidate for which on the party ticket in the circle is crossed out, cannot be counted for the latter because his name is crossed out, nor for the former where the cross opposite his name is to the right instead of to the left thereof, as required by the South Dakota statute. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180; *Parmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186.

A ballot marked with a cross at the left of a candidate's name, instead of in the appropriate margin or place at the right thereof, as required by statute, should be rejected. *Curran v. Clayton* (1893) 86 Me. 42, 29 Atl. 930.

A ballot properly marked as to three offices, but marked with a cross in the voting space in the column of blanks as to the fourth office, cannot be counted for the candidate for that office in the next column, to the right of whose name such mark is located, under the New York election law requiring the ballot to be marked in the voting spaces to the left of the name of a candidate. *People ex rel. Bantel v. Morgan* (1897) 20 App. Div. 48, 46 N. Y. Supp. 898.

Ballots marked after the names of certain candidates on a ticket with crosses placed within the square, made deliberately by the voter, 47 L. R. A.

should not be counted. *Sweeney v. Hjul* (1897) 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

A ballot marked with a cross to the right of a candidate's name instead of to the left, as required by the South Dakota statute, is not a mere informality, but a total failure to mark the cross in such a manner as to entitle the vote to be counted. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180; *McKittrick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23.

The marking of a ballot to the left and below is invalid. *White v. Mackenzie* (1875) 20 Lower Can. Jur. 22, *Wigmore*, p. 190.

4. Not opposite candidate's name.

A cross not opposite the name of any candidate requires the rejection of the ballot, under the Nevada statute providing that any names, words, or marks, except as in the act provided, shall invalidate the ballot. *Dennis v. Caughlin* (1895) 22 Nev. 447, 29 L. R. A. 781, 41 Pac. 768.

The marking of a ballot with a cross above or below the name in the same compartment is valid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, *Wigmore*, p. 190.

The marking of a ballot with a cross above the name in the same compartment is valid. *Cameron v. McLennan* (1875) 11 Can. L. J. 183, *Hodgins, Elect. Cas.* 817, *Wigmore*, p. 190.

A ballot marked with a cross on the line above the name of the first candidate in the column should be counted for such candidate. *Jenkins v. Brecken* (1883) 7 Can. S. C. 247.

A ballot containing the names of four candidates in a column marked with two crosses, one on the line above the first name in the column, and one on the line above the second name, between it and the first name, is valid for both such candidates. *Ibid.*

A ballot paper marked with a cross in the corner above the line is void for uncertainty. *Huckrose Case*, 4 O'Malley & H. 110, 6 Mews' Eng. Digest, col. 124.

A ballot on which appears an ink mark of uncertain character on the bottom thereof below the name of a candidate cannot be counted for him. *McLaren v. Milne Home* (1881) 44 L. T. N. S. 289, 3 O'Malley & H. 178.

103; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180; *Zeis v. Passwater*, 142 Ind. 375, 41 N. E. 796.

A blotch, mark, or daub that bears no semblance to a cross cannot be counted.

People ex rel. Beasley v. Sausalito, 106 Cal. 500, 39 Pac. 938; *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447; *Apple v. Barcroft*, 158 Ill. 649, 41 N. E. 1116; *Sego v. Stoddard*, 136 Ind. 297, 22 L. R. A. 468, 36 N. E. 204.

Appellant does not state in his abstract that the judgment appealed from had been entered by the clerk in the judgment docket prior to the taking of the appeal herein.

Where it does not affirmatively appear from the abstract that the judgment was so entered and the judgment roll prepared and filed before this appeal was taken, this court is without jurisdiction, and the appeal must be dismissed.

Valley Land & Irrig. Co. v. Schone, 2 S. D. 344, 50 N. W. 356.

The record must show filing of judgment roll before an appeal is taken.

Greenly v. Hopkins, 7 S. D. 561, 64 N. W. 1128; *State ex rel. Morgan v. Lamm*, 9 S. D. 418, 69 N. W. 592.

j. Conflicting marks.

A general designation by the marking of a ballot with a cross opposite the emblem of a party, indicating an intention to vote for all its candidates, is controlled by a particular designation by the marking of crosses opposite the names of part of the candidates under such emblem, and ballots so marked cannot be counted for a candidate of that party opposite whose name no cross appears. *Young v. Simpson* (1895) 21 Colo. 460, 42 Pac. 686.

Ballots marked for more candidates for an office than there are persons to be elected there to cannot be counted as to that office. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

A ballot marked with a cross in the circle at the head of each of several tickets appearing thereon can be counted for neither party, as such marks counteract each other, leaving the ballot as if unmarked. *Parmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186; *McKittrick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23.

The marking of a cross in the circle of two parties is not a marking of more names than there are persons to be elected, as to an office for which there is no candidate on one of such party tickets; and ballots so marked should be counted on the ticket representing a candidate therefor. *Parker v. Orr* (1895) 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002.

That a ballot is marked with a cross mark opposite the name of two opposing candidates for an office requires its rejection only as to such office, and it is properly counted for other candidates. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

Ballots marked with crosses opposite the names of two candidates for the same office, in different columns, but not on the same horizontal line, are not vitiated thereby, where there are two candidates to be elected to such office. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

A ballot, although marked with a cross to the left of a candidate's name, is properly rejected, where two pencil lines are drawn through the name evidently for the purpose of making plain the fact that he had changed his mind and did not intend to vote for such candi-

Fuller, J., delivered the opinion of the court:

This statutory contest proceeding between opposing candidates for the office of state's attorney at the November, 1896, election, held in Meade county, resulted in a judgment awarding the office to plaintiff, and the defendant appeals therefrom, and from an order overruling a motion for a new trial.

From appellant's abstract, and the record transmitted to this court, it affirmatively appears that judgment was entered on the 19th day of June, 1897, and that an order overruling the motion for a new trial was made and entered on the 20th day of July following. As the appeal was not taken until the 11th day of August, 1897, counsel's contention that the appeal was taken before the entry of judgment is not sustainable.

A motion to set aside the findings of fact, conclusions of law, and judgment entered thereon, and to grant the defendant a new trial for reasons mentioned in said motion, came on for hearing pursuant to the following stipulation: "It is hereby stipulated by and between the parties hereto that the motion for a new trial in the above-entitled case

date. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

A ballot marked with a cross for each of two candidates for an office should be counted for one of such candidates where there is a clear attempt to erase the cross after the other's name. *Pennington v. Hare* (1895) 60 Minn. 146, 62 N. W. 116.

But ballots marked with a cross for each of two candidates for the same office, with no attempt to erase either of such crosses, cannot be counted for either candidate. *Ibid.*

Ballot papers with a cross opposite one name and a line opposite the other name were rejected on the ground of uncertainty. *Buckrose Case*, 4 O'Malley & H. 110, 6 Mews' Eng. Digest, col. 124.

A voter desiring to vote for the candidates in a party column in which there is no nomination for one office may make a cross in the circle above such party column, and vote for a separate candidate for that office, by marking a cross to the right of his name. *Howley v. Allegheny County Comra.* (1898) 29 Pittsb. L. J. N. S. 148.

Ballots marked only with a cross in the circle at the head of each of two tickets cannot be counted for part of the candidates of one of such tickets for offices for which there are no candidates on the other ticket, as the Pennsylvania election law of 1893 is mandatory, requiring the voter to place a cross in the circle if he desires to vote for all the candidates on a ticket, but in the squares opposite the candidate's name if he desires to vote otherwise. *Fairchance Borough's Election* (1899) 8 Pa. Dist. R. 595.

But it has also been held that ballots marked with a cross in the square at the head of each of two tickets should be counted for a candidate for an office on one of such tickets for which there is no candidate on the other, as in such case there is no double marking as to that office within the meaning of the Pennsylvania election law of 1893. *Middendorf's Case* (1894) 4 Pa. Dist. R. 78.

Ballots marked with a cross at the head of the democratic column which is incomplete, and also at the head of the column "by nomination papers" which supplements such incomplete ticket, the two together forming but one full

may be heard and determined by the court on this 20th day of July, 1897, the statutory time for the service of notice being hereby waived." The motion was in all respects overruled, and counsel's contention that the court, in effect, failed to rule upon said motion by omitting to specifically recite in the order entered at the conclusion of the oral argument that a new trial was denied, is not entitled to favorable consideration.

Although appellant's abstract contains an order, not found in the record, directing the clerk of the court below to certify to this court all disputed ballots, together with the poll books, of a certain precinct, it appears that the same were so certified pursuant to stipulation of the parties, and in accordance with an order and certificate of the trial court expressly making each of said ballots a part of the respective finding of fact to which the same relates; and the point urged by counsel that no facts are presented for review is without merit. Being a part of the judgment roll, an appeal from the judgment alone would properly bring to this court the findings of fact, which, in this instance, include the written evidence upon which such findings are based. *Colonial & U. S. Mortg.*

ticket, should be counted, although the Pennsylvania election law of 1893 contemplates that an elector making a cross mark at the head of a party column shall make no other mark on his ballot. *Reed v. McArthur* (1894) 3 Pa. Dist. R. 682.

A ballot marked with a cross in each of the circles at the head of two tickets, under one of which there is no candidate for a certain office, should be counted for the candidate for that office on the other ticket, under the New York election law, which provides that if the voter shall have made a voting mark in more than one circle at the head of the tickets, and if on either of such tickets there shall be a candidate for an office for which no other candidate is named on such other ticket so marked in the circle, his vote shall be counted for such candidate, although another provision declares that a ballot on which there shall be found any mark other than the cross mark for the purpose of voting is void, and shall not be counted for any candidate thereon, and no reason appears for marking the cross in the circle of such other ticket. *Re Holmes* (1899) 61 N. Y. Supp. 775.

A ballot marked with crosses in the circles of two different party tickets should be counted for a candidate on one of such tickets, where there is no candidate on the other ticket for the same office, under the New York election law which provides that if a cross mark is in more than one circle, and if on either of the tickets there shall be a candidate for an office for which no other candidate is named on the other ticket, the vote shall be counted for such candidate. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

Ballots marked with crosses in two or more party circles should be counted for a candidate whose name is on the different tickets so marked, under the New York election law, which provides that if the cross mark is in more than one circle, and if on either of the tickets there shall be a candidate for an office for which no other candidate is named on the other ticket, the vote shall be counted for such candidate. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

Ballots marked with cross marks before the 47 L. R. A.

Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108; *Garr v. Spaulding*, 2 N. D. 414, 51 N. W. 867. In the case of *Le Oluire v. Wells*, 7 S. D. 426, 64 N. W. 519, we said: "Where, in an election contest case, the question is the legal effect of certain ballots then before the court, to be gathered from the ballots themselves without *aliunde* evidence, the question is one of law, and not of fact; and the decision of the trial court upon such question of law may be reviewed in this court without a motion for a new trial."

It appears from the notice of contest, as originally served, that respondent's certificate of nomination was duly filed, and that he was at the time a resident elector of Meade county, over the age of twenty-five years, a citizen of the United States, and a resident of this state more than one year next preceding his election; and the expression "learned in the law" is the only omission therefrom essential to show by specific averment that he possessed all the qualifications required by §§ 24 and 25 of the 5th article of the Constitution by which he would be entitled to hold the office which he claims, and, as a candidate, institute this contest proceeding in his own name, under §§ 1489 and 1491

names of opposing candidates for the same office are not wholly destroyed thereby, but should be counted for the other candidates thereon, under the New York election law, which provides that if the voter marks more names than there are persons to be elected to an office his vote shall not be counted for such office, but shall be returned as a blank vote for that office. *Ibid.*

Ballots marked with a cross in the circle at the head of each of two party tickets is marked for more than one ticket, and cannot be counted, although both tickets are incomplete, and neither contains candidates for the same office as the other, under the South Dakota statute, which contemplates the marking of but one ticket, either by placing a cross in a party circle, or in a party circle and opposite the names of individual candidates on another ticket for whom the elector desires to vote, or by placing crosses opposite the names of each candidate voted for. *Moody v. Davis* (1900; S. D.) 82 N. W. 410.

A ballot marked with a cross to the left of the name of one candidate, and with a single slanting stroke of the pencil to the left of the name of another candidate for the same office, the character of the mark to be used not being prescribed by the Oregon statute, is marked for both candidates, and cannot be counted. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

Ballots marked with crosses opposite the names of particular candidates on one ticket, and also the names of some candidates on another ticket which is marked with a cross in the square at the head of it, should be counted for the candidate so specifically marked on the ticket, and not under the marked head, as the specific intention expressed by the individual markings nullifies the general intention evinced by the mark at the head of the party column so far as the markings of individual candidates are inconsistent therewith. *Howsar v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

Ballots marked with a cross opposite the emblem of one party, indicating an intention to vote for all candidates of that party, and with crosses opposite the names of some of the candidates of another party, cannot be counted for

of the compiled laws of this state. Under the holding of this court in the recent case of *Church v. Walker*, 10 S. D. 90, 72 N. W. 101, the defect would not be jurisdictional, and the amendment supplying such averment, though made after the expiration of the time within which a contest might be instituted, would be clearly within the jurisdiction and discretion of the trial court. However, the doctrine announced in the majority opinion cannot, at this time, be treated as finally settled in this state, as the case is to receive further consideration upon a rehearing already granted. Any question that might arise from a failure to state in the notice of contest that respondent was learned in the law seems obviated by an equivalent averment found in appellant's answer, to the effect that at the time of the November, 1896, election respondent was, and still is, the legally qualified and acting state's attorney of Meade county, South Dakota. Assuming that the notice of contest failed to state facts sufficient to bring respondent's case within the constitutional and statutory requirements as to eligibility and the right to institute a contest proceeding in his own name to recover the office, every essential fact appears

upon the face of the pleadings, and, in the absence of a demurrer or motion to dismiss for the want of jurisdiction, appellant has no cause for complaint. The rule has right reasoning for a basis, and is well recognized, both at common law and under the Code system, that the omission to state a fact, however essential, is cured when supplied by the pleading of the opposite party. 1 Chitty, Pl. 671; *Slack v. Lyon*, 9 Pick. 62; *Webb v. Davis*, 37 Ark. 551; *Warner v. Lockerby*, 28 Minn. 28, 8 N. W. 879; *Whittemore v. Ware*, 101 Mass. 352; *United States v. Morris*, 10 Wheat. 240, 6 L. ed. 314; *Erwin v. Shaffer*, 9 Ohio St. 44, 72 Am. Dec. 613; *Haggard v. Wallen*, 6 Neb. 271.

Upon the face of the returns the board of county canvassers determined that of the 1,330 votes cast for state's attorney appellant had received 667 and respondent but 663, and the certificate of election was accordingly issued to appellant. At the hearing of this proceeding the trial court deducted as illegal and void twelve from the total vote canvassed for appellant, and for the same reason two votes were taken, without objection, from the aggregate number counted by the board of canvassers in respondent's favor,

either candidate for the offices so doubly marked on the theory that the particular designation controls the general, as the statutory declaration that in such a case the ballot shall only be held invalid as to any office so doubly marked is equivalent to a declaration that as to any office so marked the ballot shall not be counted. *Helskell v. Landrum* (1896) 23 Colo. 65, 46 Pac. 120.

A ballot marked with a cross in a party circle, and also with crosses opposite the names of some of the candidates of another party, should be counted for the candidate under the marked party title opposite the name of whose opponent no cross is made, although the Montana statute provides no other way of voting a split ticket than by marking each candidate voted for, in view of another provision thereof that if any part of a ballot is sufficiently plain to gather therefrom the voter's intention it should be counted, as the marking in the party circle, so far as the legal intent is concerned, is equivalent to voting for each candidate thereunder, and such intent is not subordinate to or controlled by the intent manifested by the marking of the cross opposite the particular candidate. *Dickerman v. Gelsthorpe* (1896) 19 Mont. 249, 47 Pac. 999.

Ballots marked with a cross in a party circle, and also marked with crosses opposite the names of part of the candidates under such party circle, are properly counted for a candidate thereunder whose name is not so specifically marked, in view of § 1403 of the Montana Political Code, providing that if any part of a ballot is sufficiently plain to gather therefrom the voter's intention it shall be counted, as the marking in the party circle is, so far as the legal intent is concerned, equivalent to voting for all candidates under it. *Ibid*.

Ballots marked with a cross in a party circle, and with a cross opposite the name of a candidate of another party for one office on the name of the candidate for which on the first ticket a cross has been stamped with the official stamp, are properly counted for the candidate so specifically marked on the other ticket, under the South Dakota statute, which provides that where a cross is marked in a party circle a cross to the left of any name on any other

ticket shall be taken as a vote for such person, provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180.

A ballot marked with a cross under a party title, and with a cross opposite the name of one candidate on another ticket, with a line drawn under the name of the candidate for that office on the ticket under the marked party title but without erasing the name, should not be counted for either of those candidates, as the voter's intention cannot be ascertained therefrom. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A ballot marked with a cross in a party circle, and also with a cross opposite the name of a candidate of another party for an office for which there is no candidate on the ticket under the marked party circle, should be counted for all the candidates of such party, in view of § 1403 of the Montana Political Code, providing that if any part of a ballot is sufficiently plain to gather therefrom the voter's intention it shall be counted, as the marking of the cross in the circle, so far as the legal intent is concerned, is equivalent to voting for all candidates thereunder. *Dickerman v. Gelsthorpe* (1896) 19 Mont. 249, 47 Pac. 999.

A ballot cannot be counted for a candidate opposite whose name a cross is properly marked, under the Maine statute providing that if more names are marked for any office than there are persons to be elected the ballot shall not be counted for such office, where the ballot is also marked with a cross opposite the emblem of another party, which under the statute is equivalent to voting for all the candidates of that party. *Curran v. Clayton* (1898) 86 Me. 42, 29 Atl. 930.

Where a cross was marked in the square at the right of the party named at the head of a group of candidates, and in the opposite group there was a cross marked to the right of the name of the opposing candidate, it is held that the vote would be counted for the candidate who was properly marked. *Hughes's Election*, 3 Lack. Jur. 313, Brightly, Pa. Dig. p. 3394.

A ballot marked with a cross in the circle of each of two or more party tickets counteract-

thereby giving the latter a majority of all the legal votes cast for the office in controversy. The vote of R. W. Wells, cast at Sturgis precinct for appellant, was rejected by the court as illegal and void upon the ground that said Wells was a nonresident of the precinct, having his place of abode within the military reservation of Ft. Meade; and to this point our attention is directed by the first assignment of error. By the fifth subdivision of § 18, art. 26, of the Constitution, jurisdiction over the military reservation of Ft. Meade is surrendered to the United States without reservation other than the right to serve legal process in certain cases; and the question presented by the record is whether a person in no way connected with the army or navy may, by long and continuous residence within the boundaries of the reservation thus ceded, acquire the right to vote at an election held in the county where the same is situated, pursuant to the law of the state. In his Commentaries on the Constitution (§ 1227), Judge Story, in treating the 8th section of the 1st article of the Constitution authorizing Congress to exercise exclusive legislative power over military reservations obtained by the consent of the state in

which the same are situated, says: "The inhabitants of those places cease to be inhabitants of the state, and can no longer exercise any civil or political rights under the laws of the state." The doctrine resting upon and sustained by an unruined current of authority seems to be that all political powers and jurisdiction over a military reservation, not expressly retained by a state, are surrendered absolutely to the general government by a voluntary transfer of lands for the exclusive use of the army or navy; and consequently a person residing thereon acquires none of the constitutional qualifications of an elector. *Re Highlands*, 48 N. Y. S. R. 795, 22 N. Y. Supp. 137; *Opinion of Justices*, 1 Met. 580; *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397; *Com. v. Clary*, 8 Mass. 72; McCrary, Elections, 4th ed. § 89. As the foregoing applies with equal force to the case of Charles D. Minard, a soldier stationed at Ft. Meade, the court very properly held his vote cast for appellant to be illegal and void. Residence upon the reservation from the date of his discharge to the time of re-enlistment did not make him a qualified elector, and the Constitution (§ 7, art. 7) expressly provides that "no soldier, seaman, or marine in the

ing each other, and leaving the ballot unmarked so far as they are concerned, is properly counted for a candidate on one of such tickets opposite whose name a cross is marked. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180; *Farmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186.

A ballot marked with crosses in a party circle, and with a cross opposite the name of a candidate of another party for an office, the name of the candidate for which on the first ticket has been marked out by crosses placed upon it, is properly counted for the opposing candidate specifically marked, under the South Dakota statute, which provides that where a cross is marked in a party circle to the left of any name on any other ticket it shall be taken as a vote for such person, provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180.

Ballots marked with a cross in a party circle, which is equivalent to voting for all the candidates thereunder, and with crosses opposite the names of some candidates of other parties, the names of the candidates for such offices on the first ticket being crossed out with lead-pencil lines, are illegal, and cannot be counted for any candidate under the Pennsylvania statute of 1893, permitting the voter to vote an entire ticket by making a cross in the party circle, but otherwise by a cross opposite the name of the candidate of his choice for each office to be filled. *Newberry Twp. Election* (1898) 187 Pa. 297, 40 Atl. 822.

Ballots marked with a cross in a party circle, which, so far as the legal intent of the voter is concerned, is equivalent to voting for all candidates thereunder, cannot be counted either for a candidate thereunder nor for an opposing candidate for the same office opposite whose name a circle is also marked, as the intent expressed by the first marking is not subordinate to and controlled by the specific marking of the other candidate, and it is therefore impossible to determine for which candidate the vote was cast. *State ex rel. Brooks v. Fransham* (1897) 19 Mont. 278, 48 Pac. 1.

A ballot marked with a cross in a party circle, and with a cross opposite the name of a

candidate for one office on another ticket, should be counted for a candidate on the party ticket marked in the circle for an office other than that for which the candidate was individually marked on the other ticket, under the New York election law providing that if the elector shall have made a cross in the circle of one party, and also before the names of any candidates of another party, the mark in the party circle must be deemed to have cast the elector's vote for the candidates of that party, except the candidates for the office or offices individually marked on the other ticket. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

Ballots marked with crosses in the circle at the head of a party ticket should be counted for the candidate thereunder whose name is not erased, and opposite whose opponent on another ticket a cross is placed, whether to the left as required by statute, or to the right, under the South Dakota ballot law, which provides that a ticket marked with a cross in a party circle shall be counted "throughout," except when the name is erased, and that a cross to the left of the name on any other ticket shall be taken as a vote for such person, provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased. *Vallier v. Brakke* (1895) 7 S. D. 343, 64 N. W. 180; *Farmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186; *McKitttrick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 23; *Church v. Walker* (1897) 10 S. D. 90, 72 N. W. 101.

Ballots containing three candidates for a certain office on each ticket, which are marked by placing a cross in the circle preceding one of the party titles, by crosses in the squares opposite the names of one or more of such candidates under that title, and also by crosses in the squares opposite the names of one or more candidates of the other party, can be counted only for the candidates specifically marked on the ticket, the circle of which is unmarked, as the placing of the cross in the party circle, which, under the statute is equivalent to voting for all the candidates thereunder except for offices specifically marked on the other ticket and also in the squares of individual candidates on the other ticket, is a marking of more names

army or navy of the United States shall be deemed a resident of this state in consequence of being stationed therein."

The only perceptible mark placed upon two of the disputed ballots,—Exhibits G and H,—rejected by the court, and which it is claimed should have been counted for appellant, is a cross upon each ballot in the circle at the head of the Republican ticket, and in each instance, upon the same ballot, another cross was placed in the circle at the head of the Prohibition ticket. The failure of the latter party to name and place upon its ticket a candidate for the office of state's attorney does not relieve appellant from the operation of the rule announced by this court in *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180. Under our system, two or more crosses at the head of party tickets upon the same ballot destroys the effect entirely, and the court rightly declined to count the ballots for either party.

Three of the rejected ballots contain in the circle at the head of the Republican ticket blurred crosses, apparently made with ink on a rubber stamp, the outline of which is traced or indicated with lead-pencil marks

than there are persons to be elected, in violation of the Iowa statute, which permits the marking of ballots in the circle opposite party titles, and at the same time in squares opposite candidates on other tickets, but not on the same ticket; but provides that if the voter marks more names than there are persons to be elected, or it is impossible to determine the voter's choice for an office, his ballot shall not be counted for that office. *Whittam v. Zahorik* (1894) 91 Iowa, 23, 59 N. W. 57.

On an election at which two councilmen are to be elected, for which office there are two candidates on one ticket and one on another ticket, ballots marked with a cross in the circle preceding the party title of the first ticket, by a cross in the square preceding the name of one of the candidates on the same ticket, and by a cross in the square preceding the name of the candidate of the other party for the same office, can be counted for the candidate so specifically marked as the voter's choice on the ticket whose party title is unmarked, but cannot be counted for either of the candidates under the marked title, as the marking of the opposing candidate leaves but one to be elected from the other ticket, and it is impossible to determine the voter's choice as between the two candidates thereunder except by considering that he has voted for both, which would be a marking of more candidates than there are persons to be elected, in violation of Iowa statute, which, among other methods, permits the marking of ballots in a party circle, and at the same time in the squares opposite the candidates on other tickets, but not on the same ticket, and provides that if the voter marks more names than there are persons to be elected, or it is impossible to determine the voter's choice for an office, his ballot shall not be counted for that office. *State ex rel. Hagge v. Hagen* (1894) 91 Iowa, 510, 60 N. W. 108.

A ballot marked with a cross in the circle preceding a party title under which there are three candidates for a certain office, and also in the square opposite the name of one of the three candidates of another party for the same office, should be counted for the candidate so specifically marked as the voter's choice for that office, but not for the candidates under the marked

forming a perfect cross within the circle; thus clearly showing, in the absence of any erasures, the intention of the voter in each instance to vote the entire party ticket. Appellant was clearly entitled to have these ballots counted and placed to his credit. *Parvley v. Healy*, 7 S. D. 401, 64 N. W. 186. We said in *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180: "When the intention of the elector to make a cross is clearly apparent, and the cross is made, whether with a stamp or otherwise, any informality merely in making it should be disregarded."

A ballot identified as "Exhibit b" contains two straight lines distinctly drawn with a lead pencil in opposite directions across the circle at the head of the Republican ticket, which intersect at the center thereof, and form a perfect cross. Evidently for the purpose of expressing his intention more clearly, the voter retraced the figure he had made, and in doing so allowed his pencil to waver somewhat, and extend slightly beyond the printed line describing the circle. There being no erasures or other marks upon the ticket, it should have been counted as a vote for appellant, and the same was erroneously excluded.

party title, under the Iowa statute, which among other methods, permits the marking of ballots by placing a cross in the circle preceding a party title, and at the same time by placing a cross in the square opposite the name of any candidate of any other party; in which case the ballot is to be counted for all candidates under the marked party title except as to the office so specifically marked on the other party ticket, and provides that if it is impossible to determine the voter's choice for an office his ballot shall not be counted for that office, as the specific designation of the one candidate leaves but two persons to be elected from the other ticket, and it is impossible to determine for which two of the three candidates therein named the voter intended to cast his ballot. *Whittam v. Zahorik* (1894) 91 Iowa, 23, 59 N. W. 57.

Ballots marked with a cross opposite the name of each candidate thereunder except one, and also opposite the name of a candidate of another party for that one office, should be counted for that candidate, as, under the Pennsylvania election law of 1891, the individual markings under such party group and opposite such opposing candidate's name prevail over the intention expressed by the mark at the head of the group. *Weidknecht v. Hawk* (1893) 3 Pa. Dist. R. 123.

A ballot marked with a cross opposite a party designation is a mark for all the candidates thereunder, and a ballot so marked which is also marked with a cross opposite the name of the candidate of another party is a double marking for the office for which such candidate and the opposing candidate under the marked party designation are running, and cannot be counted for either under the Pennsylvania election law of 1898, providing that if a voter marks more names than there are persons to be elected to an office his ballot shall not be counted for such office. *Bertolet's Case* (1894) 3 Pa. Dist. R. 643.

A ballot marked with a cross at the head of a party group, and opposite the names of all the candidates under that group, except one, cannot be counted for such candidate under the Pennsylvania election law of 1891, which contemplates but a single cross mark, as the mark-

Exhibit A1 is a rejected ballot upon which no cross was made in either of the circles at the head of the different tickets, but upon the Republican ticket, at the left of appellant's name, a cross appears; and while the same, by coming in contact with a heavily printed line extending across the ticket immediately under appellant's name, is rendered partially obscure, the intention of the maker is entirely clear, and the vote should have been counted for appellant.

"As to Exhibit R, the court finds that there was a cross in green ink at the head of the Republican ticket, and also pencil marks or crosses in said circle," and that the entire ballot is therefore void. From an inspection of the ballot, which the court expressly made a part of said finding of fact, and certified the same to this court for our examination, we are convinced that no pencil was used in the circle at the head of either ticket upon the ballot, and, the cross made with ink by the use of a stamp provided for that purpose being entirely sufficient, the vote should have been counted for appellant.

Exhibit H is a rejected ballot containing within the circle at the head of the Republican ticket a well-defined cross made with the

official stamp, and another similar impression just outside the circle, which might have been made by allowing the stamp to fall from the hand, or by inadvertently placing the same upon the paper. In *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180, we held that "a cross at the head of the party ticket, but not within the circle, is a nullity," and it therefore follows that the cross within the circle, in the absence of anything to indicate a contrary intention, votes the ticket, and the same should have been counted for appellant.

Another ballot,—Exhibit S,—which the court declined to count for appellant, contains a cross in the circle at the head of the Republican ticket. The name of respondent is erased, and a cross is placed in the Republican column immediately to the right of appellant's name. When there is nothing to show a design to thus mark a ticket for the purpose of invading the secrecy of the ballot by placing an identifying mark thereon, a cross in the circle at the head of a ticket is a vote for every candidate whose name appears in the column, and a cross upon either side of a name is not ordinarily sufficient to impair the effect in the slightest degree. The

ing of the individual candidates thereunder prevails over and renders ineffectual the marking at the head of the ticket, which would otherwise be considered a vote for each candidate under it. *Weidknecht v. Hawk* (1893) 3 Pa. Dist. R. 123.

A ballot marked with a cross opposite a party designation is marked for all candidates thereunder, and a ballot so marked, which is also marked with a cross opposite the name of a candidate of another party, is a double marking for the office for which such candidate and the opposing candidate under the marked party designation are running, and cannot be counted for either, under the Pennsylvania ballot law of 1891, providing that if a voter marks more names than there are persons to be elected to an office his ballot shall not be counted for such office. *Election Instruction* (1892) 2 Pa. Dist. R. 1.

In order to vote for persons whose names are on a ticket through nomination papers a mark must appear opposite every candidate intended to be voted for, as the Pennsylvania ballot law of 1891 does not provide for voting by groups in such case. *Ibid.*

A ballot marked with a cross opposite a party designation, and also opposite the name of a candidate on another party ticket for an office for which more than one candidate is to be elected, cannot be counted for any of the candidates for such office, as more names have been voted for than there are persons to be elected, and it is impossible to determine which candidate the voter intended to cut, within the provision of the Pennsylvania ballot law of 1891 that in case more names are voted for than there are persons to be elected to an office, or if it is impossible to determine the voter's choice for any office, the ballots shall not be counted for that office. *Ibid.*

The marking of individual candidates on ballots also marked at the head of a group prevails, and the marking of the group so far as the same offices are concerned, is inoperative and void under the Pennsylvania election law of 1891. *Re Election in 20th Ward, No. 2* (1894) 3 Pa. Dist. R. 120.

Ballots marked with a cross in a party circle, which is equivalent to voting for all the can-

didates thereunder, are properly counted, although marked with a cross opposite the name of a candidate for one office on another ticket, where the party ticket marked in the circle contains but one candidate for that office, and there are two to be elected, as the voter has the right to vote for each office to be filled. *Re Election of Assessor* (1899) 192 Pa. 440, 43 Atl. 972, *Distinguishing Re Newberry Twp. Election* (1898) 187 Pa. 297, 40 Atl. 822, on the ground that in that case the ticket was complete.

A ballot marked opposite the names of some or most of the candidates of one party, and marked also with a cross in the appropriate margin opposite the designation of another party, should be counted for the candidate of the latter party for an office for which no candidate is individually marked on the other ticket, under the Pennsylvania ballot law of 1891. *Loucks' Case* (1893) 3 Pa. Dist. R. 127.

But it has also been held that ballots marked with a cross opposite one party group, and with a cross opposite the name of a candidate of another party for one office, should be counted for the candidate so individually marked under the Pennsylvania election law of 1893, as the individual marking prevails over the group marking. *Coleman v. Gernet* (1894) 3 Pa. Dist. R. 500.

Ballots marked with a cross opposite one party group, and with a cross opposite the name of a candidate of another party for one office, should be counted for the candidate so specifically marked, under the Pennsylvania election law of 1891, as the individual marking prevails over the group marking. *Weidknecht v. Hawk* (1893) 3 Pa. Dist. R. 123.

k. Alteration of ballot.

1. Erasure of names.

A ballot containing a lead-pencil mark across the name of a candidate contains a distinguishing mark which prevents its being counted, under the Indiana election law forbidding the counting of a ballot containing such a mark. *Sego v. Stoddard* (1893) 136 Ind. 297, 22 L. E. A. 468, 36 N. E. 204; *Sego v. State ex rel. Stoddard* (1894) 136 Ind. 700, 36 N. E. 208.

vote should have been counted for appellant. *Parmley v. Healy*, 7 S. D. 401, 64 N. W. 186.

While the present system was designed to place our elections beyond polluting instrumentalities, and secure, as nearly as practicable, secrecy of the ballot, the legislature never intended to disfranchise a legal voter, who, in substantially complying with the mandatory requirements of law, has, without an evil purpose, but by accident or inadvertence, made a blot or mark upon his ballot, which in no manner tends to distinguish the same or divulge the secret within his breast. It was so held by the supreme court of Nevada in construing a statute more stringent by far than our own, in that it provides "that the voter shall place a cross after the name of the person he intends to vote for;

that such marking shall be done only with a black lead pencil; that when a voter marks more names than there are persons to be elected to an office, his vote for such office shall not be counted; and that any ballot on which appear names, words, or marks, written or printed, except as in this act provided, shall not be counted." *Dennis v. Caughlin*, 41 Pac. 708, 22 Nev. 447, 29 L. R. A. 731. We therefore find that of the disputed ballots Exhibits G and 11, together with the votes of R. W. Wells and Charles D. Minard, counted for appellant by the board of county canvassers, were wholly void, and therefore properly deducted by the court from the total vote of 667 returned in his favor, and that Exhibits b, H, R, t, q, x, A1, and S, also counted for appellant by said board, and excluded by

A ballot on which a pencil line is drawn through the name of all the candidates for a certain office and the name of one of such candidates written in underneath cannot be counted under the Oregon election law requiring ballots to be marked to the left of the names of candidates. *Van Winkle v. Crabtree* (1899) 84 Or. 462, 55 Pac. 831.

The erasure of names of candidates by pencil marks drawn through them does not necessarily constitute a distinguishing mark which requires a rejection of the ballot as to other candidates. *Parker v. Orr* (1895) 158 Ill. 600, 30 L. R. A. 227, 41 N. E. 1002.

But a ballot marked with a cross in the circle opposite one party designation, the name of one candidate of that party being stricken out, a cross placed in the square opposite the name of the candidate of the other party for that office, all other candidates of such other party being marked out by lines drawn through them, contains distinguishing marks which require its rejection. *Kelly v. Adams* (1899) 183 Ill. 193, 55 N. E. 837.

A ballot marked by a line drawn through the names of all the candidates of a certain party, and marked in no other way for the other candidates for one of the offices thereon, cannot be counted for a candidate of the latter party for such office, under the Oregon election law requiring the voter to express his choice by a mark to the left of the name of the candidate. *Van Winkle v. Crabtree* (1899) 84 Or. 462, 55 Pac. 831.

A ballot marked only by pencil erasures of the names of all the candidates on one ticket cannot be counted for anyone, under the Illinois ballot law requiring ballots to be marked with a cross. *Apple v. Barcroft*, 158 Ill. 649, 41 N. E. 1116.

But ballots marked by a cross above all but one of the party headings should be counted for the candidate of that party, under the West Virginia election law, which requires that tickets not voted for shall be defaced by drawing one or more lines with pen and ink or indelible pencil from the top to the bottom thereof, but which contemplates that the ballots shall be counted wherever the voter's intention is plainly indicated as to any office. *Dunlevy v. Marshall County Ct.* (1900; W. Va.) 85 S. E. 956.

Ballots, on each of which one or more names of candidates are erased with a pencil, are void, and should not be counted, under the New York election law declaring that if there shall be found on any ballot any other mark than the cross mark made for the purpose of voting, such ballot shall be void, and upon such ballot no vote for any candidate shall be counted. *Peo-*
47 L. R. A.

ple ex rel. Obert v. Bourke (1900) 63 N. Y. Supp. 906.

Ballots marked with a cross in the circle of one of two parties printed thereon are properly counted for the candidates of that party, although the voters, apparently for the purpose of emphasizing their intention to vote that party ticket, have also drawn lines through the other ticket, as such markings, although not in strict compliance with the statutory rules, are merely technical errors within the provision of the Ohio statute that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. *Stearns v. Taylor* (1894) 1 Ohio N. P. 23.

Ballots showing erasures or cancellations, or which are defaced, are invalid, and cannot be counted, under the New York election law of 1896, § 103, making it unlawful to deface or make erasures from ballots, and providing that ballots found in that condition shall be wholly void, and no vote thereon shall be counted. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

Ballots properly marked with crosses opposite the names of candidates on one ticket should be counted, although the names on the other tickets have been erased, as the erasure, while unnecessary, may have been made for the purpose of making the voter's intention more clear. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

A ballot voted at a primary election on which some of the names were erased with lead pencil and others written in in their places is not marked for identification so as to require its rejection, where it conforms in external appearance to the statutory requirements, and there is nothing showing an intention to identify it thereby. *Re McDade* (1899) 43 App. Div. 303, 60 N. Y. Supp. 333.

A ballot marked only by crossing out the names of some of the candidates on each of two party tickets should be counted for a candidate on one of such tickets whose opponent's name is so crossed out, although the only method provided by the Pennsylvania election law of 1893 for marking ballots is by crosses, and it is possible to determine from such marking the voter's intention, where the only grounds specified in such act for rejecting a ballot are that more names have been voted for than the voter has the right to vote for, or that it was impossible to determine his choice for an office; in which cases the ballot shall not be counted for such office. *Coleman v. Gernet* (1894) 3 Pa. Dist. R. 500.

The West Virginia election law of 1893, providing for the marking of ballots by crossing out candidates or tickets not voted for, declaring that if more than one of the ballots have both

the court, were legal votes for appellant, which, added to his total vote of 655, as found by the court, give him a majority of two over respondent, whom the court found to be entitled to 661 votes.

We have carefully noticed certain incidental matters of which counsel for the respective parties complain, all of which are without merit, and are points that have frequently engaged the attention of this court. The view we have taken renders any further consideration of the assignments of error unnecessary. A new trial could be of no avail to respondent. From all the material evidence, which consists of ballots expressly made a part of the court's findings of fact, appellant is, as a matter of law, entitled to the office.

ing on them to indicate which of them was not so voted then neither shall be counted, and that any ballot or part of a ballot from which it is impossible to determine the voter's choice shall not be counted as to the candidate or candidates affected thereby, contemplates that each office shall stand by itself, that the whole ballot shall be rejected only when there is nothing thereon to indicate the voter's choice as to any candidate, and shall be counted as to any candidate, the voter's intention to vote for whom is apparent from his ballot. *Dunlevy v. Marshall County Ct.* (1900: W. Va.) 35 S. E. 956.

Ballots should not be rejected as to an office for which the voter's intention is plainly indicated, although none of the party headings have been scratched off, under the West Virginia election law requiring all party tickets to be scratched off which are not voted for, but which contemplates that the intention of the voter, if clearly expressed as to any part of the ballot, shall be given effect. *Ibid.*

Ballots marked with a cross opposite the names of candidates, and with lines drawn through the names of opposing candidates, evidently honestly made for the purpose of making the voter's intention more certain and in accordance with the prior method of voting, should not be rejected as containing distinguishing marks. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346.

2. Addition of names.

The marking of a ballot with a cross, and with a name, not the voter's, in addition, is invalid. *Haswell v. Stewart* (1874) 1 Ct. of Sess. 925, 2 O'Malley & H. 215, Wigmore, p. 100.

A ballot on which the name of a candidate is erased and another name written in should be counted for the latter, although no cross or mark of any kind appears in the square opposite such name or elsewhere, under N. D. Rev. Codes, § 491, which provide that the voter may write or paste a name on the ballot opposite the office to be voted for, and such name shall be counted whether marked or not. *Hower v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

A ballot marked with a cross under a party name, and on which the name of a candidate for an office on the ward ticket is erased, and the surname only of a candidate on an opposing ticket written in, should be counted for the candidate whose name is so written in. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

Failure of a voter to mark a cross in the square opposite a name written into a ballot by him as required by the Iowa statute renders the writing of the name therein a deliberate act which could be used for identification, and the 47 L. R. A.

The judgment appealed from is therefore reversed, and the case remanded, with the instruction that the circuit court render judgment accordingly.

Hamey, J., concurring specially:

In my judgment, the original notice of contest was sufficient to give the court jurisdiction, and there was no error in allowing it to be amended; therefore it is unnecessary to hold that any essential facts were supplied by the answer. I concur in the conclusion that the judgment should be reversed upon the ground that the findings of fact do not overcome defendant's prima facie title to the office as established by the board of county canvassers and his certificate of election.

ballot should be rejected. *Voorhees v. Arnold* (1899) 108 Iowa, 77, 78 N. W. 795.

A ballot on which the name of a person for an office is written below the printed ticket on the margin of the ballot should be rejected as containing an identifying mark. *Ibid.*

Failure of a voter to mark a cross in the square opposite the name of a candidate written into a ballot requires the rejection of the ballot, under the Iowa statute requiring that a name written in be so designated the same as if printed on the ballot. *State ex rel. Hagge v. Hagen* (1894) 91 Iowa, 510, 60 N. W. 108.

The marking of a ballot with a name or initials of a candidate written opposite his name, instead of a cross, is invalid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

The writing of an initial in the blank space left for the insertion of the name of the candidate for a certain office, with the possible intention of inserting a name, but which intention was not carried out, renders the ballot void, where such mark may serve as a distinguishing mark. *Tebbe v. Smith* (1895) 108 Cal. 101, 29 L. R. A. 673, 41 Pac. 454.

The marking of a ballot with a cross, and with a candidate's name in addition, is invalid. *Cameron v. McLennan* (1875) 11 Can. L. J. 163, Hodgins, Elect. Cas. 817, Wigmore, p. 190.

A ballot in which was written the name of one not on the ticket cannot be excluded on the ground that it contains a distinguishing mark, because after such name were written the words "Independent Democrat," where the statute requires the printing of party designation after the name of all candidates, and may be considered to authorize the writing of such designation after the name so inserted. *Jennings v. Brown* (1896) 114 Cal. 307, 84 L. R. A. 45, 46 Pac. 77.

A ballot marked with a cross in a party circle should be counted for a candidate thereunder, and not rejected, under the New York election law declaring void ballots upon which is written anything other than the names of candidates not printed thereon, and that no vote thereon should be counted, where there is written in the blank column the name "John Kelly" as a candidate for a certain office, and the candidate for that office on the party ticket marked in the circle is "John Kelly," as the court is not bound, as matter of law, to presume that the names are the same, and thus extend the condemnation of the statute beyond its express terms. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

A ballot marked with a cross in the square at the head of one party ticket in which the name of a candidate is erased and the name of the opposing candidate written in its place should

WYOMING SUPREME COURT.

Samuel SLAYMAKER

v.

Arthur W. PHILLIPS.

(5 Wyo. 453.)

1. The absence of the official stamp, or of the judge's name or initials, on the exterior of the ballot when so folded as to conceal the ticket upon its face, will cause its rejection, under Sess. Laws 1890, chap. 80, § 180, providing that a "ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election, . . . shall be void, and shall not be counted."
2. It is not an unreasonable and unconstitutional restriction of the right of suffrage to require an indorsement by the official stamp, and of the name or initials of the judge of election, on the outside of an official ballot.
3. The legislature has power to define and prescribe what shall constitute a lawful ballot.

be counted for the latter, and not for the candidate of the party. *Atty. Gen. ex rel. Scott v. Glaser* (1894) 102 Mich. 405, 61 N. W. 651.

The erasure of the name of a candidate in a ticket, and the writing in of another name on a ballot properly marked with a cross in the square under a party title are not a distinguishing mark requiring a rejection of the ballot as to another candidate under such party title. *Ibid.*

Ballots from which the voter's intention is uncertain because while marked with a cross in a party circle the name of an opposing candidate for an office is written in under the name of the candidate of that party should not be counted for either of such candidates. *Parker v. Orr* (1895) 158 Ill. 609, 80 L. R. A. 227, 41 N. E. 1002.

Ballots marked with fictitious names or letters and other marks for the purpose of identification cannot be counted under the Ohio statutes providing that all ballots shall be without any mark or device by which one ticket may be distinguished from another. *Newman v. McManis* (1890) 23 Ohio L. J. 225.

That a name written into a ballot in the wrong place might possibly afford the means of identifying the person who cast the ballot does not require its rejection, but it is properly counted as to candidates thereon where the name was so written, in an attempt by the voter to exercise his right given by statute to vote for a person not on the ticket. *Van Winkle v. Crabtree* (1899) 34 Or. 462, 55 Pac. 831.

A ballot cannot be counted for the candidate of one party, the voter's intention to vote for whom is expressed only by erasing the name of the candidate of another party for the same office and writing the first candidate's name therein, as the only way provided by the South Dakota statute for voting for a candidate of another party whose name is printed upon the ballot is by marking a cross opposite his name. *McKittick v. Pardee* (1895) 8 S. D. 39, 65 N. W. 28.

A ballot marked with crosses opposite the names of candidates of one party, and containing the name of the candidate of another party written in among marked candidates below the designation of the office for which he is a candidate, cannot be counted for him, as the only way in which a voter can indicate his desire to

On rehearing.

4. A provision in a section of an election law which provides for the canvassing of the votes, requiring the rejection only of surplus and duplicate votes, is not in conflict with a prior section making void ballots not properly indorsed, so as to nullify the prior section, and require such ballots to be counted.
5. A constitutional provision fixing the qualification of voters is not violated by a statute making void ballots not properly indorsed by the election officers.

(Grossbeck, Ch. J., dissents.)

(July 1, 1895.)

PRESERVATION by the District Court for Converse County for the opinion of the Supreme Court of a suit brought to contest the election of defendant to the office of clerk of the District Court. *Judgment for plaintiff.*

The facts are stated in the opinion.

vote for a candidate of another party, under the South Dakota statute, is by placing a cross to the left of such candidate, and the law does not authorize a voter to write the name of a candidate printed upon one party ticket upon another party ticket. *Ibid.*

A ballot not marked in any manner prescribed by the South Dakota statute, but containing the name of a candidate of one party written in immediately below the name of a candidate of another party for the same office, cannot be counted for either candidate. *Parmley v. Healy* (1895) 7 S. D. 401, 64 N. W. 186.

A ballot marked with a cross in a party circle and with a cross opposite the name of a candidate of another party for the same office, whose name is also written in the column of the ticket marked in the circle and immediately below the name of the candidate of that party for the office whose name is erased, cannot be counted, as the candidate's name appears more than once upon the same ballot, and the writing of the name upon the ballot identifies the voter, and invalidates the entire ballot. *Ibid.*

A ballot marked opposite the name of a candidate for an office for which but one person is to be elected, and also containing the name of a candidate for the same office written in the blank space provided for that purpose, is irregular and illegal, and cannot be counted under the Pennsylvania statute of 1893, although the name so written in is the same as that of the candidate marked. *Re Redman's Election* (1896) 173 Pa. 59, 38 Atl. 703.

Ballots on which names of candidates are written with pencil in the blank column whose names are already printed upon the ballot for the office are vitiated thereby under the New York election law of 1896, which provides for writing in names only where they are not already printed on the ballot, and further provides that any ballot on which shall be found any mark other than the cross mark used for the purpose of voting shall be wholly void, and no vote thereon shall be counted. *People ex rel. Feeny v. Richmond County Canvassers* (1898) 156 N. Y. 36, 50 N. E. 425.

Ballots in which the voter inserts the name of a candidate for an office in the blank space provided therefor should be counted for such candidate, although no cross is marked opposite such name, under the Pennsylvania ballot law

Messrs. Lacey & Van Devanter for plaintiff.

Mr. Robert W. Breckons, for defendant:

So far as the elector himself is concerned, his duty is performed when he casts a vote on a ballot received from the hands of the proper election officer.

Section 130 can be construed without violence to the rules of rhetoric, and with as good reason as it can be construed any other way, to mean that if either the stamp or the initial be found therein the ballot shall be counted.

It is the policy of the law that no voter shall be deprived of his right of suffrage by reason of the neglect or breach of duty on the part of an election officer.

McCrary, Elections, § 192; Jones v. State ex rel. Atherby, 1 Kan. 273; Gilleland v. Schuyler, 9 Kan. 569.

In this country, in the absence of a provision of the statute to the effect that omissions of officers are fatal, their negligence, in the absence of fraud, will not deprive a voter of his right of suffrage.

of 1893, which provides for such insertion, and declares that such insertion shall be counted as a vote without the cross mark. *East Taylor Election Contest (1896) 5 Pa. Dist. R. 393.*

Ballots not be rejected as void which are properly marked with a cross in a party circle, but containing also the name of a candidate written in the blank space provided therefor for an office to which two persons are to be elected, but for which there is but one candidate on the ticket marked in the party circle. *Re Providence Twp. Election (1896) 13 Lanc. L. Rev. 273.*

A ballot on which is written in the margin the name of a person evidently for some purpose other than that of expressing the voter's preference for a certain candidate should be excluded as containing distinguishing marks. *State ex rel. Orr v. Fawcett (1897) 17 Wash. 188, 49 Pac. 346.*

A name written on a portion of a ticket which does not purport to be the name of a candidate for an office is a distinguishing mark requiring a rejection of the ballot. *Atty. Gen. ex rel. Scott v. Glaser (1894) 102 Mich. 396, 61 N. W. 648.*

Ballots should be rejected as to a candidate whose name is written in over the erased name of the candidate of another party whose ticket is voted, instead of in the space provided therefor, under the West Virginia election law, which contemplates that the intention of the voter, if ascertainable from his ballot, shall be given effect. *Dunlevy v. Marshall County Ct. (1900; W. Va.) 35 S. E. 956.*

The erasure of some one of the names on a paster put on a ballot and the writing of the same name, or that of some other person, with pencil on the front of the paster, are distinguishing marks within the prohibition of the New York ballot reform law, where they appear on a large number of ballots, and there is no other apparent reason therefor than that they were a part of a scheme for identification. *People ex rel. Hasbrouck v. Dutchess County Supers. (1892) 135 N. Y. 522, 32 N. E. 242.*

The misspelling of the name of a candidate for whom the elector intended to vote is a designation by which the ballot may be distinguished within the meaning of the New Jersey ballot law, providing that no ballot shall be counted if there shall be on the face or back any mark,
47 L. R. A.

Paine, Elections, § 373.

Statutory provisions relating to elections are not rendered mandatory as to the people by the circumstance that the officers of an election are subject to criminal liabilities for their violation.

People v. Schermerhorn, 19 Barb. 540; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; Thompson v. Ewing, 1 Brewst. (Pa.) 107.

The mistakes and negligence of election officers should not be permitted to invalidate an election in the absence of fraud, unless declared to have that effect by the statute.

Conaway, J., delivered the opinion of the court:

This is an election contest. Plaintiff and defendant were candidates for the office of clerk of the district court for Converse county, and defendant had a majority of the votes cast, counted, and returned for the office. Plaintiff contends, however, that the ballots cast at three voting precincts in the county were illegal and void, and should not have been counted, and were counted contrary to express provisions of our statute.

sign, designation, or device whereby such ballot can or may be identified or distinguished from any other ballot used at such election. *Kip v. Weeks (1899; N. J.) 44 Atl. 856.*

The writing of the voter's name upon a ballot which is not authorized by the South Dakota statute renders it void. *Vallier v. Brakke (1895) 7 S. D. 343, 64 N. W. 180.*

But ballots on the back of which the voter's name is written are properly counted, as they are not within the prohibition of *Tex. Rev. Stat. art. 1694*, of any "picture, sign, vignette, device, or stamp," and the Texas act of 1892, while it provides that the elector who places any mark upon his ballot by which it may afterwards be identified shall be punished, does not make the violation thereof a ground for rejecting the ballot. *Hanscom v. State ex rel. Lockhart (1895) 10 Tex. Civ. App. 638, 31 S. W. 547.*

A ballot marked with a cross in a party circle, and with the name of a candidate of another party for a certain office written into such party ticket after erasing the designation of the office and the name of the candidate therefor, cannot be counted for the candidate whose name is so written in, as the only method provided by the South Dakota statute for voting for a candidate of another party, where the ballot has been marked in one party circle, is by erasing the name of the candidate of such party for the office, and making a cross to the left of the name of the candidate for whom the voter desires to vote. *Vallier v. Brakke (1895) 7 S. D. 343, 64 N. W. 180.*

The writing on a ballot of the name of a candidate originally printed thereon after the erasure of a paster which had been placed over his name does not render the ballot void as containing a distinguishing mark, where there is a reasonable explanation for so writing in the name. *Coughlin v. McElroy (1899) 72 Conn. 99, 43 Atl. 854.*

1. Attempted erasure of vote mark.

A ballot from which a cross mark made opposite the name of a candidate has been either erased or crossed out, contrary to the New York statute prohibiting erasures of any name or mark written on the ballot by the voter, is prop-

If the votes of these precincts were rejected, plaintiff would be elected. The alleged illegality in the ballots cast at these three precincts consisted in their not having the name or initials of either of the judges of election upon the back or upon any part of any of the ballots, and in two of the precincts none of the ballots were indorsed with the official stamp, though the stamp was placed upon the face of the ballots, at the head of the ballots. Upon these facts, the district court reserves for our decision the following important and difficult questions: "(1) Are the provisions of the election laws of Wyoming which require that the judge of election, before delivering any ballot to an elector, shall print on the back of the ballot the designation 'Official Ballot,' and the other words provided by said laws, and that one of said judges shall write his name or initials upon the back of each ballot, directory only, or are they mandatory? (2) Should any of the ballots cast at said election at either of the above-named precincts be rejected, and, if so, which of said ballots should be so rejected? (3) Upon the facts aforesaid, should judgment be entered for the plaintiff or for the defendant?"

Section 110 of chapter 80 of the Session Laws of 1890 provides that the county clerk or clerk of the municipality, in case of a municipal election, shall furnish to the judges of election the proper number of ballots; and provides, further, that "he shall also deliver to the said judges a rubber or other stamp with ink pad for the purpose of stamping or designating the official tickets as hereinafter

provided. Said stamp shall contain the words 'Official Ballot,' the name and number of the polling precinct, the name of the county or municipality as the case may be and the name and official designation of the clerk who furnishes the tickets." Section 119 of the same act provides as follows: "At each election the judges of election shall designate two of said judges who shall deliver the ballots to the qualified electors. Before delivering any ballot to an elector the said judge shall print on the back and near the top of the ballot with a rubber or other stamp provided for that purpose the words 'Official Ballot,' and the other words on the said stamp as hereinafter provided, and one of the said judges shall write his name or initials upon the back of each ballot and directly under the official stamp. . . ."

Section 130, in so far as it affects the questions before us, provides as follows: "In the canvass of the votes any ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election as provided in this act, shall be void, and shall not be counted." There can be no question that this last provision is mandatory. The language that the ballots specified "shall not be counted" requires no construction, and admits of none. It seems to be as plain as any words that could be selected. But counsel contend that the provision may be construed to require the absence of both the stamp and the name or initials of one of the judges, in order to make the ballot void. Some room for this idea is furnished by the language of the statute in specifying nega-

erly rejected. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

A ballot marked with crosses opposite the names of two candidates for an office, one of which is very distinctly made and the other bears unmistakable evidence of an attempted erasure, is properly counted for the candidate opposite whose name the distinct cross appears. *Howser v. Pepper* (1899) 8 N. D. 484, 79 N. W. 1018.

A ballot marked with a cross mark opposite the names of two candidates for some offices nearly parallel, and horizontally across one of which crosses are drawn two pencil lines which are evidently not a part of the original cross, but made with the deliberate intention of canceling or erasing it with the view of voting for the opposing candidate, is properly rejected as in violation of the New York statute prohibiting the erasing of any name or mark written on a ballot by the voter. *People ex rel. Pierce v. Parkhurst* (1898) 24 Misc. 442, 53 N. Y. Supp. 598.

A ballot from which cross marks made in the voting space opposite the names of some candidates of a party were erased is properly rejected under the New York election law, which provides that it shall not be lawful to erase any name or mark written on the ballot by the voter. *Ibid.*

A ballot marked with a cross mark in an inner circle made within the circle at the head of a party ticket, the cross mark being evidently partially erased by the voter, is void under the New York election law, which provides that it shall not be lawful to erase any name or mark written on the ballot by the voter. *Ibid.*

Ballots on which there are erasures before the names of candidates, made either by a dirty

rubber, a wet finger, or by pencil marks, are properly rejected, under the New York election law declaring void ballots on which erasures appear, and that no vote on such ballots should be counted. *People ex rel. Obert v. Bourke* (1900) 63 N. Y. Supp. 906.

A ballot on which there is an apparent erasure opposite the name of a candidate is not thereby vitiated. *Fairchance Borough's Election* (1899) 8 Pa. Dist. R. 505.

The erasure by pencil marks or otherwise of a cross opposite the name of one candidate on a ballot marked with a cross opposite the name of another candidate for the same office, the evident intention of which is to correct a mistake made in putting the cross opposite such candidate, does not invalidate the ballot under the Washington statutes prohibiting distinguishing marks. *State ex rel. Orr v. Fawcett* (1897) 17 Wash. 188, 49 Pac. 346.

Ballots marked with crosses, and the same erased or scratched out with lead pencil, are invalid. *State ex rel. McMillan v. Sadler* (1899; Nev.) 58 Pac. 284.

m. Partial failure to vote.

Ballots should not be rejected as to an office as to which the voter's intention is clearly indicated, although his choice for another office thereon is not indicated, as, under the West Virginia election law, each office is separate and independent of all others, and the whole ballot is to be rejected only when there is nothing thereon to indicate the voter's intention as to any of the candidates. *Dunlevy v. Marshall County Ct.* (1900; W. Va.) 35 S. E. 956.

H. P. F.

tively and disjunctively what defects shall cause the rejection of the ballot, and not putting the provision in the affirmative form of declaring what shall be requisite in the indorsement of a ballot, otherwise legal, to authorize it to be counted. If the statute said that a ballot, otherwise legal, should be counted only when it is indorsed by the official stamp, or has the name or initials of the judge of election, as provided in this act, it would be clear that the presence of either one or the other would authorize the counting of the ballot. But as the provision reads it is equally clear that the meaning is that the absence of either one or the other shall cause the rejection of the ballot. The name and initials are interchangeable, of course, and both of these are not required. This all seems obvious from a mere inspection of the language, and this disposes of all the points made by counsel for defendant in brief or oral argument.

But one member of this court insists that this is an unreasonable and unconstitutional restriction of the right of suffrage. The majority of the court think differently. The duty of courts to pass upon the constitutionality of acts of the legislature is, perhaps, the most delicate duty they have to perform. Courts may well hesitate long before declaring an act of the legislature invalid, or unreasonable to the extent of being unconstitutional, and then should not do so unless such conclusion is necessary and unavoidable. The question whether a provision is reasonable or unreasonable is a question primarily for the legislature to decide in enacting the law. And it has been held that it is the duty of the courts to enforce statutory provisions, however unreasonable they may appear. *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. In case of apparent conflict between statutory and constitutional provisions, they should be harmonized, if possible. But we find no conflict between the statutory provisions under consideration and the Constitution in any of its provisions. The Constitution imposes upon the legislature the duty to pass laws to secure the purity of elections and to guard against abuses of the elective franchise. Art. 6, § 13. Section 11 [art. 6] of the Constitution imposes further legislative duties in these words: "All elections shall be by ballot. The legislature shall provide by law that the names of all candidates for the same office to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day to be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted. . . .

All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory." Our election law was enacted before the Constitution went into effect by the admission of Wyoming as a state, but after the Constitution had been adopted by the constitutional convention and ratified by vote of the people. It was thus as complete

an expression of the will of the people as to the character of election law they desired, and as efficient information to the legislature upon that subject, as it was afterwards when it went into effect as the Constitution of the state of Wyoming. And the act in question has been left in force ever since without important change, and no change affecting the questions submitted for our decision, as providing the means for carrying these constitutional provisions into effect. This is an emphatic legislative indorsement of these provisions as they stand to-day, and they follow the constitutional provisions very closely. It will be observed that not a single one of these constitutional provisions is self-executing. There could not be an election by ballot without a law providing means for the polling of the vote by ballot. So as to the other provisions. It was and is necessary, and the Constitution expressly requires, that the legislature shall provide by law for the privacy of voters in preparing their ballots, for the compulsory secrecy of the ballot, that the names of candidates shall be printed on the same ballot at public expense, and delivered on election day to the voters within the polling place by sworn public officials, and that only such ballots so delivered shall be received and counted. Legislation was and is necessary to provide the public official to deliver the ballots, and to provide the means of identification requisite to carry out the provision that only such ballots so delivered should be received and counted, and to exclude all others.

If we could entertain a doubt as to the correctness of our conclusion that § 130 of the act of 1890 requires both the official stamp and the name or initials of a judge of the election to make a valid ballot, and that the legislature has not exceeded its authority in enacting the provisions quoted from the act, and that they are not in conflict with the Constitution, there are some further considerations which would suffice to remove all doubt. We have examined a considerable number of cases industriously collated by the chief justice, and fairly collated, without regard to the question of whether they sustain his dissent or not. We have also examined the authorities at hand upon the general question of the authority of legislatures, under constitutions more or less similar to our own, to enact laws resulting in the rejection of illegal ballots, even when involving large numbers of votes, the votes of entire precincts, or districts consisting of a number of precincts, or the validity of an entire election. After such examination, we feel safe in announcing the following proposition: No respectable authority can be found denying the power of the legislature to define and prescribe what shall constitute a lawful ballot. And the further proposition that no respectable authority can be found denying the power of the legislature to enact that none but lawful ballots shall be received or counted. Such provisions our legislature has enacted. The first subdivi-

sign of § 164 of the act of 1890 reads: "No officer shall deposit in the ballot box any ballot except a lawful one. A lawful ballot is an official ballot officially stamped and marked with the initials or name of a judge of the election, and offered by a qualified elector during the time of election." And the authorities are unanimous to the effect that an illegal ballot will not be counted. If it be considered doubtful whether § 130 requires both the official stamp and the name or initials of a judge of the election upon the ballot, it cannot be considered doubtful under § 164. And § 128 of the act provides also that "no judge of election shall deposit in any ballot box any ballot upon which the official indorsement hereinbefore provided for does not appear." The official indorsement is the official stamp, with the name or initials of a judge of election written directly under it by himself. The meaning of these three sections taken together is clear. A legal ballot is one with both the official stamp and the name or initials of a judge of the election upon it. No judge of election shall deposit any other ballot in any ballot box, and no other ballot shall be counted. And, if any judge of election deposit any other ballot in any ballot box, the act is highly penal. The eleventh subdivision of § 164 provides: "Any officer violating any of the provisions of this section shall be imprisoned in the penitentiary not more than five years and not less than one year, or be fined not more than two thousand dollars and not less than one hundred dollars, or may be both imprisoned and fined as aforesaid, and shall forever thereafter be incapacitated from holding any civil office or of exercising the elective franchise in Wyoming." The legislature evidently regarded the observance of these provisions as of great importance, and made the penalty thus severe. But the voter has duties to perform supplementary to that of the officers, and the performance of these duties by the voter constitutes an important part of the scheme of the Constitution and the statute to secure the purity of elections, to guard against abuses of the elective franchise, and to secure the secrecy of the ballot. And § 165 of the act imposes a severe penalty upon any person upon whom any duty is imposed by the act "who shall wilfully do or perform any act by this act prohibited, or who shall neglect or omit to perform any duty imposed by this act." And the act specifies some things which the elector himself shall do, and some things which he shall not do: "On receipt of his ballot the elector shall forthwith and without leaving the polling place, retire alone to one of the places, booths or compartments provided to prepare his ballot. He shall prepare his ballot by marking a cross before or after the name of the person or persons for whom he intends to vote." Section 120. "No elector other than one who may, because of his disability to read or physical disability, be unable to mark his ballot shall divulge to any one within the polling place the name of any candidate for whom he intends to vote or (to) ask or re-

ceive the assistance of any person within the polling place in the preparation of his ballot." Section 127. "After preparing his ballot the elector shall fold it so that the face of the ballot will be concealed, and so that the indorsement thereon may be seen. He shall then vote forthwith and before leaving the polling place." Section 122. What acts of omission or commission will subject the elector to the penalties of § 165 we will not now consider. But we cannot regard the elector who neglects to comply with any of these positive provisions of the statute as blameless, and we think he has no cause of complaint if, in consequence of such neglect, he loses his vote. The positive command of the statute that the elector shall fold his ballot so that the indorsement may be seen implies that he shall look for such indorsement. It cannot be said that it is impossible for him to comply with this requirement when the ballot furnished bears no indorsement. The judges are there with the official stamp. It is little trouble to ask them to indorse the ballot properly. We have no patience to consider the idea that the voters generally have not the intelligence to do this. We will not speculate as to what presumptions may arise from this neglect of duty by the officers of the three precincts named, with the acquiescence of all the voters. But we must say that the effect of such proceeding is to open the door to fraud and abuses of the elective franchise which the legislature has properly sought to close, and to put it in the power of unscrupulous election officers and their confederates to perpetrate the very frauds and abuses which it is the object of the Constitution and the statute to suppress. Such irregularities may occur through negligence in case of a fair election, but we are of the opinion they are not likely to.

But these are minor considerations in the discussion of the questions before us. The description of a lawful ballot is plain. The command to the judges to place no other ballot in the ballot box, and the provision that any ballot not answering to the description shall not be counted, are plain, imperative, and mandatory. The doctrine of all the authorities as to such language in election laws is well summed up in McCrary on Elections at § 190. He says: "The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature." We are willing to go to the extreme limit of liberal construction in order to save an honest election, or to avoid the loss of votes cast in good faith; but we cannot conceive that it is permissible for this court or any court to set aside positive legislative enactments. The statutes under

consideration are too clear in their meaning to require construction. The question is simply whether we will enforce them or not. We are of the opinion that the supreme court of Kansas has well stated the correct principles applicable to such cases in *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486, 37 Pac. 16, as follows: "The departure from the law in matters which the legislature has not declared to be of vital importance must be substantial in order to vitiate the ballots." And the following rule from the same case commands our approval: "Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statute, that the courts will enforce the law as it reads, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements." We are of the opinion that the statutory provisions under consideration are reasonable, constitutional, and efficient means of the discharge by the legislature of the duty imposed by the Constitution to pass laws to secure the purity of elections, to guard against abuses of the elective franchise, and to make the secrecy of the ballot compulsory.

But we are not prepared to give the categorical answer of "Yes" or "No" to the first question reserved for our decision; neither do the facts of the case call for it. We should be loath to say that a defective stamp not containing all the words required by the statute, used upon all the ballots of a voting precinct, would require the rejection of the vote of the precinct cast at an election fairly and honestly conducted. And the facts of this case do not raise this question. Neither do we decide whether the stamp and the name or initials of a judge of the election must be upon the back of the ballot to authorize its counting. If the stamp and the name or initials of the judge were upon some other portion of the ballot, and the ballot were folded so that this could be seen, but the tickets printed upon the face of the ballot concealed, it might be that this would be a sufficient compliance with the spirit, if not with the letter, of the law, to save the ballot from rejection. This, of course, in the absence of fraud, and when the place of the stamping and the writing of the initials would not be a mark or means of distinguishing the ballot from ballots cast by other persons. But we are of the opinion that the official stamp and the name or initials of a judge of the election must appear upon the exterior of the ballot when it is so folded as to conceal the tickets which it bears upon its face; and if this is not the case the law must be enforced which prohibits the counting of such ballot. We are inclined to regard the name or initials of a judge of the election, written by himself directly under the official stamp, as the statute requires, as the signature of the judge to the words impressed by the stamp, and as the legal means and the best means of certifying to the voter that the ballot is the official ballot of the precinct, and as the legal means and the best means of identification by the judges of the ballot

offered and voted by the elector as the identical official ballot furnished to him by the judges of the election.

To the second question we answer that all of the ballots cast at the three precincts named should be rejected.

As to the third question, we are not in position to say whether further proceedings may not lawfully be had prior to judgment. The cause will be remanded for further proceedings in accordance with this opinion.

Potter, J., concurs.

Groesbeck, Ch. J., dissenting:

By the decision of the majority of this court, the voters of three election precincts of Converse county have been deprived of the right to have the ballots counted as cast by them, through no fault of their own, but simply and solely through the carelessness or inefficiency of the judges of election. These officers were charged by the law, under heavy penalties, with the duty of placing on the back and near the top of the ballots, with a rubber or other stamp provided for that purpose, the designation "Official Ballot," and the name and numbers of the polling precinct, the name of the county, the date of the election, and the name and official designation of the clerk furnishing the tickets; and one of the judges of election was required to write his name or initials upon the back of each ballot, and directly under the impression of the official stamp. §§ 110, 119, chap. 80, *Seas. Laws 1890*. In all three of the precincts, the name or initials of a judge of election do not appear on any of the ballots voted, and at two of the precincts the indorsement of the official ballot was not stamped on the back of any of the ballots, although it was printed or stamped on the face of the ballots. The authority for rejecting these ballots and excluding them from the count rests mainly, if not solely, on the provisions of § 130 of the election law, which says that "in the canvass of the votes any ballot which is not indorsed by the official stamp or has not the name or initials of the judge of election, as provided in this act, shall be void and shall not be counted." Counsel for the defendant insists that this act may be so construed as to permit a ballot to be counted which has either one of these indorsements, the official stamp, or the name or initials of the judge of election. Courts have been extremely cautious in construing the Australian ballot law in such a manner as not to disfranchise the voter, where the omission is not through his own fault, and any construction which will uphold the ballot and secure its count is seemingly upheld, though the reasons therefor are not always very satisfactory. The statute of Minnesota provided that the initials of two of the judges of election of opposite political parties should be indorsed on the ballot. It was held that where there was no wilful disregard of the statute, and no wrong or fraud intended or perpetrated, the requirement was not mandatory, but was complied with if the initials were those of two judges of the

same political faith. But this was mainly upon the ground that the statute, though requiring the indorsement on the ballot by two judges of opposite political affiliations, did not say expressly that a ballot not containing such indorsement should not be counted, although it did say that "no ballot which had not the initials of two judges of election in said judges' own handwriting on the back thereof" shall be placed in the box. The reasoning of the court is not quite clear, as it seems that the statute, strictly construed, would mean that no ballot should be deposited in the box unless it be the identical ballot handed to the voter by the election officer, upon which should appear the initials of two judges of election of opposite political faith. *State ex rel. Bralley v. Gay*, 59 Minn. 6, 60 N. W. 676. In the case of *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486, 37 Pac. 16, the supreme court of Kansas decides a case more nearly in point. The statute of that state provided that the "ballots shall be on plain white paper through which the printing or writing cannot be read." Sample ballots printed on paper of any color but white are directed by the statute of Kansas to be printed and distributed through certain officers for the inspection of candidates and their agents, and these are exact copies of the official ballots printed on white paper. The statute of that state further provided that "no ballot without the official indorsement shall be allowed to be deposited in the ballot box and none but ballots provided in accordance with the provisions of this act shall be counted." In one precinct all the ballots cast were yellow sample ballots, and yet the supreme court held that such ballots should be counted, on the ground that the statute nowhere "explicitly" provided that a ballot printed on paper of a color other than white shall not be counted. With all due deference to the learned court, I think that the only ballot provided for as the official ballot, following the letter of the law, was one printed on white paper.

These provisions from Kansas and Minnesota are recent ones, and illustrate the extreme reluctance on the part of the courts to so construe the Australian ballot law as to deprive any elector of his vote, or of the right to have his vote counted as cast, when the fault is not his own, but that of the election officers. I cite these cases as showing how liberally the statutes are construed in favor of the voter, and against a strict construction that would result in disfranchisement. If these two cases were taken as guides in construing § 130 of our election law, *supra*, it seems to me that if the ballot contains the "indorsement" of the official stamp alone, even if it were not placed upon the proper part of the ballot, the law would be technically complied with, and the ballots should be counted. The court said in *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 486: "We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purposes of the act can have been impaired in any degree by the mis-

take made in using the colored ballots." True, the opinion contains some deductions which might be considered as supporting the views of the majority of the court in this case, on abstract questions of law, but this closing extract of the opinion shows the true reason for the decision. I am inclined to the view that the construction of the section should be such as to uphold the legality of the ballots, inasmuch as the disjunctive conjunction "or" is used in two places in § 130, and the ballot must have one of three indorsements,—either that of the official stamp, "or" the name, "or" the initials of the judge of election. I should not be content to rest my view of the case on this matter alone, as the use of the words "or" and "and" are so loose and so frequently inaccurate that their strict meaning is more readily departed from than that of any other words, and one is read in place of the other in deference to the meaning of the context. *Sutherland, Stat. Constr.* § 252. But the next section (131) of the law must be read with its predecessor quoted herein. It relates to the canvass of the ballots cast at the election precinct, and provides that, as soon as the polls of election shall be closed, the judges of election shall immediately proceed to canvass the vote, and shall continue without adjournment until the canvass is completed; and then follows this provision: "The canvass must commence by a comparison of the poll lists and they must be made to agree; the ballot box shall then be opened and the ballots counted by the judges and clerks, unopened, and if there are more ballots than names upon the poll list the ballots must be returned to the box, shaken up, and one of the judges shall draw from such box ballots enough to make the remainder agree with the poll list, which ballots so drawn shall be destroyed, and two or more ballots being found so folded, as to bear the appearance of having been voted by one person shall not be counted, but preserved with the poll books; the poll list and ballots being made to agree the judges and clerks shall then proceed to count and ascertain the number of votes for each person named upon such ballots." It appears to me that this section is either inconsistent with the one preceding it, or, if construed with it, as it must be, effectually neutralizes the provisions of the other. Nothing is said in this § 131 about not counting the ballots denounced in § 130, but only those ballots may be destroyed when there is an excess of ballots over the legal number of votes cast, as shown by the poll lists, and the only ballot that "shall not be counted" is a ballot containing two or more votes folded so as to bear the appearance of having been voted by one person. This § 131 utterly negatives the idea of examining the indorsement on the ballot, because,—if that only could be looked to, the ballot containing the doubtful vote would be counted, if properly indorsed as required by § 130, while the others inclosed within would not be. Under § 131, all the ballots, those inclosed with the ballot and the inclo-

ing ballot itself, shall not be counted. By this section no ballots are denounced, but all must be counted, except those drawn from the ballot box to make the number of ballots correspond with the number of voters on the poll list, and ballots inclosing others. If these sections are inconsistent, under well-known canons of construction, the last section in number or position, under some authorities, must prevail. Sutherland, Stat. Constr. § 220. At any rate, there would be such a conflict that the sections would be held to neutralize each other, as the legislature has *uno flatu* enacted a contradiction. Perhaps a construction of both of these sections ought to be given so as to exclude all ballots not properly indorsed only where there is an excess of ballots; but it is doubtful if this could be done without rendering nugatory § 131. The safest way, in my judgment, is, where, as in this case, there is no pretense of fraud in the action of voters or election officials, the presumption must be that all of the ballots cast were received from the election judges by the voters and returned after having been prepared, were received by the judges, and should be counted. This is the main purpose of these sections,—that the elector shall vote only the ticket he has received from the judge of election, and only such tickets shall be counted. The law prescribes minutely the duties of the electors and of the election judges. Cards of instruction printed in English, in clear type, and posted in the election booths, are provided for the voters, and these contain the directions to the voters how to get the ballot,—that is, from a judge of election,—how to prepare it for voting, to vote no other than that received, and to fold the ballot so that the indorsement made by an election judge may be seen, before the ticket is voted. In the majority opinion some stress is laid upon this last direction to the voter, but I do not think it applies here, as there was some sort of an indorsement on the ballot, or one of the indorsements, the official stamp stating that it was the official ballot, etc., and I think that an elector might presume that this was all of the indorsement required, as his attention in the cards of instruction and the sections of the law therein copied is not called to the full indorsement. Nowhere in the law is he required to see that the proper indorsement is made, but only to fold his ticket so as to show the indorsement. In the case of the ballots in the two precincts where the stamp was placed on the face of the ballot. I think it should be presumed, in the absence of any showing to the contrary, that it was on the margin or at the side, and that the voter obeyed the injunction to fold it so as to disclose the indorsement without revealing the ballot as prepared by him. It seems to me that there must have been some purpose on the part of this legislation providing for such minute directions to the voter, and in bringing home to his notice what he should do in obtaining, preparing, and delivering his ballot to the election officials, in which all of his duties are specified L. R. A.

cally defined. When he has complied with these, this is all that may be required of him. Surely, in all of these directions given to him, nothing is said about the extreme care he is to exercise, according to the majority opinion, in seeing whether the name or initials of a judge of election is on the ballot, but the decision of this court adds another duty not imposed by the law, and not brought home to his notice by the instructions given to him pursuant to law,—the duty of scrutinizing the ballot to see if the proper indorsement is made thereon. It is said in the majority opinion: "It is little trouble to ask them [the judges of election] to indorse the ballot properly. We have no patience to consider the idea that the voters generally have not the intelligence to do this." Yet it seems that the judges of election, who must be electors, did not have such "intelligence," for they did not indorse or see to the indorsement of their own ballots, if they voted at all, or those of the electors generally, in strict compliance with the law. They had the law which must be furnished them for their guidance, but the elector had nothing but the card of instructions required by law to be posted in his booth to guide him, and this does not call his attention to the fact that the name or initials of a judge must be on the ballot. Shall the law mock a voter? Shall he be told minutely what to do by a card of instructions for his guidance, and then have his vote rejected because he has not complied with another part of the law which relates solely to the duties of the sworn officials of the law? Is he to take notice of the duties of an election officer and see that they are performed? As to the indorsement of the ballot, that duty is incumbent upon the county clerk and a judge of an election. If the former neglects something in the stamp, such as the name or number of the precinct, or some other part of the indorsement to be stamped on the ballot, is the voter to be held responsible? If the election officers fail in their duties as to their part of the indorsement, is the elector to be blamed? It was held where one received a majority of the votes cast for the office of township treasurer—it being contended that he was not the nominee of any party, as the ticket was not properly certified, and he was not therefore entitled to a place thereon, and that such tickets should not be counted—that the voter finding the ticket upon the ballot could not be required to determine its regularity at his peril. The court said: "This might involve a necessary knowledge of facts difficult to ascertain. He [the elector] may safely rely upon the action of the officers of the law, whom he has right to suppose have done their duty." *Braydon ex rel. Loranger v. Navarre*, 102 Mich. 259, 60 N. W. 277. This was the rule contended for by me in my dissenting opinion in the case of *State ex rel. Bennett v. Barber*, 4 Wyo. 58, 32 Pac. 28. It is with much pleasure that I notice that the case of *Price v. Lush*, 10 Mont. 61, 9 L. R. A. 487, 24 Pac. 749, holding to the contrary, which I refused

to follow, has been, it is said, "modified," but, as the concurring justice, Judge Hunt, says, "overruled," in a recent case in the same court, in which a masterly opinion was delivered by Mr. Justice De Witt. *Stackpole v. Hallahan*, 16 Mont. 40, 28 L. R. A. 502, 40 Pac. 80.

I see evidences of returning reason in the more recent construction of the Australian ballot laws, and I am confident that the rule I follow in this case will finally be plainly announced by the courts of the country. The law attempts to prevent former evils in protecting the individual voter from corruption and intimidation, but it should not be so construed as to invite a wholesale disfranchisement of unsuspecting voters, who have relied upon and who have the right to rely upon the faithful performance by election officials of the duties imposed upon them. I cannot insist upon the literal interpretation of the ballot law that may deprive any voter, duly qualified, through the misfeasance, non-feasance, or malfeasance of any officials, where the elector has obeyed instructions minutely mapped out for him by the law. The sole object of the sections of the law quoted from is that the elector shall vote only an official ballot delivered to him by a judge of election, after having prepared it, and in this case it seems to me irresistible that the law was complied with on the part of the elector. It is difficult to construe, and the most liberal construction should be given to it, in order to secure freedom and purity of elections, but not to deprive any elector of his vote through the fault of the election officials. To hold to any other rule would be to sacrifice substance to form, and to have our last estate worse than the first. It is safe to say that the framers of the Australian ballot law, as it appears in our statutes, many of them men of prominence in the history of the state, never contemplated the wholesale disfranchisement of electors through the negligence of election officers. I think that they will stand aghast at such an interpretation of their statute. It may be intimated that without a close adherence to the letter of the law, if it can be ascertained, which is to be extremely doubtful, the door to fraud by election officers would be opened, but I think not. In one case in the books the judges of an election precinct stamped and indorsed according to law official ballots after the polls closed, and cast the ballots themselves, and the names of the electors on the poll books showed that, after the judges and clerks voted, the electors, strange to say, were recorded in alphabetical order. *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 217. So it seems that it is very difficult to prevent corrupt officials from voting official ballots, and indorsing them with all of the official indorsements required by law, if they desire to do so. In the case at bar there is a total absence of fraud, and this is, in effect, conceded, as the only matter submitted to us is a technical non-compliance with certain provisions of the law. The dangers afforded by the power

conferred upon certain judges under a strict construction and an unreasonable one of the law, by giving undue prominence to certain clauses of it, is greater than would be the liberal construction contended for by me. In one case there is no remedy but the punishment of the judges for failure to indorse properly the official ballot, and no way to count the vote of the defrauded voters. In the other, a judicial investigation can be had to determine the facts and ascertain if fraud actually existed. It is poor compensation to the people who have been defrauded of their rights to have the guilty punished, when they themselves, although innocent, must be punished by having their votes thrown out in the count. I may be pardoned, in closing this branch of the case, to quote, as my brethren have done, from McCrary, *Elections*: "Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disfranchise a district." Section 102, citing *Gilleland v. Schuyler*, 9 Kan. 569.

However, the case might well be disposed of on other grounds. The law was enacted before the Constitution went into effect, and if repugnant to that instrument must fail, as only those territorial laws are continued in force that are not repugnant to the Constitution, and, if the construction of the statute adopted by this court is the true one, the law is invalid. The Constitution provides certain qualifications required of electors, such as age, residence, Federal citizenship, ability to read and write the English language, and excludes from the electorate idiots, insane persons, those convicted of infamous crimes, unless restored to citizenship, and certain electors who are not Federal citizens. The right of suffrage is called "the right to vote," and certain citizens not falling within any of the classes excluded from the suffrage "shall be entitled to vote" at any election. Article 6, §§ 1, 2. This "right," as it is termed by the Constitution, "privilege," as it is sometimes called, is sacredly preserved. It cannot be sacrificed through the fault or neglect of election officials. The right to vote includes and carries with it the right to have the vote cast, counted, or the right to vote is lost. Where the Constitution fixes the qualification of voters, it is not in the power of the legislature either to enlarge or abridge them; but legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. *Cusiok's Election*, 136 Pa. 459, 10 L. R. A. 228, 20 Atl. 574. The legislature has full power to regulate the right to vote, but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise. Under the pretense of regulation, the right to suffrage must be left untrammelled by any provisions or even rules of evidence that may injuriously or necessarily impair it, and so the citizen cannot forfeit the right except by his own neglect, or by such peculiar accidents as are not attributable to the law itself.

Daggett v. Hudson, 43 Ohio St. 548, 3 N. E. 538. In the note to this case, as found in 54 Am. Rep., at page 843, the language of Coulter, J., in *Brown v. Hummel*, 6 Pa. 86, is cited, and I repeat it: "The most important of all our franchises—the right of an elector and citizen—cannot, in a confined sense, be called property. It is not assets to pay debts, nor does it descend to the heir or administrator. But who does not feel its value, and who but would turn pale if he thought he could be deprived of it, without hearing or trial, by act of assembly?" In New York a case arose where the officials charged with the duty of preparing the ballots omitted the name of an office which under the law was to be filled at the election for which the ballot was prepared, and it was held that the voter might write or paste thereon the name of such office and of the person for whom he desired to vote as the incumbent thereof. The court well says: "The Constitution confers upon every citizen meeting the requirements specified therein the right to vote at elections for all officers that are elective by the people, and there is no power in the legislature to take away the right so conferred. The legislature may prescribe regulations for ascertaining the citizens who shall be entitled to exercise the right of suffrage, for that power is given to it by the Constitution. In prescribing regulations for that purpose, or in respect to voting by ballot, it does so subject to, and, presumably, in furtherance of, the constitutional right, and its enactments are to be construed in the broadest spirit of securing to all citizens possessing the necessary qualifications the right freely to cast their ballots for offices to be filled by election, and the right to have those ballots, when cast in compliance with the law, received and fairly counted. Legislation which fails in such respects, and prevents the full exercise of the right as secured by the Constitution, is invalid." *People ex rel. Goring v. Wappingers Falls*, 144 N. Y. 616, 39 N. E. 641. Many of the cases are collected to the note to the case of *Daggett v. Hudson* (Ohio) in 54 Am. Rep., at page 843, and to them may be added *White v. Multnomah County Comrs.* 13 Or. 317, 57 Am. Rep. 20, 10 Pac. 484; *Kellogg v. Hickman*, 12 Colo. 256, 260, 21 Pac. 325; *Kirk v. Rhoads*, 46 Cal. 406; *Eaton v. Brown*, 96 Cal. 371, 17 L. R. A. 697, 31 Pac. 250. In the case at bar, if the law operates to disfranchise any elector, and prevents ballots cast by the elector, received by him from the election judges, from being counted, whether properly indorsed or not, in the absence of fraud, it is repugnant to the Constitution. I believe that an "honest ballot and a fair count" is secured by the Constitution, and that no law, whether adopted prior or subsequent to the time of the taking effect of the Constitution, can step between the voter and the Constitution, and that any requirement of any statute that adds to the qualifications of suffrage as enumerated in the Constitution itself is void, particularly when it is attempted 47 L. R. A.

to impose upon a qualified voter such additional qualifications or restrictions as to make the right of suffrage dependent upon the whim, dishonesty, inefficiency, ignorance, or inadvertence of any election officer.

All the disputed ballots should be counted, and judgment rendered for the defendant; and the district court for Converse county should be so advised.

A petition for rehearing having been filed, Comaway, J., on December 6, 1895, handed down the following opinion:

The principal questions now called to our attention arise upon the provision of § 130 of chap. 80, Session Laws 1890, in regard to the rejection of ballots: "In the canvass of the votes any ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election as provided in this act, shall be void, and shall not be counted."

1. It is urged that this may be construed to mean that "in the canvass of the votes any ballot which is not indorsed by the official stamp, and has not the name or initials of the judge of election, as provided in this act, shall be void, and shall not be counted,"—thus requiring the absence of both the stamp and the name or initials to authorize the rejection of a ballot. It is true that some courts have gone to the extent of construing "or" to mean "and" in order to carry out the plain intent of the legislature; but, as shown in the opinion handed down on the first hearing, the whole tenor of the act in which this provision occurs shows that the legislature meant what is expressed.

The following example was given in argument in illustration of the use sometimes made of the word "or": "Any person who is not a citizen of the United States, or has not declared his intention to become such, is not entitled to vote." As to this it is to be said that any author using this language would be saying what he did not mean. The evident meaning is that "any person who is not a citizen of the United States, and has not declared his intention to become such, is not entitled to vote." The evident intention is to say that both disqualifications are required to deprive one of the right to vote. But in the provision under consideration, requiring the rejection of ballots, our legislature has expressed its evident intention in apt language. The provision is in plain, terse, and mandatory words; it is not for the courts to question its wisdom or propriety.

2. It is further contended that the provision of § 130 requiring the rejection of ballots, is in conflict with part of the next section of the act upon the same subject. The next section is as follows: "Sec. 131. As soon as the polls of the election shall be closed the judges shall proceed immediately to canvass the vote given, and shall continue without adjournment until the canvass is completed. The canvass must commence by a comparison of the poll lists, and they must be made to agree; the ballot box shall then be opened, and the ballots counted by the judges and clerks, unopened, and if there

are more ballots than names upon the poll list, the ballots must be returned to the box, shaken up, and one of the judges shall draw from such box ballots enough to make the remainder agree with the poll list, which ballots so drawn shall be destroyed, and two or more ballots, being found so folded as to bear the appearance of having been voted by one person, shall not be counted, but preserved with the poll books; the poll list and ballots being made to agree, the judges and clerks shall then proceed to count and ascertain the number of votes for each person named upon such ballots."

This section contains, in substance, the usual provisions authorizing and requiring the proper officers to canvass the vote. So far as the cases have fallen under our observation, or been called to our attention, such provisions have not been held to conflict with other provisions requiring the rejection of other ballots than those specified, nor to require the counting of illegal or void ballots. It is the duty of the courts to so construe the provisions of a statute that they may all stand and have effect, if this can be done by a reasonable construction. Section 130 provides that any ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election as provided by this act, shall be void, and shall not be counted. Section 131 provides that two or more ballots being found so folded as to bear the appearance of having been voted by one person shall not be counted. These provisions are not conflicting, but easily stand together without the aid of construction; and we are not of the opinion that the general language of the concluding clause of § 131, requiring the canvassers to count the votes, require the counting of votes contained in illegal or void ballots, or ballots which other statutory provisions require to be rejected.

3. It is further contended that the provision quoted from § 130 is repugnant to the Constitution because its enforcement will result in the rejection of ballots of persons having the constitutional qualifications of electors. So far as we are at present advised, assisted by the diligent research of counsel, there are, up to this time, but two authorities holding that a statutory provision such as that of § 130 is in conflict with constitutional provisions fixing the qualifications of electors. And the qualifications of electors are fixed by constitutional provision in every, or nearly every, state in the Union. It is said that there are one or two exceptions, but we know of none. 6 Am. & Eng. Enc. Law, p. 263. These two authorities are the dissenting opinion in this case, and the case of *Moyer v. Van de Vanter*, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60. These authorities command and receive our respectful consideration. As to the case of *Moyer v. Van de Vanter*, it is to be remarked that it was decided under statutory and constitutional provisions different from our own. The ballots drawn in question in that case bore the proper stamp, but had not the name or initials of a judge of the election, as re-

quired by statute. Another section of the statute makes it a misdemeanor for any inspector or judge of election to deposit in any ballot box any ballot upon which the stamp does not appear. It is not made a crime to deposit a ballot upon which the initials do not appear. Our statute punishes as for a felony any election officer who deposits in a ballot box a ballot which has not both the stamp and the name or initials of a judge of the election. The Constitution of the state of Washington provides that "all elections shall be by ballot. The legislature shall provide for each method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." The Constitution of Wyoming contains similar provisions, and, in addition, the following: "The legislature shall provide by law that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day to be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted." [Const. art. 6, § 11.] This devolves upon our legislature the constitutional duty, and the corresponding constitutional authority, to provide adequate means for identifying the ballots received and counted as those delivered to the voters within the polling place by sworn public officials, and to provide by statute the means to secure the constitutional result that only such ballots so delivered shall be received and counted. If the legislature may not provide the means, it cannot secure the result. In the statute now attacked as unconstitutional such means are provided. And nowhere else is any provision made prohibiting the counting of ballots not delivered by sworn public officials. Nowhere else is a method provided for identifying the ballot offered by the elector as the one furnished him by the election officers in the polling place. But the doctrine of the case of *Moyer v. Van de Vanter*, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60, is clearly against the great weight of authority. The result of a consideration of the cases is well summed up in these cases: "These statutes being designed to preserve the secrecy of the ballot, and to prevent fraud, . . . will generally be considered mandatory, and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted; but if this provision is lacking, while it is the duty of the election officers to refuse to receive the ballots, if the deviations from the law are manifest, if they have been received they should not be rejected if the variations are trifling." 6 Am. & Eng. Enc. Law, p. 349. And this is in accordance with Judge McCrary's view of the law, although from a quotation from *Gilleland v. Schuyler*, 9 Kan. 509, contained in the dissenting opinion in this case, a different inference might be made. McCrary's text leaves no room for doubt as to his view, and little room to question that his view is correct. Perhaps no better discussion of this branch of the law

can be found, in brief, than his. He says: "The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. Thus it has been held in Missouri that a statute making it the duty of the judges of election to cause to be placed on each ballot the number corresponding with the number of the voter offering the same, and providing that no ballot not numbered shall be counted, is mandatory and must be enforced. Although this doctrine may sometimes result in very great hardship and injustice by depriving the voters of their rights by reason of the negligence or misconduct of the officers of election, it is, nevertheless, difficult to see how any different construction could have been placed upon such a statute. Statutes which simply direct the judges of election to number the ballots, without declaring what consequences shall follow if this be not done, may well be held directory only; but where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction. Such statutes are intended to prevent fraudulent voting; and if the legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail." *McCrary, Elections*, §§ 190, 191 [4th ed. §§ 225, 226].

And the qualifications of electors are fixed by the Constitution in Missouri. The rule in Kansas, announced in *Jones v. State ex rel. Atherby*, 1 Kan. 273, and approved in *Gilleland v. Schuyler*, 9 Kan. 569, and quoted by *McCrary*, is stated in these words: "Unless a fair consideration of the statute shows that the legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely." And the qualifications of electors are fixed by the Constitution in Kansas. The case of *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 217, is cited in the dissenting opinion in this case. It was a case of fraudulent misconduct of election officers, and the return of the vote of a precinct was rejected, 47 L. R. A.

and the entire vote of the precinct lost, on account of such misconduct. And the qualifications of electors are fixed by the Constitution in Montana.

In Michigan, statutory provisions for securing the secrecy of the ballots are held mandatory without a statute, that when those provisions are disregarded the ballots shall be void or shall not be counted. *Atty. Gen. ex rel. Seavitt v. McQuade*, 94 Mich. 439, 53 N. W. 944. And in Michigan the qualifications of electors are fixed by the Constitution.

In Nebraska, the indorsement of a name which is not the name of a judge of the election upon a ballot causes its rejection in the count, without any express statutory provision to that effect.

Spurgin v. Thompson, 37 Neb. 39, 55 N. W. 297. And in Nebraska the qualifications of electors are fixed by the Constitution.

In Texas a law was passed in accordance with a constitutional requirement that ballots should be numbered. The law further provided that ballots not numbered should not be counted. Held, mandatory. *State ex rel. Barry v. Connor*, 86 Tex. 133, 23 S. W. 1103. And in Texas the qualifications of electors are fixed by the Constitution.

We will not attempt a citation of the numerous cases in which the votes, not only of individual electors, but of entire precincts and entire elections, have been lost solely through the misconduct of election officers. The rule to be derived from the cases is correctly stated in *Paine, Elections*, § 502: "Many irregularities, of frequent occurrence, involving the performing, or omission, of acts not touching the essential validity of the election, are held to be insufficient to justify the rejection of the poll, unless committed in violation of statutes mandatory in form."

In *Moyer v. Van de Vanter*, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60, and in the dissenting opinion in the case at bar, it is held that omissions in violation of statutes mandatory in form are not sufficient to justify the rejection of the poll or ballot, but that such statutes are unconstitutional. These authorities are entitled to, and receive, our respectful consideration. We will not disregard them on the sole ground that they are opposed to the great weight of authority. The principal reason urged in support of these opinions is the hardship and injustice of depriving the voters of their right by reason of the negligence or misconduct of election officers. *McCrary* answers this in the quotation already given: "Such statutes are intended to prevent fraudulent voting; and if the legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail."

But in the case at bar some question is made in the dissenting opinion as to the in-

tention of the legislature in enacting the statute in question. It is there said: "It is safe to say that the framers of the Australian ballot law, . . . many of them men of prominence in the history of the state, never contemplated the wholesale disfranchisement of electors through the negligence of election officers. I think they will stand aghast, at such an interpretation of their statute." As to this it is only necessary to say that our legislators have expressed their intention, in language too plain for interpretation or construction, that some ballots shall be void, and shall not be counted. It is not material on this point whether the ballots in question in this case are such ballots or not. When, in any case, ballots from any precinct, or from any number of precincts, come within the description of ballots which these prominent legislators have declared shall be void and shall not be counted, and when they stand aghast at the result, they can only reflect that the work is their own, and not that of the courts. After thus appealing to the intention of the legislators, the dissenting opinion insists that such intention, whatever it may be, shall be utterly disregarded, and set at naught as unconstitutional. Into such inconsistencies are able and ingenious jurists driven in attempting to defend indefensible positions.

The statutory provisions under consideration are part of an act of the last territorial legislature, consisting of one hundred and eighty-four sections entitled "Elections," approved March 14, 1890. At that time the Constitution had been ratified by popular vote by an overwhelming majority. The legislature, fresh from the people who had so recently ratified the Constitution, enacted this law. It is safe to say that the members of this legislature did not regard as unconstitutional the provision that certain ballots should be void, and should not be counted. The first state legislature re-enacted, generally, all the statutory law of the territory not repugnant to the Constitution. *Sess. Laws 1891, p. 157.* This legislature also amended the election law in some particulars, but in no point affecting the decision of the questions reserved in this case. The second state legislature did not amend this law in any particular. The third state legislature amended the election law in some of its provisions, but not in any point affecting the questions under consideration. These successive legislatures left in force § 119, that "before delivering any ballot to an elector the said judges shall print on the back and near the top of the ballot, with a rubber or other stamp provided for the purpose, the designation 'official ballot,' and the other words on the official stamp as hereinafter provided, and one of the said judges shall write his name or initials upon the back of each ballot, and directly under the said official stamp." They left in force § 118, providing that "no judge of election shall deposit in any ballot box any ballot upon which the official indorsement does not appear." They left in force § 164, providing that "no officer shall deposit in the ballot box any

ballot except a lawful one. A lawful ballot is an official ballot officially stamped and marked with the initials or name of a judge of the election and offered by a qualified elector during the time of election." They left in force § 130, providing that "in the canvass of the votes any ballot which is not indorsed by the official stamp, or has not the name or initials of the judge of election, as provided in this act, shall be void, and shall not be counted."

It is safe to say that these successive legislatures in preserving these sections did not think that they were violating the Constitution, or impairing the constitutional rights of electors. It is safe to say that they intended these provisions to have effect and to be enforced, and that the prohibited ballots should not be counted. And while they were doing this, so far as we have been able to ascertain, assisted by the diligent research of counsel and of the dissenting justice, there could not be found a decision of any court, or an opinion of any judge denying the constitutional authority of the legislature of a state to pass a law defining a lawful ballot, and prohibiting the counting of ballots which are not lawful. These provisions, and the entire system of voting known as the Australian ballot law, are intended to prevent fraud. It is poor consolation to the honest voter to cast his vote and have it counted when he knows it may be offset by a purchased vote. It is poor consolation to the majority of honest voters of a populous district to cast their votes and have them counted when they know that their majority will be met and overwhelmed by the votes of hordes of hired ruffians and repeaters. It is poor consolation to them to go into court for a remedy, and vainly attempt to get evidence of frauds which are notorious, while the successful criminals are laughing at their futile efforts. It is notorious in the recent history of the country that such frauds, committed with impunity, were attaining such enormous proportions, and were becoming so habitual, that thoughtful patriots believed that the foundation of popular government was being undermined and its perpetuity threatened, and all the while there were laws upon the statute books for the punishment of such crimes; and all the while laws were in force and the courts were open for the correction of the results of these crimes by which the popular will was defeated. And all the while the successful conspirators were carrying out their nefarious schemes with effect, educating hordes of retainers in venality and corruption, defying the popular will, and challenging the better elements of society with the self-convicting question, expressed generally in action, but sometimes in words: "What are you going to do about it?" This is no imaginary picture. Words fail in adequately depicting the reality in its true colors. The controlling principle in the operation of these enemies of popular government, so long expressed in their actions, and so long and so successfully carried into effect, has recently been confessed and proclaimed in clarion tones in the constitutional

convention of South Carolina by the honorable member from Berkeley in these words: "We do not want fair elections!"

Evils of this nature, so monstrous in older communities, were threatening Wyoming. Wyoming does want fair elections. Legislators, truly prominent in the history of the state, men of integrity and ability, have devoted their best thought to devising and perfecting a plan to meet and crush such frauds in their inception. Prevention is better than attempted cure. The result of their sustained and persistent labor is the present election law. By this law, Wyoming, through four successive legislatures, has said that she does want fair elections. This law is her answer to the question, "What are you going to do about it?"

One provision of this law was considered so essential to the prevention of fraud, bribery, intimidation, and corruption, that it is put in language expressly mandatory. It specifies certain ballots which shall be void, and shall not be counted. This provision is attacked as repugnant to the Constitution.

We are asked to declare it so by what we must regard as an innovation in the law of statutory construction, opposed to the great weight of authority, and without foundation in sound reason. The distinguishing feature of this statute, as compared with former election laws, is the prevention of fraud. The construction contended for would destroy this feature. It would relegate the wronged and defrauded public entirely to the old remedies by criminal actions and election contests, prosecuted after the harm was done. These were the remedies which so often, and for so long a time, proved inefficient, and which the legislature has endeavored to supplement, by efficient preventive measures. The fear of punishment has never been found to be an efficient safeguard against political crimes. Let it once be known that the most mandatory provisions of our election law may be disregarded, and then there is at once destroyed all the security for the purity of elections which the law furnishes above former laws. Nothing more is required for the destruction of the barriers which Wyoming has erected for the protection of the honest verdict of her legal electors as expressed at the polls against the machinations of political tricksters and criminals. Nothing more is necessary to reopen the floodgates of fraud. Nothing more is necessary to restore the old order of things under which, in older communities, crime has reared aloft its brazen front in the sight of all the world; has defiantly stalked abroad in the light of the noonday sun; has placed its minions in positions of power, of trust, of honor, and of profit; has educated its votaries to regard crime as honorable, and to think and expect that successful crime should be abundantly rewarded.

The legislators of Wyoming have done their work carefully, and, it would seem, wisely and well. That it is satisfactory to the people is evidenced by their preserving every distinguishing feature of the work after repeated tests in its political operation, 47 L. R. A.

and repeated opportunities to repeal or modify it through its legislators. But this is straying from the question: Is the law constitutional? From considerations already advanced, and authorities already cited, I am of the opinion that it is. The former order of this court will stand.

Rehearing denied.

Potter, J., concurs.

Groesbeck, Chief Justice:

I dissent. Since a rehearing was ordered in this case I have seen nothing to change my views as announced upon the original hearing. Indeed, since my opinion was filed, decisions in parallel cases, including some very recent ones, have intrenched my position.

There can be no question that all of the disputed ballots, which were all of the ballots voted at three precincts in Converse county, were honestly cast and honestly counted. There is no imputation or suggestion of fraud in the case, and it is apparent that if the ballots are illegal they become so through the failure of the judges of election, or some of them, to make or cause to be made all the indorsements thereon mentioned in the act.

The provision of law quoted in the majority opinion was doubtless enacted for the purpose of preventing ballot-box stuffing, and the voting of other than the official ballots, not to work a wholesale disfranchisement of honest and unsuspecting voters. "It is one of the great maxims of interpretation, to keep always in view the general scope, object, and purpose of the law, rather than its mere letter." *Rutledge v. Crawford*, 91 Cal. 533, 13 L. R. A. 761, 27 Pac. 779. Laws are to be construed according to their spirit and meaning, and not according to their letter. Assuming the constitutionality of a law, before it should be construed to work the disfranchisement of an elector, it must be clear that under the circumstances then existing, the legislature intended such to be the case. "All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor, and unless a ballot comes within the letter of the prohibition against a particular kind of a ballot, it should be counted. A great constitutional privilege—the highest under the government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action, whenever the application of the common sense rules which are applied in other cases will enable the courts to understand and render it effectual." *Talcott v. Philbrick*, 59 Conn. 485, 10 L. R. A. 150, 20 Atl. 436. These extracts are taken from the recent decision in Nevada in the case of *Buckner v. Lynip*, 22 Nev. 426, 30 L. R. A. 354, 41 Pac. 762, where the statute provides that any vote not bearing the water-mark "and" any ballot on which appear names or marks written or printed, shall not be counted, and where it was held that ballots should be counted from which the in-

spector or judge of election failed through ignorance to remove strips bearing the number, though his failure to detach the strips made the ballot capable of identification, and this decision was in the face of positive provisions of the statute. The court was loath to give such a liberal interpretation to the law as to reject these ballots, and it looked to the evident purpose and spirit of the act, very properly holding that the law did not contemplate a sweeping disfranchisement of qualified electors through the carelessness or inefficiency of election judges. This court quotes with approval from other authorities, which are applicable in the case at bar: "These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter, and those imposed upon election officers. There is a disposition to hold the former valid and mandatory, but where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been, in fact, an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them." *Moyer v. Van de Vanter*, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60. The language of the opinion in the case of *Parvin v. Wimbberg*, 130 Ind. 561, 15 L. R. A. 775, 30 N. E. 790, is also quoted with approval by the Nevada court: "A study of the statute upon the subject of elections leaves no doubt that its purpose is to secure a fair expression of the will of the electors of the state, by secret ballot, uninfluenced by bribery, corruption, or fraud. The disfranchisement of whole precincts by reason of an honest mistake on the part of election officers is inconsistent with this purpose." These are golden words, and ought to govern the disposition of this case, for by giving a literal meaning to the law, its very purpose is defeated, and its enforcement is made most grievous to bear. The object of the provision was to identify the votes, and to preclude the reception and counting of illegal ballots, but it certainly could never have been intended by the legislature to have the law read so as to practically disfranchise all of the electors of one or more precincts, through the inadvertence or negligence of election officials. Under the decision of this court, it would seem that there is no remedy for the electors who have been deprived of their suffrages, nor for the candidate who has been deprived of his office, for he cannot show by evidence *aliunde* that these votes were in fact honestly cast and honestly counted. I cannot consent to such an interpretation of the law, even if its construction should be what my brethren have made it, as I think it is making the law an engine of oppression, while its aim and object was to suppress fraudulent voting and to secure pure and free elections. Some stress is laid in the majority opinion upon the fact that

the law has stood without amendment since its enactment in respect to its provision denouncing certain ballots as void and declaring that they should not be counted. This statement is easily answered. This provision has never before been brought to the attention of the courts of this state for consideration. I mistake the temper of the people of this state if it shall remain unmodified, for I think the construction adopted is abhorrent to reason, and is destructive of popular government. No other law would be construed as harshly as this one has been, and no law should be more liberally construed than this one, in order that it may not be a reproach to our jurisprudence, and accomplish fraud by seeking to prevent it. Election contests have been rare in this jurisdiction before the passage of this law, but the present act has been, like many new enactments, a fruitful source of contention. It is to be regretted that our young commonwealth is not to take its place in the van with those states where the Australian ballot law has received a liberal and broad construction so as to jealously guard the most sacred of our rights, the right of every qualified elector to cast one vote, and to have that vote honestly counted.

It was held in Canada, in an early case in Wigmore, *Australian Ballot System*, p. 194, that although at a certain polling place none of the ballots deposited had the initials of the election officers on the back as required by law, that as the irregularity occurred on all the ballots, without reference to a particular candidacy, and was evidently the result merely of the ignorance of the election officers, the ballots were valid. *Ex parte Tremblay* (1887) 13 Quebec L. Rep. 64. It may be that the provincial statute did not contain the mandatory language of our statute, denouncing such ballots as void, and providing that they should not be counted; but I think this makes but little difference in principle. The legislature certainly could never have intended to mean that all of the ballots cast at a polling precinct should be excluded because they do not contain all of the indorsements mentioned in the act, where it does not appear that there was a design to evade the statute or to effect a fraud on the part of the electors, or in the action or failure to comply with the provisions of the act on the part of the judges of election, and where it must be inferred that such failure to comply with the strict terms of the law was owing to the carelessness or inadvertence of the judges of election. The provision, even though mandatory in its terms, is not quite clear in denouncing the ballots as illegal for a lack of all of the indorsements, but a survey of the whole act, keeping in view the great object in its enactment, makes it plain that it was never intended to defeat the popular will by casting out bodily the entire votes of districts by any provision of the statute. It was intended to prevent the voting of any ballot but an official one received from the proper officials and deposited by the electors who so received

it. It is clear that none but official ballots were cast and counted, and this is sufficient, as the statute, however it may be construed, is but a means to an end, and if the end in view has been attained that is sufficient. I adopt the views of Judge Peckham, recently promoted to the Supreme Court of the United States, from his dissenting opinion in the case of *People ex rel. Nichols v. Onondaga County Canvassers*, 129 N. Y. 448, 449, 14 L. R. A. 624, 29 N. E. 327: "But a mere inadvertent mistake of an officer ought not to work such an extreme penalty as disfranchisement on innocent electors." "It seems plain to me that those purposes (of the election act) are endangered, if not frustrated, by a construction which in my judgment is unreasonable and unnecessary, and by which thousands of perfectly innocent electors may annually be disfranchised without fault on their part, and the will of the majority be thus set at naught."

The case of *Spurgin v. Thompson*, 37 Neb. 39, 55 N. W. 297, relied upon in the majority opinion, does not go to the extent claimed therein. As I understand the facts in the case, a name appeared written on the ballot which was inferred to be that of an elector, and so it was rejected, and not because the name of the election officer was not thereon.

A review of all the cases bearing upon the construction of statutes similar to ours convinces me that no provision of the act before us should be allowed to operate against the evident object and purpose of the act, and to bring it into contempt and reproach, by making it a means of disfranchisement of whole districts, and its technical violation result in the conversion of a minority of electors of a county into a majority. The ballots are delivered to the electors by the judges of election, received again by them, and deposited in the ballot box and counted, although, perhaps, not indorsed with all the matters required by the statute, are sufficiently identified as official ballots, and should not be rejected.

2. But the great question at stake in this case is, assuming that the statute is as it is construed by the majority of this court, whether it would be permitted to disfranchise all of the electors of one or more precincts because a judge of election has failed to make certain indorsements upon the ballot, which it is contended are required by the statute, whether it would be constitutional. The case of *Moyer v. Van de Vanter*, 12 Wash. 377, 29 L. R. A. 670, 41 Pac. 60, is directly in point. The provisions of the Washington statute are as follows: "In the canvass of the votes, any ballot which is not indorsed, as provided in this chapter, by the official stamp and initials, shall be void, and shall not be counted," etc. The court said: "The failure to comply with the law appears to have been due to ignorance of its provisions on the part of the election officers. That the prohibition aforesaid against the counting of these votes, under the above circumstances, is an unreasonable one, and in conflict with the right guaranteed by the 47 L. R. A.

Constitution, seems to us a clear proposition. Were we authorized to hold otherwise, such a holding would be subversive of the best interests of society, and might result in great peril to our governmental structure. Such a holding is not necessary to preserve the purity of elections, for provision can be made for the investigation of charges of actual fraud upon the part of electors and election officers. It would be an interminable task to refer to each of the cases cited in detail, and we content ourselves with giving our conclusions drawn from all of them. No decision cited has gone to the extent that we are asked to go by the appellant in this case; and to accord with the general holdings of the courts, as we understand them, in the light of what has actually been decided in the cases, we are compelled to hold that the provision aforesaid against counting ballots where no initials are placed thereon cannot be sustained."

The court puts the distinction very clearly as to statutes held to be mandatory and constitutional, and those that are not; the former is where the voter is required to do certain things, and is charged with obedience to the regulation, and the latter where certain duties devolve upon election officials, a distinction. I think, the majority of this court have overlooked. The majority opinion states that this decision by the Washington supreme court is against the weight of authority. I think not. Neither is it based upon constitutional and statutory provisions differing in any material respect from our own.

The provision of our Constitution invoked by the majority of this court reads as follows: "The legislature shall provide by law that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day to be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted." This provision does not qualify in any manner the other constitutional provisions which grant the right to vote to persons having the qualifications provided in the Constitution. It certainly affords no warrant nor authority for the enactment of any law which could be so construed as to exclude the ballot of any qualified elector which has been delivered to him by a sworn public official in the polling place, and which was received from him and deposited in the ballot box by one of the judges and counted by all of them. It is asserted that this provision and the corresponding constitutional authority "to provide adequate means for identifying the ballots received and counted as those delivered to the voters within the polling place by sworn public officials, and to provide by statute the means to secure the constitutional result that only such ballots so delivered shall be received and counted. If the legislature may not provide the means, it cannot secure the result." The legislature undoubtedly may provide the means for identification, but not to such an extent as to de-

prive the elector of his vote when it appears that he has voted only the ticket received from a judge of election, and that only such votes so received have been counted. It cannot deprive the injured electors and the candidates deprived of their votes of any remedy anywhere to prove that the ballots cast and counted were those furnished by the judges and deposited and counted by them. It cannot make the right of suffrage dependent, and I use the word advisedly, upon the competency and integrity of the judges of election or any of them.

Our constitutional provision was never intended to cover such a "means of identification" of any ballot as to nullify the popular will, and to establish a triumvirate in each election precinct, which shall hold in its hands the fate of any election, and whose action or negligence is final and not subject to review. It was never intended by the Constitution of this state, or of any state, to substitute for a government of and by the people a government of and by the election judges. I cannot believe that it was the object of any constitutional or statutory provision to thus subvert the popular will, and in the name of "fair elections" to seat a minority candidate for office, and to set aside the returns from three precincts to do so, where fraud in the conduct of the election is neither charged nor imputed.

The doctrine I contend for was established in Michigan by the decision in the case of *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388, where the court says: "The object of a registry law, or of any law, to preserve the purity of the ballot box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the legislature, in attempting ostensibly to prevent fraud, disfranchise legal voters without their own fault or negligence. The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction." After citing a number of authorities, the opinion reads: "These authorities all tend in one direction. They hold that the legislature has the right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has not power to restrain or abridge the right, or unnecessarily to impede its free exercise." And further on, the opinion says: "No elector can lose his right to vote, the highest

exercise of a freeman's will, except by his own fault or negligence." It will not do to say that this opinion has no application to the Australian system of voting. In a recent decision of the same court, *Todd v. Kalamazoo Election Comrs.* 104 Mich. 480, 29 L. R. A. 330, 62 N. W. 564, 64 N. W. 496, while holding that a law prohibiting the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, is a valid exercise of the power of the legislature to pass laws to preserve the purity of elections and guard the elective franchise, as conferred by the Constitution of the state, approved the doctrine in the case of *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L. R. A. 99, 44 N. W. 388, and says: "If the effect of this act, as is strenuously argued by the learned counsel for the relator, is to 'subvert or impede the right to vote,' it is clearly unconstitutional."

It is unnecessary to multiply authorities in support of my position. Their name is legion and their reasoning is unanswerable. The doctrine they establish is imbedded in constitutional provisions which are the pillars that support popular government. The right to vote, the highest exercise of a freeman's will, cannot be frittered away by technical violations by election officials of a statute doubtful in its terms, or even where it has the plainest meaning and intent, and the popular will thus set aside and thwarted. Expressions to the contrary, and there are undoubtedly some of them, have never found, and will never find, a permanent lodgment in the jurisprudence of any commonwealth in the Union, for the doctrine they announce is abhorrent to reason, shocks the moral sense, and undermines the foundation of free government. I regret that this court has not fearlessly taken the stand with great tribunals of sister states, in denouncing as unconstitutional any invasion of the great right of suffrage, that inflicts vicarious suffering and punishment upon a body of electors for the sins of omission of their servants. I cannot see what bearing the remarks of the honorable member of Berkeley county in the constitutional convention of South Carolina has to do with the question here. If I understand correctly his remarks, as stated in the majority opinion, he desired to see the will of a majority of the people sacrificed by constitutional restrictions, which would hamper and impede the right to vote of a large class of people. Precisely what he may have desired has been accomplished here by the disfranchisement of all the voters of three election precincts of a county, through the failure of election officers to comply with asserted strict requirements of the law. "Wyoming does want fair elections." But the people of this state will never consent to have their will as expressed at the ballot box defeated by any construction of a statute, nor by any statute which places the election of either local or state officials, or, it may be, a presidential election, in the power of careless or inefficient election officials, from whose action or omission to act

there can be no appeal, and whose action is now made final and conclusive. While expressing noble and lofty sentiments upon the subject of fair elections, in which I heartily concur, it seems to me that the majority of this court, after uttering them, proceed to make a fair election the sport of chance and wholly dependent upon the conduct of election officials who preside at each polling precinct, and in whose hands is now lodged an enormous uncontrolled and uncontrollable power. History will bear me out in saying that these bodies are not always free from partisan and corrupt influences, and that many of the most notorious frauds against the ballot box have been perpetrated by election officials. The temptations to fraud may be great under the law as it is now to be administered, but it will not continue long.

A people jealous of their rights will speedily sweep from the statute books the least excuse for thwarting their will as honestly expressed by their ballots. They will free the ballot box from the absolute and arbitrary control of election boards, and provide that innocent mistakes of election officials shall not constitute a ground for wholesale disfranchisement.

I may aptly close this opinion by quoting a brief, but comprehensive, extract from Judge Cooley's great work on Constitutional Limitations, at page 775: "That one entitled to vote shall not be deprived of the privilege by the action of the authorities is a fundamental principle." As to the other matters discussed in my former opinion, I am content to permit them to remain unmodified.

MISSOURI SUPREME COURT (Division 1).

Daniel SULLIVAN, *Appt.*,
v.

STRAHORN-HUTTON-EVANS COMMIS-
SION COMPANY, *Respt.*

(.....Mo.....)

1. Any privilege that may exist by virtue of the common interest of the parties when a creditor is writing to his debtor complaining of a delay in the payment of the debt by a third person through a bank, does not extend to the imputation of evil motives and dishonesty to such third person by use of the following language: "We know S. very well, and firmly believe he has misinstructed his St. Louis bank here in order to make interest on your money. We sincerely hope, for your own good, and ours, too, that you will never have anything more to do with S., when the business has to come through our hands, as we do not like his business methods, and we are afraid to deal with him."
2. A question for the jury as to malice of the writer of a defamatory letter is raised, although the question of privilege is for the court, where violent language is used, and improper and evil motives are attributed.

(November 14, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

Statement by Marshall, J.:

Plaintiff is the senior member of the firm of D. Sullivan & Co., which company is engaged in the banking business at San Antonio, Texas. Defendant is a business corporation organized under the laws of Mis-

souri, and A. D. Evans is its secretary. J. M. Chittim is a large cattle dealer in Texas, and held \$10,000 of the stock of the defendant company. Prior to the 24th of June, 1895, the defendant had loaned Chittim \$50,000, which was evidenced by his note to it, secured by a mortgage on 4,150 head of cattle, of which 2,500 were in the Thornton pasture, in Bee county, Texas, and 1,600 in other pastures. The \$50,000 secured note was dated October 18, 1894, and matured about April 21, 1895. About the 1st of April, 1895, Chittim paid defendant \$10,000 on account, and executed renewal notes (the record does not show how many) for \$40,000, which matured at different dates between the 13th and 28th of June, 1895. Chittim paid \$11,000 of these renewal notes before June 24, 1895. Some time prior to June 24, 1895, the defendant notified Chittim that he must meet his notes at maturity, as it was in need of funds. To enable himself to do so, Chittim applied to D. Sullivan & Co. for a loan of \$35,000 to be secured by his mortgage and notes held by defendant, and on the 24th of June, 1895, Sullivan & Co. made the loan; and on the same day Sullivan & Co. wrote to defendant that Chittim "requests us to ask you to send releases for his cattle in Bee county to us, and we will submit them to Mr. Chittim, and, if everything proper, we have instructions to remit you amount. He also says the amount is about \$25,000. Mr. Chittim also requests you to send us his stock he has in your company, by express." On the 26th of June, 1895, defendant replied to Sullivan & Co.: "We have your letter of 24th inst., and have sent the same to our Kansas City office, as they hold the Chittim paper, amounting to about \$25,000. You will hear from that office in due course of mail. Agreeable to your

NOTE.—For malice to destroy privilege in libel case, see also *Smith v. Smith* (Mich.) 3 L. R. A. 52, and *Belknap v. Ball* (Mich.) 11 L. R. A. 72.

For statements in course of business, see also *Missouri P. R. Co. v. Richmond* (Tex.) 4 L. R. A. 47.

A. 280; *Broughton v. McGrew* (C. C. D. Ind.) 5 L. R. A. 406; *Moore v. Manufacturers' Nat. Bank* (N. Y.) 11 L. R. A. 753; *Rothholz v. Dunkle* (N. J.) 13 L. R. A. 655; and *Warner v. Clark* (La.) 21 L. R. A. 502.

request, we send you, Pacific Express to-night, J. M. Chittim's stock in our company." On the 28th of June, 1895, defendant wired Chittim: "Have Sullivan wire his St. Louis bank to pay us twenty-nine thousand dollars on receipt of mortgages released to Sullivan & Co., covering forty-one hundred fifty cattle in Thornton pasture. This will make your individual account about even at this office, and leave you owing Kansas City five thousand dollars, maturing July 17th, which we will extend for you. Answer." On the 29th of June, 1895, Sullivan wired defendant: "We wrote Boatmen's Bank to-day to pay you \$29,000 on delivery to them of proper releases of Chittim cattle." On the same day Sullivan wrote the Boatmen's Bank of St. Louis: "The Strahorn-Hutton-Evans Com. Co., National Stock Yards, Illinois, will present to you mortgage and releases covering 4,156 head of cattle of J. M. Chittim, in Thornton pasture, Bee county, Texas; and upon delivery to you of mortgage, releases, and notes of J. M. Chittim, covering said mortgage, you will please pay them \$29,000, and charge our account with same. Send us all papers by express at the value of \$10." On the same day Chittim wrote defendant: "Just in receipt of your letter and statement. I do not fully understand. I owed individually \$50,000 at St. Louis, and \$25,000 K. C. I placed \$25,000 cash your office, and \$5,000 cash K. C., and total of \$30,000; and, as I have never got all sales of the Chittim and Lasater cattle, do not know what they amount to. I wish to have a full statement, as, I am so thick-headed, unless everything is very plain I cannot understand it. I wish you would please itemize each transaction. I see \$50.00, one time, exchange and int., and the total acc't shows \$36,868.58. Please let me have a full statement, and what amount you placed at K. C., and that amount you received from Chittim and Lasater cattle. You speak of open acc't. Did I overdraw my acc't? If so, when and how much? Hoping you will not find it too much to get the acc't so a leather-head can understand it. P. S. Sullivan wired \$29,000 on release of mortgage St. Louis, to-day. Hoping it has all been released, satisfactorily; for I am paying him interest, and meant to stop interest at that end at once." On the 29th of June, Evans, defendant's secretary, applied to the Boatmen's Bank, and, learning that Sullivan's letter of the same date from San Antonio had not been received by the bank (which, of course, it had not been, as it was only mailed at San Antonio that day), telegraphed Sullivan: "Your letter to Boatmen's Bank not received. Instruct them fully by mail at once." Evans called later at the bank, and learned that Sullivan's letter had been received, but was not fully understood, so the bank would not pay the money without further directions. Thereupon, on the 1st of July, 1895, defendant telegraphed Chittim: "Sullivan's instructions to their bank are so indefinite that they cannot pay us. Have Sullivan instruct them immediately, and you wire us what to release to bank. Answer quickly." On the 1st of July, 1895, Sullivan telegraphed defend-

47 L. R. A.

ant: "Present papers to Boatmen's Bank again. Instructions reached them by this time. Indorse Chittim's notes to us without recourse." On the same day defendant telegraphed Chittim: "Sullivan wants us to indorse your notes without recourse. We think your notes should be canceled before Sullivan gets them." Chittim telegraphed defendant on the same day: "Sullivan wired bank to accept release of twenty-five hundred head of cattle in Thornton pasture. Deliver to bank mortgage, release, and notes covering them." On the 2d of July the Boatmen's Bank telegraphed Sullivan: "Strahorn-Hutton-Evans Co. offer release for twenty-five hundred, with surrender of mortgage. Shall we accept? Please also state what amount of notes we are to get. They offer \$30,000 canceled. Decline to indorse without recourse and deliver uncanceled." On the 2d July, 1895, Sullivan telegraphed Boatmen's Bank: "Observe instructions our letter 29th and telegram 30th regarding payment of Strahorn-Hutton-Evans Com. Co., with exception that mortgage release and notes of J. M. Chittim shall cover twenty-five hundred head of cattle in Thornton pasture, instead of forty-one hundred and fifty head, as advised." This change from 4,150 to 2,500 head of cattle was made because, while the mortgage covered 4,150 head, there were only 2,500 head in the Thornton pasture, and Chittim explained to Sullivan that he (Chittim) owed defendant some other debt, and defendant might not want to release all the security; and, as the 2,500 head of cattle was regarded as sufficient security to Sullivan, he agreed to make the change to 2,500 head from the 4,150 head as originally agreed upon as security for his loan to Chittim. Defendant still refused to indorse the notes without recourse but insisted upon canceling them, and the Boatmen's Bank refused to pay the money unless the notes were indorsed without recourse. On the 3d of July defendant wired Chittim: "Please see Sullivan at once and make them fix matter." Chittim was not in San Antonio when this dispatch reached there, but Sullivan replied by wire to defendant: "Chittim out of the city, but, if you will observe instructions wired you by Chittim yesterday, you will get your money." Upon receipt of this telegram, defendant wired Sullivan "Why don't you instruct bank to accept release on twenty-five hundred steers, and advise us how many of Chittim's notes you want? Please wire them immediately." On the same day defendant wrote Chittim: "Up to this hour, three o'clock, we have not been able to get the boatmen's Bank to pay us the \$29,000 which you advised us Sullivan & Co. instructed them to pay. When we went to see the Boatmen's Bank Monday, they had not received any instructions from Sullivan & Co., except a telegram which was so indefinite that none of us could understand it. Tuesday the Boatmen's Bank received a letter stating that we would turn over to them a released mortgage covering 4,516 cattle. Later in the day they received a telegram stating to accept release on 2,500 head of cattle, and also instructed the Boatmen's Bank to require us to indorse

your notes without recourse. Now, the question with the Boatmen's Bank is what notes to indorse, and how many. We wired you yesterday, but Sullivan replies that you are out of the city, and that they cannot do anything towards paying us the money until you return. *We know Sullivan very well, and firmly believe he has misinstructed his St. Louis bank here in order to make interest on your money. We sincerely hope, for your own good and ours, too, that you will never have anything more to do with Sullivan, when the business has to come through our hands, as we do not like his business methods, and we are afraid to deal with him.* We are now carrying all of your past-due paper, and are feeling the weight. Hope you will receive our telegrams to-day or to-morrow, and will make Sullivan & Co. instruct their St. Louis bank to pay us the money." On the 5th of July the Boatmen's Bank paid defendant \$29,000, and received from it Chittim's notes for \$50,000, together with the mortgage securing the same, and a release as to 2,500 head of cattle in favor of Sullivan & Co., which the bank forwarded to Sullivan & Co. Sullivan & Co. had done business with the Boatmen's Bank for about fifteen years, and had never received any interest on their account with the bank, had never overdrawn their account, and at the times herein referred to had a balance to their credit in the bank of something over \$35,000. Sullivan & Co. and the defendant did not know each other at all, and had never had any previous business dealings with each other. When Chittim received defendant's letter, he showed it to Sullivan; and afterwards, when Chittim spoke to Mr. Evans, the secretary of the defendant company, about the letter, and told him he had shown the letter to Sullivan, Mr. Evans said the letter was intended for Sullivan to see, if Chittim chose to show it to him. Sullivan then instituted this libel suit against defendant, counting upon the italicized portion of the letter of July 3, 1895. The defendant answered, admitting the writing of the letter to Chittim, and pleading that it was a privileged communication, written by it in good faith, believing it to be true, to Chittim, its client and one of its stockholders. The reply was a general denial. Upon the trial in the circuit court the evidence for the plaintiff disclosed the facts herein set forth. At the close of the plaintiff's case the defendant demurred to the evidence on the grounds: "(1) Because, under the pleadings and evidence in the case, the plaintiff is not entitled to recover; (2) because the letter is privileged; (3) because, the letter being privileged, there is no evidence of express malice offered." The court sustained the demurrer. Plaintiff took a nonsuit, with leave, which being overruled, the plaintiff appealed to this court.

Messrs. Lubke & Muench and Charles W. Ogden, for appellant:

While a portion of the letter of July 3, 1895, written by the defendant to J. M. Chittim, referred to a business transaction in which they had a common interest, still the court erred in holding that the portion of

that letter which is made the basis of this action is privileged.

In making a communication which is only privileged by reason of being made to a person interested in the subject-matter thereof, the writer must be careful not to branch out into extraneous matter with which he is not concerned.

Newell, Defamation, Slander & Libel, p. 532; Odgers, Libel & Slander, 245; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020; *Arnold v. Suyings Co.* 76 Mo. App. 159.

He must also be careful to avoid the use of exaggerated expressions, for the privilege may be lost by the use of violent language when it is clearly uncalled for.

Newell, Defamation, Slander, & Libel, p. 532, and cases cited.

Anyone in the transaction of business with another has the right to use language, bona fide, which is relevant to that business, and which a due regard to that business makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle upon which privileged communications rest; but defamatory comments upon the motives and conduct of the party with whom he is dealing do not fall within this rule.

Tuson v. Evans, 12 Ad. & El. 733.

The court erred in instructing the jury, at the request of the defendant, that there was no proof of express malice.

When the matter complained of is privileged, the burden of proving malice lies on the plaintiff.

Such evidence may either be extrinsic,—as of previous ill feeling or personal hostility between the parties, threats, rivalry, squabbles, or other actions, libels, or slanders, and the like, or intrinsic,—the violence of the defendant's language, the mode and extent of its publication, etc.

Newell, Defamation, Slander, & Libel, 324. Malice, express and implied, are the same, the only difference being in the establishment of it.

Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020.

Where the language used, though taken in connection with what was in the defendant's mind at the time, is much too violent for the occasion and circumstances to which it applied, or utterly beyond and disproportionate to the facts, or where improper motives are unnecessarily imputed, there is evidence of malice to go to the jury.

Newell, Defamation, Slander, & Libel, 340, 341.

It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards an individual, or that he entertain and pursue any general bad purpose or design.

Com. v. Snelling, 15 Pick. 321.

In the case of privileged communications slight evidence of malice may be left to the jury.

Fowles v. Bowen, 30 N. Y. 20; *Lathrop v. Hyde*, 25 Wend. 448.

Messrs. J. W. Hamilton and D. P. Dyer for respondent.

Marshall, J., delivered the opinion of the court:

In the trial court counsel treated the letter as libelous. The defendant contended that it was a privileged communication; and the plaintiff, while conceding that the defendant had a right to write in harsh or fault-finding terms to Chittim about the business in hand, it had abused its privilege by making irrelevant charges against the plaintiff, and by libeling him, when there was no necessity, in the nature of the business between defendant and Chittim, to impute evil motives to Sullivan, or to charge him with dishonesty or fraud, and hence the privilege was lost; and, furthermore, that there was enough prima facie evidence of express malice to take the case to the jury.

"A privileged communication," says Newell on Defamation, Slander, & Libel, 2d ed., p. 388, "is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable." Every defamatory publication prima facie implies malice, but where a communication is made in good faith upon any subject-matter in which the communicant has an interest, or in reference to which he has a duty, legal, moral, or social, to a person having a corresponding interest or duty, it is privileged, and the privilege rebuts the presumption of malice, and the burden of proof is cast upon the plaintiff to prove express malice. Newell, Defamation, Slander & Libel, pp. 389-391. But the interest must be common to both parties,—the person communicating and the recipient of the communication, *e. g.* two customers of the same bank, two directors of the same company, two creditors of the same debtor, two officers of the same corps, two executors or trustees, an attorney and client, etc.; and, to fall within the privilege, "the statement must be such as the occasion warrants, and must be made bona fide to protect the private interests both of the speaker and of the person addressed." Odgers, Libel & Slander, p. 234. "So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out into extraneous matters, with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty. The defendant must also be careful to avoid the use of exaggerated expressions, for the privilege may be lost by the use of violent language when it is clearly uncalled for." *Id.* p. 239. Or, as was said in *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, where a member of a city council, while in open session, spoke of the superintendent of streets, against whom no charge or inquiry was pending, as a "down-right thief," and, when sued for slander, defended on the ground of privileged communi-

cation: "There can be no doubt, on proper occasion, members of the city council would be protected from 'responsibility for whatever is said by them which is pertinent to any inquiry or investigation pending or proposed before them,' but no further. They would become 'accountable when they wander from the subject in hand to assail others.'" In *Tison v. Evans*, 12 Ad. & El. 733, it appeared that defendant claimed that plaintiff owed him rent, and authorized his agent to demand it. The agent reported to defendant that plaintiff denied his liability, and thereupon defendant wrote to his agent, saying: "This attempt to defraud me of the produce of the land is as mean as it is dishonest." Plaintiff sued for libel. Defendant pleaded privileged communication. The trial judge reserved leave to move to enter a nonsuit, but told the jury that the publication was a libel, and that the only question was the amount of the damages. There was a verdict for plaintiff, and, upon the decision of the rule reserved, Lord Denman, Ch. J., said: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would therefore have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Anyone, in the transaction of business with another, has a right to use language, bona fide, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another, and this is the principle on which privileged communication rests: but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion. To characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary. This case therefore was properly left to the jury, and there will be no rule."

Applying these principles to the case at bar, it follows that the trial court erred in holding that the portion of the letter of July 3d, complained of, was privileged. The occasion did not justify the terms employed, and they were wholly unnecessary; and this is true even if it be conceded that they were used in respect of a matter of common interest between defendant and Chittim, as to which it is quite debatable. The record shows that defendant was advised by plaintiff as early as June 24th that Chittim had secured the money from him to pay defendant if the securities were proper, and defendant was requested to send the securities to plaintiff at San Antonio, and also to send Chittim's stock in the defendant company to plaintiff. Defendant on the 26th day of June sent the stock to plaintiff, and wrote him that the

Chittim notes were held by defendant's Kansas City office, and that plaintiff would hear from there by due course of mail. But, instead of doing so, for some unexplained reason, defendant, two days later (June 28), telegraphed Chittim to have Sullivan wire his St. Louis bank to pay it \$29,000 on receipt of mortgage, released to Sullivan & Co., covering 4,150 cattle in the Thornton pasture; stating that this would make Chittim's individual account about even at the defendant's St. Louis office. Complying with this request for a change of the original arrangement, Sullivan on the next day (July 28), wired defendant that he had written the Boatmen's Bank to pay it \$29,000 on delivery to them of proper releases of Chittim cattle, and did actually write the Boatmen's Bank, directing it to pay defendant \$29,000 upon delivery to it of mortgage, releases, and notes of Chittim "covering said mortgage" on 4,150 head of cattle in the Thornton pasture. On the 1st of July defendant's secretary called on the bank, and was informed that Sullivan's instructions were so indefinite and uncertain the money could not be paid; and defendant so wired Chittim, and asked him to have Sullivan instruct the bank immediately, and asking what Chittim wanted released to the bank. On the same day Sullivan telegraphed defendant to present the papers to the bank again, and added: "Indorse Chittim's notes to us without recourse." Instead of doing this, defendant on the same day telegraphed Chittim that Sullivan wanted the notes indorsed to him without recourse, and advised Chittim that the "notes should be canceled before Sullivan gets them." On the same day Chittim telegraphed defendant that Sullivan had instructed the bank to accept release of 2,500 cattle in the Thornton pasture, and directed defendant to deliver to the bank "mortgage, release, and notes covering them." Up to this time 4,150 head of cattle had been spoken of, and this is the first time a release of 2,500 head had been referred to in the correspondence; and this reduction was not of defendant's asking, but was suggested to Sullivan by Chittim, and agreed to by him, so that defendant would still have security for any other debt Chittim owed it, although in its telegram to Chittim of June 28, asking that the payment be made in St. Louis instead of in San Antonio, defendant had said the mortgage covered 4,150 head of cattle, and that \$29,000 would make Chittim's individual account about even at the St. Louis office. However, instead of doing as Chittim directed on the 1st of July, the defendant on the 2d of July offered the Boatmen's Bank to release 2,500 head of cattle, with surrender of mortgage and of Chittim's notes for \$30,000, canceled, and declined to deliver to the bank the Chittim notes indorsed without recourse, as directed by Sullivan's telegram of the 1st of July, but insisted upon canceling the notes, as defendant advised Chittim by telegraph, on the 1st to do. Right here it will be observed that defendant was itself the cause of the money not being paid on that day, because it knew that Sullivan

had furnished Chittim the money to pay his debt to defendant, and was to get the securities it held, and the whole negotiation up to this time was on that understanding; yet defendant arbitrarily, and without any authority from Chittim, but in the face of his instructions to the contrary, and of his refusal to take its advice to cancel the notes before Sullivan got them, refused to indorse the notes without recourse, and insisted upon canceling the notes. Upon being advised by the bank of this claim of defendant, Sullivan directed the bank to observe his instructions previously given. Thereupon, on the 3d of July, defendant, without disclosing the true reason for the nonpayment, telegraphed Chittim to have Sullivan fix the matter, and, upon receiving a reply from Sullivan that Chittim was out of the city, but that, if it would observe Chittim's instructions of the 2d of July, it would get its money, telegraphed Sullivan on the same day (July 3d) to instruct the bank to accept release on 2,500 head of steers, and asking how many of Chittim's notes he wanted. This, too, in the face of Chittim's telegram to it on July 1st telling it that Sullivan had instructed the bank to accept a release of 2,500 cattle upon his delivering to the bank "mortgage, release, and notes covering them." It is incomprehensible how defendant could ask Sullivan how many of Chittim's notes he wanted, when it knew Sullivan was furnishing the money to pay the \$29,000 Chittim owed defendant, and was to get the mortgage and all the notes it covered. It will be observed, however, that defendant did not tell Sullivan the true reason upon which the bank refused to pay him the money on the day before, i. e., that defendant would not indorse the notes without recourse, but insisted upon canceling them before Sullivan got them. Thus, it appears that the defendant itself was wholly and solely the cause of the \$29,000 not being paid to it before the 3d of July. Sullivan and Chittim and the bank had met every proper request of defendant, and defendant itself refused to accept the money on the 2d of July, except upon terms it was not authorized to impose, and which were perfectly absurd, to wit, that the notes, which were to be Sullivan's security, should be canceled before he received them. Now, it was in the light of these facts, conditions, and circumstances that the defendant wrote the letter of July 3d to Chittim, containing the libelous matter complained of in this suit. That matter was unnecessary and unjustifiable. It said: "We wired you yesterday, but Sullivan replies that you are out of the city, and that they cannot do anything towards paying us the money until you return." Sullivan's telegram was quite different. It read: "Chittim out of the city, but, if you will observe instructions wired you by Chittim yesterday, you will get your money." Again this letter said: "We know Sullivan very well" (which was not a fact, as defendant and Sullivan were not acquainted, and never had any dealings before), "and firmly believe that he has misinstructed his St. Louis bank here in order to make interest on your money" (which was a gratuitous imputation

of improper and evil motives to plaintiff, wholly unwarranted, in view of the fact that defendant was informed by plaintiff's telegram of June 29 that the bank was instructed to pay it \$29,000 on delivery to it by the defendant of proper releases of the Chittim cattle). Again the letter proceeded: "We sincerely hope, for your own good, and ours, too, that you will never have anything more to do with Sullivan, when the business has to come through our hands, as we know his business methods, and we are afraid to deal with him," which, as Lord Denman said in *Tuson v. Evans*, 12 Ad. & El. 733, was a "defamatory comment on the motives or conduct" of Sullivan; for which there was no provocation or foundation of fact in anything Sullivan did in this transaction, or is shown by the record in this case to have ever done. On the 5th of July defendant indorsed the notes covered by the deed of trust, without recourse, and delivered the mortgage, release of 2,500 cattle, and the notes to the bank, and received from it \$29,000, just as it might have

47 L. R. A.

done at any time after June 29, and certainly at any time after July 2. If it had done so, there never would have been any occasion, as there never was any excuse, for the letter of July 3, complained of in this case.

Thus, it conclusively appears, not only that the language complained of was libelous, and was not privileged, but also that the violence of the language used, and the improper and evil motives and conduct attributed to Sullivan, afforded sufficient prima facie evidence of actionable malice to take the case to the jury. It was a question of law for the court whether the letter was a privileged communication, but malice was a question of fact for the jury, if there was any evidence whatever of malice. *Newell, Defamation, Slander & Libel* 2d ed. p. 392, § 10; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614.

These conclusions result in reversing and remanding this case. It is so ordered.

All concur.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1899. Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES OR REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; LIENS; TRUSTS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Statutes.

The re-enactment of a state statute attempting to regulate the lien of Federal court judgments is held unnecessary to make it operative after Congress has authorized such legislation, although when the act was passed it was ineffectual for want of state authority over the subject. (Iowa.) 469.

An option given to cities incorporated under special charters, to adopt the provisions of a general law, is held not to make that statute violate constitutional provisions against special or local laws amending municipal charters, and providing that laws for such purposes must be general and uniform throughout the state. (Wis.) 441.

Public money.

An attempt by the legislature to appropriate public moneys to pay a pardoned convict for alleged wrongful imprisonment is held subject to constitutional provisions as to appropriations for private purposes, and such a claim is held not to be one which the board of auditors can adjust. (Mich.) 117.

Taxes.

A fire tax to which the property of railroad companies is subject, without being entitled to any of the benefits of the tax, is held unconstitutional. (Kan.) 77.

A tax on contracts of insurance made with companies not authorized to do business in the state, which is based on the premiums paid, is held to violate the constitutional requirement of uniformity. (Kan.) 68.

Under a constitutional provision authorizing inheritance taxes upon all inheritances, etc., above a fixed and specified sum, but providing that the tax above such sum may be uniform or may be graded or progressive, it is held that a statute exempting devises of real property to persons and corporations whose property is exempt by law from taxation, and which allows a larger exemption to lineal heirs than to collaterals, and does not lay the tax on the excess of the value of the property received above a uniform exempted sum, is unconstitutional. (Minn.) 525.

License tax.

A license tax on merchandise brokers is held void as a regulation of commerce with respect to a broker engaged in selling goods, which are not in the state, solely by sample, for principals who are in other states. (Va.) 583.

An ordinance requiring a license for the use by merchants of trading stamps is upheld as a license for the purpose of raising revenue. (Wash.) 205.

Assessments.

The structure of an elevated railroad is held to be property subject to assessment for benefits on account of a street pavement. (Ill.) 624.

A published notice of an assessment for local improvements which fails to show when, where, or before whom appearance can be made to contest the assessment, is insufficient to satisfy the constitutional provision for due process of law. (Va.) 574.

The fact that an ordinance for a street assessment did not affirmatively show that benefits were considered is held insufficient to require an injunction against the assessment, when it is established that the benefits were more than the assessment, and it does not appear that the burden was not fairly apportioned. (Ohio) 156.

Eminent domain.

The restriction of the height of buildings adjacent to a public square, made by statute for the purpose of promoting the beauty and attractiveness of the square or park and prevent interference with light and air, is held to be for a public purpose justifying the expenditure of public money to pay compensation for injury to property rights, thus creating an easement of light, air, and view annexed to the park. (Mass.) 314.

Counties.

An obligation imposed by statute upon a new county to pay bonds of the county out of which it was formed is held to be in the nature of a specialty, not governed by the ordinary statute of limitations applying to contract obligations or liabilities in writing, and

the limitation period is held to begin at or after the date of the imposition of the obligation by the statute. (C. C. App. 9th C.) 459.

Local self-government.

A statute arbitrarily establishing a high school and requiring its maintenance by the people of the county is held not to be an unconstitutional interference with the right of local self-government. (Kan.) 67.

Courts.

A statute empowering the court to fix maximum water rates, on petition of a party aggrieved, once in five years, is held constitutional on the ground that the primary purpose is to settle existing rights of parties in relation to each other, although it secondarily establishes a rate for all, and for the future as well as the past. (Mass.) 319.

Officers.

The right of a woman to be elected prosecuting attorney is denied under a constitutional provision that officers shall be chosen by the electors, when there is no provision expressly conferring on women the right to hold such office. (Mich.) 92.

The unconstitutionality of a legislative act is held not open to question by executive officers to defeat a mandamus to compel their performance of ministerial acts. (La.) 512.

A tie vote for justice of the peace is held to create no vacancy which can be filled by appointment, under a constitutional provision that justices shall hold over until their successors are elected or appointed and qualified. (Mo.) 560.

The existence of a vacancy in the office of senator, requiring the election of a new incumbent, is held to be a question which the courts cannot decide until it has been decided by the senate, under a constitutional provision making the senate the sole judge of the qualification and election of its members. (Md.) 622.

Elections.

A ballot law requiring an indorsement by official stamp on the back of a ballot, and the name or initials of the judge thereon, is held constitutional, and construed so as to cause the rejection of a ballot which is defective in either particular. (Wyo.) 842.

Leaving two columns of an official ballot uncrossed while the statute requires the voter to cross out all groups of candidates except one is held to render the entire ballot invalid, although in one column there was but a single name, and for most of the offices named in the other column it was left blank. (Mo.) 806.

A statute relating to the marking of ballots is construed and applied to a variety of markings. The court holds that certain merely technical variations from the form of mark specified do not vitiate the ballots, where the marks were evidently made in good faith. (S. D.) 830.

The power to decide between candidates for justice of the peace who have an equal number of votes, though a statute attempts to give it, is held to be contrary to a constitutional provision which provides for the

election of such justices, without making any provision for decision of a tie vote in such cases, though a provision of this kind is made as to other officers. (Mo.) 551.

Municipalities.

The liability of a municipal corporation for damages sustained by a person in enforcing an unconstitutional and void ordinance is sustained. (Ky.) 593.

A municipal corporation is held not to be liable for injury to a person struck by a bicycle ridden on a sidewalk by reason of its failure to enact or enforce an ordinance prohibiting such riding. (Va.) 294.

The right of a city to build waterworks of its own, after having granted a franchise to a water company which has constructed such works and is supplying water, is upheld where the franchise granted was not in terms exclusive, and there was no agreement, express or implied, to prevent the city from erecting its own works, and the charter power of the city to construct, or authorize others to construct, such works, is held not to be in the alternative. (Wash.) 214.

Highways.

A telephone company having the right to string wires in a highway is held entitled to do the necessary trimming of trees therein without giving the landowner an opportunity to do it, but being answerable for any unnecessary, improper, or excessive cutting. (Mich.) 497.

The consent of a municipality is held not to be necessary to the use of streets by telephone companies under a statute which gives the authority in general terms, without requiring such permission. (Mich.) 104.

Bicycle paths.

The establishment of bicycle paths by county authorities, and the use of a portion of a public highway therefor, are held to be ratified by a statute making it a misdemeanor to drive animals or vehicles other than bicycles on such paths. (Minn.) 144.

Defective bridge.

The mere existence of a defect in a bridge for two or three days is held insufficient to constitute constructive notice thereof to a city under a statute making the city liable for such defect only in case of knowledge or notice thereof. (Mich.) 499.

Ordinances.

An ordinance prohibiting any livery stables within the business part of a city, except those already in operation, is held invalid for discrimination, and also for excess of authority, where the statute provides for the regulation of stables, but not for their suppression. (La.) 652.

An ordinance making it unlawful to receive intoxicating liquors within a municipality notwithstanding the fact that they had been lawfully purchased elsewhere is held not to be authorized by the general welfare clause in a city charter. (Ga.) 366.

An ordinance requiring saloons to be closed between 10 P. M. and 4 A. M., and on Sundays, is held valid, but a provision requiring curtains on front doors and windows to be removed from sunset to sunrise, and

making it a misdemeanor to let any person closing, is held unreasonable and void.
in or out of the saloon during the hours of (Tenn.) 278.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

An eight-hour law applying to smelters is held unconstitutional as an interference with the liberty of the citizen, and his right to acquire and possess property. (Colo.) 52.

An eight-hour law applicable only to employees of the state or of some municipality or subdivision of the state is held valid. (Kan.) 380.

A statute prohibiting payment of the wages of employees of a corporation or trust employing ten or more persons in anything but lawful money is held void as a deprivation of property without due process of law or the equal protection of the laws. (Kan.) 369.

A statute requiring corporations to pay wages monthly, and in default thereof giving a lien for the wages on all the property of the corporation superior to any other liens except duly recorded mortgages and deeds of trust, and also giving an attorney's fee in case of suit, with the right to attach property, is held unconstitutional because of the discrimination against corporations and their employees. (Cal.) 338.

A statute making it unlawful to screen coal mined at quantity rates before it is weighed and credited to the employees is held constitutional, where it leaves the parties free to contract for work at day wages or for wages based on the amount of screened coal. (Kan.) 71.

Interstate commerce.

An agent who collects garments and sends them to another state to a laundry, and redelivers them to their owners when returned, is held not to be engaged in interstate commerce because the transaction is not commercial in its nature. (Tenn.) 416.

Public contract.

A contract for a garbage crematory is held invalid when let without filing any plan as required by a city charter, and upon specifications so indefinite as to evade the statutory provisions requiring bids. (Wis.) 685.

Validity.

A contract to furnish crushed stone to a paving contractor, delivered on the street, "in such quantities as may be desired," is held not to bind the promisor to furnish all that was needed for paving that street, since the contractor was not bound to take such quantity. (Wis.) 427.

Signature.

A signature by mark is held sufficient at common law without any attestation by a subscribing witness. (Wis.) 695.

Consideration.

A contract between merchants to close their places of business at a certain hour each day is held to rest upon a sufficient consideration, and to be free from the objection that it illegally restrains trade. (Ky.) 287.
47 L. R. A.

Duress.

Threats which actually put a person in such fear as to make him incapable of exercising his free will are held sufficient to constitute duress, although they would not have such an effect upon a person of ordinary firmness and courage. (Wis.) 417.

Mistake.

A mutual mistake in pointing out boundary lines, though without any fraud or intentional misrepresentation, is held to justify a rescission, where the vendee gets only half of the quantity and less than half the value of the property bargained for. (Tenn.) 267.

Carriers.

One licensed as a common carrier within a city is held liable as such when carrying goods beyond the city limits under an agreement to take them to a certain point, without any further contract, although he could not have been compelled to carry them outside the city. (Ky.) 383.

A rule that baggage will not be checked more than half an hour before train time is held not to be unreasonable as matter of law. (Wis.) 221.

Hackmen at depot.

Discrimination by a railroad company between hackmen and private carriers with respect to the right to enter the depot to solicit business from passengers is held lawful, but discrimination between them at points outside the depot is held illegal. (Minn.) 532.

Banks.

A bank receiving for collection a note on which it is an indorser is held to have no defense on account of its own failure to make presentment and demand. (Ark.) 329.

The selection by a bank of its regular correspondent for an agent in the collection of a check which the initial bank has received for collection is held to indicate proper care. (Tenn.) 270.

Consignment.

An ordinary consignment of goods for sale, retaining title, is held to give no power to the consignee to pass title to the goods even to an innocent purchaser, when he sells them the same day they are received as part of his entire stock and business. (Conn.) 601.

A consignment to the consignor's order, where the bill of lading with draft attached is sent to a bank to be delivered when the draft is paid, and stipulates that it must be surrendered in order to obtain the delivery of the goods, does not pass title to them, or entitle the person for whom they were sent to their delivery by the carrier without surrendering the bill of lading, although the bank refuses to surrender it to him or accept his tender of the amount of the draft. (Md.) 124.

Covenant.

A covenant by grantors in a deed to a railroad company, agreeing to build a fence or not hold the company responsible for damages to stock, is held to be personal, and not to run with the land. (Or.) 409.

A covenant by which a lessee of a part of a railroad right of way for warehouse purposes agrees to save the lessor harmless from damages or claims for injury to property on the leased premises by fires set by the lessor's engines, when there is a stipulation that the covenant shall bind the assigns of both parties, is held to inure to the benefit of a transferee of the railroad property and of the lease. (N. D.) 149.

Insurance.

The express terms of a certificate of membership in an insurance association are held to prevail over by-laws, where the certificate denies liability for suicide, and the by-laws do not authorize the limitation. (Wis.) 681.

The protection of a member of a beneficial insurance association against changes and amendments of by-laws is made in a Minnesota case where a change was made by which a notice of assessments previously required by by-laws was made unnecessary. (Minn.) 136.

The power of an insurance company to grant an annuity by a policy which is not under seal or in the form of a deed is upheld under a charter authorizing it to "grant, purchase, or dispose of annuities." (Md.) 614.

A barber is held not to be engaged in a more hazardous occupation at the time of an injury received while hunting rabbits as a mere incident of his daily life, and not for hire or profit. (Kan.) 650.

A policy against damage by cyclones, tornadoes, and wind storms is held not to cover damage by hail accompanying a wind storm, under a provision excluding damage by hail or lightning and various kinds of damage

caused by wind, unless other damage occur. (C. C. App. 8th C.) 308.

An insurance broker authorized to procure a certain amount of insurance in companies to be chosen by him is held not to be an agent of the insurer so as to bind the latter with the agent's knowledge of other insurance, although he is allowed a commission on the business by the recognized agents of the insurer. (C. C. App. 7th C.) 450.

An oral contract by an agent of a foreign insurance company, to renew a policy that he had issued, is held to be within his authority to make insurance and deliver policies. (N. D.) 641.

Credit for part of the first insurance premium extended by a general agent of a foreign company is held binding on the company, though a provision of the policy thereafter issued, but which was not assented to by the insured, declared that the policy should not be valid until the premium was paid, and that no provision of the contract should be waived by the agent. (Wash.) 201.

The conflicting decisions are reviewed on the question of the effect of a clause in an insurance policy requiring suit to be brought within a certain time after a fire, and it is held that this phrase gives the stipulated time for suit after the right of action accrues. (S. C.) 696.

Infant's contract.

An infant rescinding a contract for the purchase of a bicycle, and attempting to recover back instalments paid, is held to account for the value of the use of the bicycle and its deterioration in value while in his possession. (N. Y.) 303.

A restoration of the consideration received by an infant for his conveyance of land is held not necessary on disaffirming the deed after coming of age, when the consideration is no longer in his possession or control, but has been dissipated by him while still an infant. (Tex.) 326.

III. CORPORATIONS AND ASSOCIATIONS.

See also *supra*, II.

The constitutional prohibition against creating a corporation by special act is held violated by renewing or extending the term of the existence of corporations which have special charters. (Ind.) 489.

A foreign insurance company is held entitled to a license without regard to the similarity of its name to that of a domestic corporation, when it has complied with the provisions of the statutes, which include nothing on that subject, although the statutes governing domestic corporations provide that a name applied for may be rejected when it is too similar to one already appropriated. (Ill.) 795.

A statute providing that certain incorporated associations shall each appoint one member of a state board for licensing commission merchants is held unconstitutional under a provision prohibiting the grant of

special franchises to corporations or associations. (Ill.) 802.

The right of a telephone company to alienate the permission which has been granted it for the use of streets is held not to depend on the consent of the municipality, where the statute authorizes corporations to alienate their property. (Mich.) 87.

State hospital.

A state hospital is held not to be liable to an action for damages on account of injuries sustained by an inmate from negligence or misconduct of the persons in charge. (Va.) 577.

Railroad commissioners.

The authority of railroad commissioners to order a station house or depot to be built is held to be conferred by a statute giving them general supervision over railroads, and providing that they shall inform the company of the improvements which they adjudge to be proper. (S. D.) 569.

Stockholders.

A transfer of shares of stock in good faith is held sufficient to relieve the stockholders from liability as such, unless prevented by the statutes or the by-laws of the company. (N. Y.) 246.

A right of action by a foreign receiver against a stockholder in a foreign corporation is sustained on the ground that the liability is contractual. (N. Y.) 725.

Receivers are denied any right of action to enforce liability of stockholders for debts of the corporation on the ground that the fund is not assets of the company. (Md.) 617.

The right of a stockholder to inspect the books of the corporation is sustained on condition that it is made for the interests of the corporation. (Wash.) 208.

IV. DOMESTIC RELATIONS.

A married woman authorized by a court to buy and convey property as a *feme sole* is held to have no power to convey realty in another state, to which she removes, without the joinder of her husband in the deed, where such joinder is necessary by the laws of that state on a conveyance of property by a married woman. (Fla.) 608.

Contract to marry.

A contract to marry is held not to be within the statute of frauds. (Md.) 384.

Breach of promise of marriage.

A man is held to be justified in breaking a contract of marriage when, after it was made, he developed a grave malady which would make his marriage dangerous to his life or health. (Va.) 581.

Divorces.

Mere payment of an allowance to a wife under an order of court is held insufficient to prevent a divorce for desertion with entire neglect of duty. (Conn.) 750.

A divorce granted on substituted service of process in another state where complainant is domiciled is held entitled to recognition by interstate comity, where actual no-

tice of the pendency of the suit was given to defendant, and the ground of the divorce was one which the public policy of the forum recognized. (N. J.) 546.

Alienation of affections.

The alienation of a husband's affections from his wife by another woman is held to create no right of action in favor of the wife, if it is unaccompanied by adultery. (Mass.) 310.

Infants.

A mother given by divorce decree the care and custody of a child, while no provision is made for its support, is held to have no right of action for injuries to the child, as the duty of supporting it still rests on the husband. (Mo.) 391.

A girl seventeen years of age is released from a convent by habeas corpus, notwithstanding that she was received there on the supposition that her parents had consented, and is not restrained of her liberty, but remains there by choice, since a minor has no right to choose any other domicile than that of her parents. (La.) 656.

As to infant's contract, see *supra*, II.

V. FIDUCIARIES OR REPRESENTATIVES.

The withholding of commissions from an executor on account of his failure to give proper care to the estate is held to be within the discretion of the surrogate, notwithstanding a statute saying that he "must allow" certain commissions on settlement of an executor's account. (N. Y.) 721.

An attorney employed by an association to procure the discharge of receivers is held to be precluded from recovering for his services

in the matter, when he has at the same time been engaged and paid by one of the receivers, who was adversely interested. (Ill.) 792.

A subagent intrusted with the collection of a debt is held to have no right to apply the funds collected to the payment of a claim held by him against the principal agent, or in any way divert the funds from speedy transmission to the real owner. (Minn.) 529.

VI. TORTS; NEGLIGENCE; INJURIES.

Nuisance.

No notice or request to remove a building encroaching on a street is held necessary before action to abate it as a nuisance, brought against the person who erected it with constructive notice of the street boundary, although such person was only a lessee of the premises, and acted in good faith, believing the building was entirely on private ground. (Ind.) 487.

Notice to the original wrongdoer is held not to be necessary to create a liability for the injury caused by a structure made by him, although the owner of the property

injured acquired it after the structure was made. (Md.) 127.

Libel.

The privilege, if any, in writing a letter to a debtor, complaining of the nonpayment of the debt by a third person through a bank, is held not to extend to the imputation of evil motives and dishonesty. (Mo.) 859.

Exceeding the privilege of a communication is held not to defeat the privilege, but to be material only as bearing on the question of malice. (Iowa) 483.

See also *infra*, IX.

Trespass by animals.

Under a statute requiring premises to be inclosed with a lawful fence in order to entitle the owner to recover for trespass by animals thereon, it is held that an owner of animals is liable for the trespass of his animals on unfenced lands if they were there, not merely by reason of his negligence, but because he turned them thereon. (Va.) 588.

Blasting.

One who fires a blast upon his own land, whereby a piece of wood is thrown which injures a person lawfully traveling on a highway, is held liable as a trespasser, although the blast was fired for a lawful purpose and without negligence or want of skill. (N. Y.) 715.

Explosion of gas.

Explosion of gas in a house supplied with a low-pressure current is held not to make the gas company liable, when it was caused by the blundering act of an employee of another company who broke into a plank box containing the by-pass by which a high-pressure line was connected therewith, and made the connection. (Pa.) 790.

Negligence.

The rule that one whose negligence in conjunction with some other cause, both operating proximately, and either of which was sufficient to cause injury, is responsible for the damage, is applied to a defective railing on a bridge, which was broken by a team when frightened by lightning. (Iowa) 480.

A person who resists a gateman's efforts to save him by removing him from a dangerous position near a railroad track as a train approaches is denied a right of action against the railroad company for being thrown down in the tussel, and having his leg cut off by the train. (Pa.) 788.

Starting a back fire to protect one's property from a prairie fire is held not to be negligence, if done with proper care, and not to be the proximate cause of loss which would in any event have resulted from the original fire. (N. D.) 646.

Contributory negligence is held to be no defense to a cause of action under a statute which imposes an absolute liability, as one charging railroad companies with liability for fires. (Me.) 82.

Fright.

A right of action for physical injury resulting from mere fright is again upheld where a wrongful act or omission was deemed the proximate cause of the injury, and the injury ought to have been foreseen. (Tex.) 325.

But in another case the rule that no recovery can be had for fright is held to apply, although the negligence was gross and the party in fault ought to have known that the result would follow. (Mass.) 323.

Negligence of carrier.

The theft of diamond rings from the finger of a woman while asleep in a sleeping car is held to give a right of action against the sleeping-car company, if it resulted from the failure to use proper care in guarding her and her property. (Ky.) 286.

47 L. R. A.

The shooting of a passenger during a quarrel with other passengers which grew out of a game of cards is held to create no right of action against the carrier, in the absence of evidence that the injury could have been prevented after knowledge of the danger, although the game was allowed in violation of the rules. (Md.) 120.

Injury to servant.

The completed part of a tunnel through which men go to continue the work is held to be an appliance, means, or place which the master must make safe, so that the servant does not assume the risks of its caving in. (Cal.) 597.

A person who enters the employ of another is held to assume all the risks usually incident to the employment, including those which it is a part of his duty to take knowledge of by observation. This applies to the use of a machine from which a bolt is missing, and the defect in which is obvious. (N. J.) 147.

The maxim *Volenti non fit injuria* is held applicable to a case of injury to a servant wheeling coal on a runway not protected by guards, although a statute makes the employer liable for injuries from defects in the ways, works, or machinery. (Mass.) 161.

A boy who has had two years' experience in riding colts is held chargeable with the risk of the sufficiency of a stirrup strap, when, after complaining of its insufficiency and seeing it tested and being told that it is sufficient, he becomes satisfied that it is so, and proceeds to use it. (Mass.) 107.

The use of compressed air in the construction of a tunnel is held, under the law of Canada, not to create a liability as absolute insurer of the machinery, appliances, and system adopted, but the employer's duty in this respect is held to be satisfied by employing competent superintendents and workmen, and authorizing them to procure all necessary machinery and appliances. (Mich.) 112.

Injury by servant.

A locomotive engineer is held to be acting in the exercise of his authority when ejecting a trespasser from the footboard of the engine, irrespective of any interference by the latter with the manipulation of the machinery. (Tex.) 282.

Injury on highway.

A white cloth hay-cap, tied at the corners to stakes in the ground, is held to be a nuisance which will create a liability for frightening a horse, when it is maintained in a highway at such a place as to be likely to frighten horses that are ordinarily gentle. (Me.) 752.

Bicycles are held not to be within the meaning of an ordinance giving vehicles a right of way upon street railway tracks in the direction in which the cars usually run over vehicles running in the opposite direction, and, in an open, unobstructed highway it is held that the driver of a cart need not turn out to one side in order to give the right of way to a bicyclist. (Pa.) 289.

VII. PROPERTY RIGHTS; LIENS; TRUSTS.

Deeds.

The destruction of an unrecorded deed, and a new conveyance at the grantee's request, by the grantor, to a third person, is held to convey an equitable interest, and not a legal interest. (N. D.) 637.

A reservation in a deed of land on one side of a river of a right to build a dam against it, with the accompanying right of flowage, and also of an acre of land near the end of the dam, although containing no words of inheritance, is held to give the grantor easements appurtenant to, and not in gross, and a fee simple in the land, instead of a mere license. (N. H.) 226.

Mines.

A lessee of an undivided interest in a mine is held entitled to maintain an action for damages against the owner of the remaining interest, who excludes him from the mine. (Nev.) 540.

Natural gas.

A statute prohibiting the escape of natural gas from wells into the open air is held constitutional, and an action by the state for an injunction to prevent it is sustained on the ground that it is a nuisance. (Ind.) 627.

Mortgage.

A mortgage of a stock of goods authorizing a mortgagor to sell for the benefit of the mortgagee and account to him for the proceeds of the sales, though authorizing him to sell on credit of thirty days and to draw his living expenses out of the proceeds, is held valid. (Mont.) 400.

Satisfaction.

Judgment against a solvent garnishee, although not collected, is held to be a satisfaction of the claim for the amount thereof against the original debtor, who cannot be compelled to take the judgment instead of having credit therefor on his own claim. (Iowa) 131.

Judge.

A judge is held to be disqualified from trying a case in which the plaintiff is a corporation of which his wife is a shareholder, although there is no statutory provision to that effect. (S. D.) 413.

Damages.

The pollution of the water of a stream used for a paper mill is held to be an element of consequential damages caused by the operation of a railroad. (Pa.) 782.
See also *supra*, VII.

Evidence.

A man's declarations as to facts of his own history and pedigree are held provable for the purpose of identification in an action after his death to recover the proceeds of his estate, which has been escheated. (Or.) 548.

Parol evidence that a grantor agreed that
47 L. R. A.

Redemption from mortgage.

The balance of a mortgage debt when the land is sold for less is held not to be a "lawful charge" which must be included in the amount to be paid on redemption, where the statute provides for paying the purchase price and all "lawful charges." (Fla.) 742.

Damage by eminent domain.

The meaning of the word "damaged" in a constitutional provision requiring compensation for property damaged for public uses is discussed at length in a case which denies that the depreciation in the value of property by noise, smoke, and cinders caused by a railroad constitutes such damage. (Ga.) 755.

Liens.

A mechanic's lien on the buildings of a state university is denied on the ground that the property is public. (Va.) 284.

The enrichment of the soil and beautifying of ground, including the construction of a rustic bridge of little importance, are held insufficient to give a mechanic's lien under a statute authorizing it for a house, fixtures, machinery, "or improvements made" on land. (Tenn.) 273.

Trust.

A general deposit by an administrator of moneys of the estate in a bank owned by him is held to destroy the identity of the fund as a trust fund, if any money is afterwards checked out of the bank, although there is more than the amount of the deposit left therein when it becomes insolvent. (Or.) 265.

VIII. CIVIL REMEDIES.

he should have no passway over the land conveyed is held admissible to rebut the implied reservation of an easement of necessity. (Ky.) 79.

Photographs calculated to arouse sympathy or indignation of the jury should be excluded when not substantially necessary or instructive to show material facts or conditions. (Wis.) 691.

An application to have plaintiff required to submit to have his neck photographed by the use of the X-rays is denied during the progress of the trial, on the ground that the application is not made in time, and also because it is not shown that the person by whom it is proposed to have the photograph taken has the necessary skill or experience to apply the rays without injury to the person. (Minn.) 141.

Physical examination.

An action by a father for the loss of the services of his minor daughter, occasioned by personal injuries, should not be dismissed because she, after reaching her majority, refused to obey an order of the court in which the action was pending, requiring her to submit to a physical examination of her person by a physician. (Ga.) 486.

Presumption.

The court refuses to presume that the law merchant as to the protest of a draft prevails in Asiatic Turkey. (Mass.) 495.

Action for conspiracy.

An action on the case for conspiracy is held not maintainable by a general creditor against those who combine to remove the debtor's property beyond the reach of his claim. (Wis.) 433.

Recovering money paid.

The right to recover back money paid on an assessment for a street improvement, on the ground that the improvement was not completed and the property assessed was not benefited, is denied where it does not appear that all the money collected on the assessment was not honestly expended on the work of the improvement that was done. (Minn.) 537.

Injunction.

A very remarkable attempt to obtain an injunction against the removal of a building from a town, on the ground that it would so diminish the taxable property in the town as to make it difficult for the town to pay its indebtedness, and that it would throw an excessive burden of taxation on the remaining taxpayers, was unsuccessful. (S. D.) 572.

An injunction to protect purely political rights, such as those of citizens as voters, is declared to be in excess of equity jurisdiction. (Mo.) 393.

Garnishment.

An officer who has collected money by garnishment is held not to be liable for paying it over to the creditor after notice that the title to the fund had been assigned by the debtor before the garnishment was levied, where the garnishee acknowledged that it owed the fund and paid it over as the property of the debtor. (Mont.) 737.

Garnishment against an executor to reach a debt of the decedent before a decree for the distribution of the assets in his hands is de-

nied where there is no statutory permission therefor. (Mich.) 345.

Specific performance.

A decree for the specific performance of a contract is denied for the lack of definiteness and certainty of its provisions, where it called for the opening and development of mining property, the building of a mill, etc., and also because the decree would involve the supervision of a long series of acts involving special knowledge and skill. (Cal.) 334.

New trial.

Inadequacy of damages is held to be one of the grounds for which a verdict may be set aside and a new trial ordered. (N. C.) 33.

Attack on probate.

The probate of a will is held not subject to collateral attack years afterwards by a proceeding to annul it, merely because one of the two witnesses was disqualified by reason of interest. (Ill.) 798.

Pendency of other suit.

The pendency of proceedings in admiralty for limitation of liability of shipowners, and an injunction against further proceedings in the state court in an action for damages against them with other defendants as joint tortfeasors, are held no bar to further prosecution of the action against the remaining defendants. (Cal.) 467.

Limitation in contract.

A contract limitation of the time for bringing an action on an insurance policy is held not to be subject to a provision of the general statute of limitations to the effect that a new suit brought after the failure of a previous one shall be deemed a continuation thereof. (Iowa) 709.

Laches.

Eight years' unexplained delay in prosecuting suits for taxes, when the statute would have barred the taxes except for the suits, is held to defeat the lien for the taxes. (Tenn.) 275.

IX. CRIMINAL LAW AND PRACTICE.

Bail pending appeal is allowed in extraordinary circumstances on account of the danger to the health of the prisoner. (Cal.) 466.

Attempt.

The necessity of something more than mere preparation to constitute an attempt to commit a crime is emphasized by holding no attempt was made where one had provided himself with revolver and slippers, and had gone 9 miles towards the place where he intended to break and enter a dwelling house, and then met a confederate, loaded his revolver, and procured chloroform, but was prevented from committing the crime by being arrested. (Mich.) 108.

Confidence game.

On an indictment for attempting to obtain money by a confidence game by selling a gold brick, it is held that no conviction can be had where the proof is that the money was actually obtained, although it was obtained in a different county from that where the

representations were made and the prosecution had. (Ill.) 731.

Libel.

The privilege to publish charges against a candidate for the office of judge is held to be limited to publications within the judicial district for which he is to be elected. (Iowa) 223. See also *supra*, VI.

Extradition.

A person who comes into a state at the request of another and in pursuance of the latter's business is held not to be a fugitive from justice subject to surrender, in extradition proceedings at the instance of the employer. (S. D.) 566.

Fish laws.

A statute making it unlawful to sell, or have in possession for sale, any trout, is upheld as valid, and construed to cover the possession of trout lawfully caught in another state. (Or.) 153.

INDEX TO NOTES.

(The General Index follows this.)

Action. See FRAUD.

Annuities; form of instrument necessary to create

614

Appeal; inadequacy of damages as a ground for setting aside a verdict:— (I.) Power and duty of the court as to; (II.) rule in contract actions; (III.) rule in actions with relation to property and property rights; (IV.) rule in actions for personal injuries: (a) generally; (b) actions for libel and slander; (c) actions for malicious prosecution and false imprisonment; (d) actions for assault and battery and other torts; (e) actions for personal injuries caused by negligence: (1) general rules as to; (2) what sufficient to show bias or omission of duty—instances; (f) statutory provisions as to smallness of damages for personal injury; (V.) effect of uncertainty as to cause of injury; (VI.) who entitled to relief; (VII.) matters of procedure; (VIII.) increase of verdict by court

38

Arrest; liability of municipality for, see MUNICIPAL CORPORATIONS.

Attachment. See GARNISHMENT.

Bailment; of bicycle

805

Benefit societies. See INSURANCE.

Bicycles; bicycle law:—(I.) Introductory; (II.) right of bicyclists to use highways, generally; (III.) validity of enactments restricting the use of highways by cyclists; (IV.) reciprocal duties of cyclists and other persons traveling on highways: (a) duty of cyclists to pedestrians; (b) bicyclists entitled to benefits and subject to burdens of the rules of the road; (V.) liability for frightening horses; (VI.) duty of cyclists to carry bells and lamps; (VII.) use of footpath by cyclists: (a) under the common law; (b) under statutes and ordinances; (VIII.) right of cyclists to recover for injuries caused by defective highways; (IX.) special enactments for the protection and convenience of cyclists; (X.) injuries to cyclists at railway crossings; (XI.) injuries to cyclists caused by street cars; (XII.) injuries to bicycles left standing in streets; (XIII.) payment of tolls, liability of cycles to; (XIV.) cycles as a subject of taxation by municipalities; (XV.) bicycles as a subject of contracts of sale or lease; (XVI.) the bicycle as a subject of bailment; (XVII.) the bicycle as a subject of insurance; (XVIII.) when a bicycle is a necessary for a minor

289

By-laws; of insurance company, see INSURANCE.

Corporations; effect of transfer of shares of stock upon liability for unpaid subscriptions:—(I.) Introductory; (II.) statutes continuing liability; (III.) transfer prohibited; (IV.) generally transfer releases subscriber: (a) under statutory provisions; (b) corporation scheme contemplates release; (c) transfer must be perfected; (d) transfer must be bona fide; (e) after insolvency of corporation; (V.) transfer to or release by corporation; (VI.) right of creditors; (VII.) time of transfer

246

Damages. See also APPEAL.

Pollution of water as an element of damages for taking railroad right of way

782

Eminent domain. See DAMAGES.

Executors; garnishment of, see GARNISHMENT.

False imprisonment; liability of municipality for, see MUNICIPAL CORPORATIONS.

Franchise; right to transfer or mortgage privilege to use streets for telegraph, telephone, or other quasi-public purposes

87

Fraud; action by general creditor for damages against third party on account of fraud in disposing of debtor's property or preventing plaintiff from collecting his claim

438

Garnishment; effect of judgment against garnishee to merge or satisfy liability of principal debtor

181

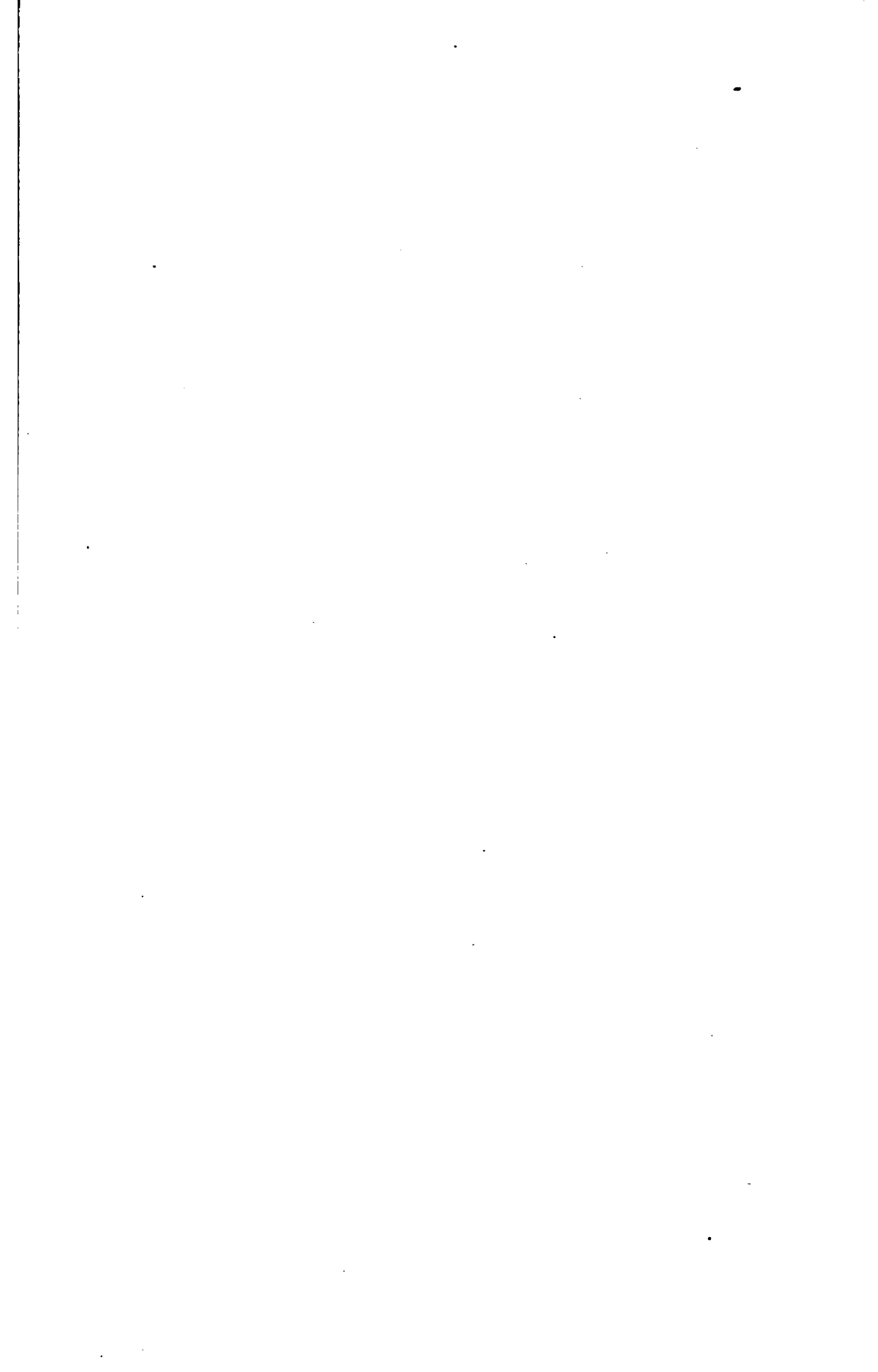
Of executor or administrator:—(I.) Scope of the subject; (II.) application of statutes to executors and administrators: (a) general statement as to; (b) application to claims against estates generally; (c) rule after estate is ready for distribution; (d) general statutes as to attachment and garnishment; (e) statutes specifically applicable to executors and administrators; (f) statutes as to attachment execution; (g) statutes as to foreign attachment; (h) statutes as to attachment of absent, concealed, and absconding debtors; (i) statute as to attachment of property not capable of manual delivery; (III.) interest and possession necessary to sustain; (IV.) garnishment of husband's interest in wife's legacy or distributive share; (V.) rule when the representative is the debtor; (VI.) effect of trust conferred upon representative; (VII.) set-off; (VIII.)

- the judgment; (IX.) exclusiveness of the remedy; (X.) summary 345
- Highways.** See **BICYCLES; FRANCHISE.**
- Infants; bicycles as necessities of** 307
- Insurance; of bicycles** 307
- Stipulation limiting time for suit on insurance policy:—(I.) Scope of the note; (II.) fire-insurance policies: (a) limitation for fixed period after loss: (1) general statement as to; (2) the literal construction; (3) the relative construction; (b) limitation for fixed period after fire: (1) general statement as to; (2) the literal construction; (3) the relative construction; (III.) accident-insurance policies; (IV.) life-insurance policies; (V.) marine and other miscellaneous insurance policies; (VI.) what will prevent or delay the running of the limitation; (VII.) to what actions the limitation applies; (VIII.) summary 696
- Conflict between by-laws and certificate, or policy, of a mutual benefit society or insurance company 681
- Judgment.** See also **GARNISHMENT; LEVY.**
- Of Federal court; lien of:—(I.) Similarity of liens of Federal judgments to those of judgments in state courts; (II.) derivation of liens; (III.) territorial extent of liens: (a) generally; (b) as limited by state recording acts; (IV.) time of attaching; (V.) statutes of limitation; (VI.) suspending the lien; (VII.) judgments rendered in another state; (VIII.) priority of judgment in favor of United States; (IX.) decree in admiralty 469
- Levy; sheriff's duty as to adverse claims to proceeds of judgments in his hands, except in cases of rival executions** 737
- Liens.** See **JUDGMENT.**
- Mandamus; unconstitutionality of statute as defense against mandamus to compel its enforcement:—**Introductory statement; constitutional change or judicial declaration of invalidity; ministerial duties; to compel tax; the payment of public money; judicial officers; other decisions; practice matters; cases in which defense was made without any discussion; conclusion 512
- Master and servant; volenti non fit injuria as a defense to actions by injured servants:—**(I.) Introductory; (II.) meaning and effect of the maxim, as a matter of verbal construction; (III.) relation of the maxim to the doctrine of a contractual assumption of risks; (IV.) maxim not available as a defense, unless plaintiff's knowledge of danger is shown; (V.) logical significance of the servant's knowledge; (VI.) how far voluntary action may be inferred from the servant's knowledge of a risk; generally; (VII.) specific circumstances bearing on question whether servant was volens: (a) fact that risk was one ordinarily incident to the service; (b) fact that risk was known to the servant when he entered the employment; (c) fact that risk was not known to the servant when he entered the employment; (d) fact that conditions were or were not under the control of the servant; (e) fact that work was undertaken by servant *ex proprio motu*; (f) fact that servant complained of the dangerous condition; (g) fact that servant's motive for continuing work was his fear of dismissal; (h) fact that duty violated was statutory; (i) necessity of proving consent to particular risk; (j) circumstances indicating master's acceptance of the responsibility; (VIII.) negligence of the servant of a person other than the plaintiff's employer not a risk assumed; (IX.) relation of the maxim to the defense of contributory negligence; (X.) bearing of the servant's knowledge upon the question whether he was negligent 161
- Maxim.** See **MASTER AND SERVANT.**
- Mortgage; of right to use streets for quasi-public purposes** 87
- Municipal corporations; municipal liability for arrest and imprisonment under valid ordinance** 593
- Negligence.** See **MASTER AND SERVANT.**
- Officers.** See **VOTERS AND ELECTIONS.**
- Parliamentary law; casting vote by presiding officer in deciding tie on election** 561
- Railroads; injury to bicyclists at crossing** 301
- Set-off; in garnishment of executor** 348
- Sheriff.** See **LEVY.**
- Stock.** See **CORPORATIONS.**
- Street railways; injury to bicyclists** 392
- Tolls; on bicycles** 303
- Trespass; sufficiency of equitable title to sustain action for trespass to land:—**(I.) Action against owner of legal title; (II.) action against mere wrongdoer, generally; (III.) action for permanent injury; (IV.) statutory action 637
- Verdict.** See **APPEAL.**
- Voters and elections; decision of the vote at election:—**(I.) In the absence of statutory provisions; (II.) statutory provisions applicable to the vote: (a) general statement as to; (b) decision by lot: (1) constitutionality and construction; (2) effect of, on contest and right to contest; (c) casting vote by presiding officer; (d) appointment or election on failure to elect or to fill vacancy; (III.) summary 551
- Marking official ballot:—**(I.) Validity and construction of law; (II.) official marks: (a) general rule; (b) printer's marks; (c) failure to indorse ballot; (d) erroneous or mistaken marking of ballot by official; (e) correction
- 47 L. R. A.

of errors; (iii.) voter's marks: (a) preliminary statement; (b) failure to indicate intent; (c) failure to use cross; (d) imperfect cross; (e) device other than cross; (f) blots; (g) superfluous lines or marks: (1) distinguishing marks; (2) harmless marks; (h) mark with wrong implement; (i) mark in wrong place: (1) on back of ballot;
47 L. R. A.

(2) out of square; (3) on wrong side of name; (4) not opposite candidate's name; (j) conflicting marks; (k) alteration of ballot: (1) erasure of names; (2) addition of names; (l) attempted erasure of vote mark; (m) partial failure to vote 806

Waters. See DAMAGES.



GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACCIDENT INSURANCE.

See INSURANCE, 15, 21.

ACTION OR SUIT.

As to Proper Remedy, see also ATTORNEY GENERAL.

See also ATTORNEY GENERAL, 2; CONSTITUTIONAL LAW, 10; STATE.

1. The refusal to carry out a contract of marriage may entitle the other party to bring a suit for the breach, even though the time within which the contract is to be performed has not expired. *Lewis v. Tapman* (Md.) 385

2. A notice to a railroad company of a claim by two persons for the value of certain live stock killed on the railroad is not insufficient to authorize a recovery by one of those persons for a part of the stock owned by him individually, under Or. Laws 1893, p. 28, requiring notice by the owner. *Brown v. Southern P. Co.* (Or.) 409

3. Admiralty proceedings in a Federal court for limitation of liability under the United States laws, instituted by shipowners who have been sued for damages in a state court with other persons as joint tortfeasors, but who obtain an injunction from the Federal court against further proceedings against them in the state court, will not bar the prosecution of the action for damages against the other defendants in the state court while the admiralty proceedings are pending and plaintiff has not actually received satisfaction, or the equivalent of satisfaction, in any amount. *Grundel v. Union Iron Works* (Cal.) 467

4. A person excluded by a cotenant from a mine in which he has an undivided interest can maintain an action for damages, and his remedy is not limited to an action for partition, or an accounting of rents and profits. *Paul v. Cragnas* (Nev.) 540

5. An action for damages will not lie against a state institution against which judgment cannot be enforced, merely for the purpose of fixing the amount of damages in order to make a claim for presentation to the legislature. *Maia v. Eastern State Hospital* (Va.) 577

6. An objection that a plaintiff is not prosecuting the action in good faith, and is not the real party in interest, should be determined by proof on the trial, and not upon 47 L. R. A.

the pleadings and affidavits upon preliminary hearing. *Ricketson v. Milwaukee* (Wis.) 685

7. The husband of a mortgagee who bought land on foreclosure may be joined as defendant in a suit to redeem the land, when he had joined with her in a subsequent conveyance thereof, although by Ala. Code, § 2527, the husband is not a proper party to a suit on her contract or engagement. *First Nat. Bank v. Elliott* (Ala.) 742

NOTES AND BRIEFS.

See also FRAUD.

Action; making interested persons parties defendant. 265

Prohibiting waiver of right as to. 371

ADMIRALTY.

See ACTION OR SUIT, 3.

ADMISSION.

See COURTS, 10.

ADVERTISING.

See CONTRACTS, 7, 8.

AFFIDAVIT.

See WITNESSES, 3.

AGENCY.

See PRINCIPAL AND AGENT.

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, 3.

ANIMALS.

See also ACTION OR SUIT, 2; FENCES, 1, 3.

NOTES AND BRIEFS.

Animals; liability for trespass by; effect of fence law. 588

ANNUITY.

1. The failure to attach the seal of the insurance company to a policy granting an annuity, or the omission of some other technical requirement, will not constitute a defense to a suit for annuity after the insurer has received the purchase money. *Cahill v. Maryland L. Ins. Co.* (Md.) 614

2. A contract for a life annuity not issuing out of or charged upon lands, but by 877

which an insurance company, in consideration of a sum certain, agrees to pay the annuitant specified sums annually during life is a mere chose in action for the payment of money, which need not be made in the form of a deed or under seal. *Cahill v. Maryland L. Ins. Co. (Md.)* 614

3. A charter authorizing an insurance company to "grant, purchase, or dispose of annuities," does not limit the company to the grant of annuities by deed or contract under seal. *Cahill v. Maryland L. Ins. Co. (Md.)* 614

NOTES AND BRIEFS.

Annuity; nature of, how granted. 614

Form of instrument necessary to create. 614

APPEAL AND ERROR.

1. An order dismissing an appeal from a justice's court, which terminates the action and prevents a judgment from which an appeal can be taken, is appealable. *Finley v. Prescott (Wis.)* 695

Transfer of cause.

2. A notice of appeal is not insufficient because of a clerical mistake in giving the date of the order appealed from as the 11th instead of the 10th day of a certain month. *Paul v. Cragnas (Nev.)* 540

3. An undertaking on appeal is not vitiated by a mere clerical mistake in stating the date of the order appealed from. *Paul v. Cragnas (Nev.)* 540

4. The execution of an undertaking on appeal before the notice of appeal is filed will not make the undertaking insufficient, if it is filed after the filing of the notice of appeal, as the statute requires. *Paul v. Cragnas (Nev.)* 540

Record and case in appellate court.

5. Papers which constitute no part of the record on appeal may be struck out on motion. *Paul v. Cragnas (Nev.)* 540

6. A petition for a transfer of a cause to another judge because of the disqualification of the judge before whom it is brought, and an order denying the petition, constitute part of the judgment roll under S. D. Comp. Laws, § 5013, as they are included in "all orders or papers in any way involving the merits and necessarily affecting the judgment," and they are therefore properly before the court for review on appeal, without any bill of exceptions. *First Nat. Bank v. McGuire (S. D.)* 413

7. An appeal from the judgment alone in a contested election case will take to the South Dakota supreme court the written evidence on which the findings of fact are based. *McMahon v. Polk (S. D.)* 830

8. An exception to a ruling on a question does not show error if it does not appear that the question was answered. *Lewis v. Tapman (Md.)* 385

Review of discretion.

9. The discretion of the court in setting aside a verdict for inadequacy of damages 47 L. R. A.

is not reviewable on appeal. *Benton v. Collins (N. C.)* 33

10. The refusal to allow a jury to view water in a pond and then after it has been passed through filters, on an issue as to its pollution, is within the discretion of the court, and not subject to review. *Rudolph v. Pennsylvania S. V. R. Co. (Pa.)* 782

Review of findings of fact.

11. A finding of the lower court as to the amount of benefits sustained by an elevated railroad company from a street pavement is not subject to review by the Illinois supreme court. *Lake St. Elev. R. Co. v. Chicago (Ill.)* 624

12. A finding of the trial court as to the existence of facts constituting a fraud will not be disturbed on appeal, unless clearly wrong. *Galusha v. Sherman (Wis.)* 417

13. The decision of the trial court as to the residences of voters will not be disturbed when supported by their testimony, and the question is one of fact into which the intention of the parties largely enters. *Hope v. Flentge (Mo.)* 806

Questions not raised below.

14. Objections to instructions, which were not made in the court below, cannot be considered on appeal. *Paul v. Cragnas (Nev.)* 540

15. The wrongful refusal of inspection of the books of a corporation, on the broad ground that the shareholder had no right to inspect them at any time or for any purpose, cannot be sustained on appeal on the ground that it was not shown that his demand was made during business hours, or at the proper place, or that the person making it was his agent. *State ex rel. Weinberg v. Pacific Brewing & M. Co. (Wash.)* 208

16. An assumption of a fact by an instruction will not be considered on appeal, if there is nothing in the record to show that objection was made to it, or that it was passed upon in the court below. *Lewis v. Tapman (Md.)* 383

17. The presumption of innocence is not sufficient to raise an inference in the appellate court that a sale was of the original package, so as to warrant that court in considering the claim that one convicted of illegal sales was exempt from prosecution under the state law because the sale was of an original package brought from another state, where that question was not raised below, and the record shows only that the property was shipped from the other state without showing that it was in the original package. *State v. Schumann (Or.)* 153

Prejudicial errors.

18. Proof made by an original book of records cannot be prejudicial merely because the proof should have been made by certified copy. *State v. Hoskins (Iowa)* 223

19. Testimony by the plaintiff in a suit for breach of promise to marry, that she supposed a phrase in one of defendant's letters had reference to getting married, though it was the province of the jury to interpret

the phrase, does no injury because it is inconclusive and merely gives her supposition. *Lewis v. Tapman* (Md.) 385

20. A defendant cannot urge that he was prejudiced by an amendment of the complaint, when it was made on condition that he be given sufficient time to prepare to meet the issues as amended, and he subsequently announced himself ready and proceeded to trial on the amended pleadings. *McCabe v. Aetna Ins. Co.* (N. D.) 641

21. A defendant who has the benefit of an inspection of a letter offered to contradict his testimony, and who testifies that he did not write it, is not injured by the fact that he is not shown the letter or asked in regard to it until after it is read in evidence. *Lewis v. Tapman* (Md.) 385

22. A question as to the constitutionality of a license tax upon a merchandise broker is affirmatively shown by the record so as to give jurisdiction to the Virginia court of appeals, where a bill of exceptions has been duly taken to the refusal of an instruction to find in favor of the broker, if he carried on business only as a resident sales agent for nonresident principals, although no reference was made in terms to the commerce clause of the Federal Constitution. *Adkins v. Richmond* (Va.) 583

NOTES AND BRIEFS.

Appeal; inadequacy of damages as a ground for setting aside a verdict:—(I.) Power and duty of the court as to; (II.) rule in contract actions; (III.) rule in actions with relation to property and property rights; (IV.) rule in actions for personal injuries: (a) generally; (b) action for libel and slander; (c) actions for malicious prosecution and false imprisonment; (d) actions for assault and battery and other torts; (e) actions for personal injuries caused by negligence: (1) general rules as to; (2) what sufficient to show bias or omission of duty—instances; (f) statutory provisions as to smallness of damages for personal injury; (V.) effect of uncertainty as to cause of injury; (VI.) who entitled to relief; (VII.) matters of procedure; (VIII.) increase of verdict by court. 33

APPROPRIATIONS.

See also PUBLIC MONEY, 2.

A joint resolution of the legislature is within Mich. Const. art. 4, § 45, requiring the assent of two thirds of the members to "every bill appropriating the public money or property for local or private purposes." *Allen v. Board of State Auditors* (Mich.) 117

NOTES AND BRIEFS.

Appropriations; requisites of enactment of appropriation bill. 117

APPURTENANT.

See EASEMENTS.

47 L. R. A.

ARREST.

NOTES AND BRIEFS.

Liability of Municipality for, see MUNICIPAL CORPORATIONS.

ASSESSMENTS.

See INJUNCTION; PUBLIC IMPROVEMENTS.

ASSIGNMENT.

See also TELEPHONES, 1.

An order to pay money to become due under a contract for services to a third person will constitute a valid assignment which equity may enforce. *Merchants' & M. Nat. Bank v. Barnes* (Mont.) 737

ASSIGNMENT FOR CREDITORS.

See INSOLVENCY.

ASSUMPSIT.

See also PUBLIC IMPROVEMENTS, 7.

NOTES AND BRIEFS.

Assumpsit; for money paid on assessment. 537

On failure of consideration for contract. 615

ATTACHMENT.

See GARNISHMENT, NOTES AND BRIEFS.

ATTEMPT.

See also EVIDENCE, 24.

1. One who is successful in obtaining money by means of the confidence game cannot be convicted of an attempt, although the act was not consummated in the county where the indictment was found. *Graham v. People* (Ill.) 731.

2. The common-law rule as to what constitutes an attempt to commit an offense is not changed by Mich. Comp. Laws 1897, § 11,784, providing for punishment of every person who shall attempt to commit a crime and do any act towards its commission, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same. *People v. Youngs* (Mich.) 108

3. An attempt to break and enter a dwelling house was not made by the fact that a person left his home with revolver and slippers, and traveled 9 miles towards the place where he intended to commit the crime, where he met a person with whom he had planned to commit the crime, and then provided himself with chloroform and loaded his revolver, but was prevented from committing the crime by being arrested. *People v. Youngs* (Mich.) 108

NOTES AND BRIEFS.

Attempt; to commit crime. 108

To commit crime; what constitutes. 733

ATTORNEY GENERAL.

1. An information in equity by the attorney general is the proper form of proceeding for the enforcement of public rights

against a building erected above the height permitted by statute in front of a public park. *Knowlton v. Williams* (Mass.) 314

2. A statutory remedy for enforcing building laws, given by Mass. Stat. 1894, chap. 257, to the city of Boston, does not exclude a suit by the attorney general to enforce Mass. Stat. 1898, chap. 452, prohibiting the erection of buildings adjacent to Copley square above a certain height, and requiring the city to pay damages for the interest in lands thus taken, thus giving the city a pecuniary interest against the enforcement of the law. *Knowlton v. Williams* (Mass.) 314

NOTES AND BRIEFS.

Attorney general; right to maintain action in case of real estate; to protect public interests. 314

ATTORNEYS.

An attorney employed by a building and loan association to procure the discharge of all the receivers who have been appointed for it, but who is also employed and paid by one of the contesting sets of receivers and renders services for them, will be precluded by public policy from recovering from the association, even if the board of directors has by resolution approved what he has done, with full knowledge of his inconsistent employments. *Strong v. Brennan* (Ill.) 792

NOTES AND BRIEFS.

Attorneys; inconsistent or double employment. 793

ATTORNEY'S FEES.

Unconstitutional Discrimination as to, see CONSTITUTIONAL LAW, 9.
See also ESCHEAT, 2.

AUDITORS.

See also CLAIMS.

An attempt by the legislature to make the board of state auditors an appellate court to determine the guilt or innocence of a pardoned convict, and allow him damages for wrongful conviction and imprisonment if they find him innocent, is in violation of the constitutional provisions establishing courts and conferring upon them exclusive jurisdiction to try civil and criminal cases. *Allen v. Board of State Auditors* (Mich.) 117

BACK FIRE.

See FIRES; PROXIMATE CAUSE, 3; TRIAL, 5.

BAGGAGE.

See CARRIERS.

BAIL.

Bail pending appeal from a conviction may be allowed because of the extraordinary character of the circumstances, on proof by physicians, one of whom was selected by the district attorney, that the prisoner is suffering from asthma and trouble with his lungs to such an extent that his continued incarceration in the county jail in the physical conditions existing there will be fraught with serious impending danger to his health, and will probably be fatal if he is left there three months or more. *Re Ward* (Cal.) 466

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BAILMENT.

NOTES AND BRIEFS.

Bailment; of bicycle. 305

BALLOTS.

See VOTERS AND ELECTIONS.

BANKS.

Liability of Stockholders in, see CORPORATIONS, 6.

See also BILLS AND NOTES, 1; TRUSTS.

1. A credit of checks deposited for collection, and the issuance of a deposit slip stating that all cash items not actual cash are entered subject to payment, entitle the bank to charge back a check if it proves uncollectible. *Givan v. Bank of Alexandria* (Tenn.) 270

2. A bank receiving a check for collection exercises due diligence if, in accordance with its custom, it credits the check and forwards it on the following day. *Givan v. Bank of Alexandria* (Tenn.) 270

3. The selection of a suitable intermediate bank for the purpose of sending a check for collection discharges the duty of the initial bank to the person who deposits the check. *Givan v. Bank of Alexandria* (Tenn.) 270

4. The selection of its regular correspondent employed to transact its own business, for the purpose of sending a check for collection, indicates proper care on the part of a bank with which it is deposited for collection. *Givan v. Bank of Alexandria* (Tenn.) 270

5. Sending a check directly to the drawee bank for collection constitutes negligence on the part of the collecting bank. *Givan v. Bank of Alexandria* (Tenn.) 270

6. A bank receiving for collection a note on which it is an indorser is not relieved of liability by reason of its own failure to make demand and give notice of dishonor. *Auten v. Manistee Nat. Bank* (Ark.) 329

7. A cashier of a national bank has authority to indorse negotiable paper for the bank to parties dealing with it in good faith. *Auten v. Manistee Nat. Bank* (Ark.) 329

8. A subsequent misuse or misapplication by bank officers of the proceeds of notes bought from the cashier of a national bank and deposited to the credit of such bank, by its direction, in a New York bank, will not affect the rights of the purchaser, if it was innocent. *Auten v. Manistee Nat. Bank* (Ark.) 329

NOTES AND BRIEFS.

Banks; indorsement of note by cashier; power to borrow money; rediscounting paper. 330

BENEVOLENT SOCIETIES.

See INSURANCE, 10-13; NOTES AND BRIEFS.

BICYCLE PATHS.

See also INDICTMENT, 1.

1. The establishment of a public bicycle path by county commissioners is impliedly ratified, and the use of a portion of the public highway therefor impliedly authorized, by Minn. Laws 1899, chap. 43, § 1, making it a misdemeanor to drive animals or any vehicles except bicycles upon such paths. State v. Bradford (Minn.) 144

2. The bicycle paths upon which it is made unlawful by Minn. Laws 1899, chap. 43, § 1, to drive animals or vehicles except bicycles, include public bicycle paths only, and not private bicycle paths which a person has constructed upon his own land. State v. Bradford (Minn.) 144

BICYCLES.

See HIGHWAYS, 5-7; INFANTS, 2; MUNICIPAL CORPORATIONS, 2.

NOTES AND BRIEFS.

Bicycles; right to use on highway. 145

Bicycles; bicycle law:—(I.) Introductory; (II.) right of bicyclists to use highways, generally; (III.) validity of enactments restricting the use of highways by cyclists; (IV.) reciprocal duties of cyclists and other persons traveling on highways: (a) duty of cyclists to pedestrians; (b) bicyclists entitled to benefits and subject to burdens of the rules of the road; (V.) liability for frightening horses; (VI.) duty of cyclists to carry bells and lamps; (VII.) use of footpath by cyclists: (a) under the common law; (b) under statutes and ordinances; (VIII.) right of cyclists to recover for injuries caused by defective highways; (IX.) special enactments for the protection and convenience of cyclists; (X.) injuries to cyclists at railway crossings; (XI.) injuries to cyclists caused by street cars; (XII.) injuries to bicycles left standing in streets; (XIII.) payment of tolls, liability of cycles to; (XIV.) cycles as a subject of taxation by municipalities; (XV.) bicycles as a subject of contracts of sale or lease; (XVI.) the bicycle as a subject of bailment; (XVII.) the bicycle as a subject of insurance; (XVIII.) when a bicycle is a necessary for a minor. 289

BID.

See CONTRACTS, 7, 8.

BILLS AND NOTES.

See also BANKS, 6-8; EVIDENCE, 3.

1. A demand and notice upon a Federal examiner in possession of an insolvent national bank may be sufficient to bind the 47 L. R. A.

bank as an indorser, when he is by operation of law in charge of its books and papers, so that there is no other person upon whom to make the demand at the place appointed in the note. Auten v. Manistee Nat. Bank (Ark.) 329

2. One who takes title to a promissory note payable to order but not indorsed, under a mere assignment of the note and a mortgage securing it, cannot claim the protection of the law merchant, but holds the note subject to the equities that would affect it in the hands of his assignor. Galusha v. Sherman (Wis.) 417

NOTES AND BRIEFS.

Bills and notes; notice of dishonor; to whom given; waiver of demand and notice. 331

Who are bona fide purchasers. 419

BLASTING.

One who explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully traveling in a public highway, is liable as a trespasser in a the injury thus inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill. Sullivan v. Dunham (N.Y.) 715

NOTES AND BRIEFS.

Blasting; liability for damages by. 716

BOARDS.

See CONTRACTS, 10.

BONA FIDE PURCHASER.

See also BILLS AND NOTES, 2.

Bona Fide Purchaser of Goods, see ESTOPPEL, 1.

BONDS.

NOTES AND BRIEFS.

Bonds; contract as to tax for payment of. 460

BOUNDARY.

Boundary; Mistake as to, see VENDOR AND PURCHASER.

The bed of the river between the middle of the stream and the abutting land belongs to the owner thereof, under an exception in a deed of a piece of land fronting on a river "12 rods in length on the bank of said river and extending back far enough, same width, to comprise 1 acre of land." Smith v. Furbish (N. H.) 226

BREACH OF PROMISE.

See ACTION OR SUIT, 1; EVIDENCE, 23; HUSBAND AND WIFE, 1, 2.

BRIDGE.

See also PROXIMATE CAUSE, 1.

Constructive notice which will render a city liable for injury caused by a defect in a bridge under Mich. Pub. Acts 1887, p. 345, § 2, which creates a right of action against a city for such a defect only when

it has knowledge or notice thereof, does not arise from the mere existence of such a defect for two or three days only. *Thomas v. Flint* (Mich.) 499

NOTES AND BRIEFS.

Bridges; liability for defect in railing. 480

BROKERS.

See INSURANCE, 2, 3.

BUILDING AND LOAN ASSOCIATION.

See ATTORNEYS.

BUILDINGS.

See also ATTORNEY GENERAL; EMINENT DOMAIN, 1; INJUNCTION, 4; MUNICIPAL CORPORATIONS, 1; NUISANCE, 1; PARKS.

An approval of certain sculptured ornaments on the face of the wall on two sides of a building above the lawful height, made by park commissioners under Mass. Stat. 1898, chap. 452, authorizing them to approve sculptured ornaments extending above the permitted height of the building, does not relieve the building from the prohibition of the statute, when its solid brick walls extend 6 feet above the limit, and its roof is at the top. *Knowlton v. Williams* (Mass.) 314

BURGLARY.

See ATTEMPT, 3.

BY-LAWS.

See also INSURANCE, 10-13.

NOTES AND BRIEFS.

By-Laws; of Insurance Company, see INSURANCE.

CARRIERS.

See also HACKS, 1; TRIAL, 6.

1. A common carrier has, by virtue of its right of ownership in its property, the control of its depots, subject only to the rights of the public having business relations with it. *Godbout v. St. Paul Union Depot Co.* (Minn.) 532

2. The rule that a carrier is charged with the highest degree of care consistent with the nature of his undertaking, as between him and his passenger, in respect to the acts or omissions of the carrier and his servants, does not extend to the matter of the carrier's liability for injuries to passengers by acts of fellow passengers or strangers. *Tall v. Baltimore Steam Packet Co.* (Md.) 120

3. A carrier's liability for the misconduct of a passenger because of the injury to another passenger arises only when the carrier or his servants could have prevented the injury, but failed to interfere to avert it, with knowledge, or upon facts which ought to have imparted knowledge, that the injury was threatened. *Tall v. Baltimore Steam Packet Co.* (Md.) 120

47 L. R. A.

4. Allowing passengers to play cards in the smoking room of a steamboat, in violation of a rule of the carrier, does not make the carrier liable for the injury to another passenger who is shot during a quarrel which occurs during the game. *Tall v. Baltimore Steam Packet Co.* (Md.) 120

5. The theft of diamond rings from the finger of a woman while she is asleep in a sleeping car gives her a right of action against the sleeping-car company, if the theft results from the failure of the agents and employees in charge of the car to use ordinary care and watchfulness to protect her and her property from thieves. *Pullman's Palace Car Co. v. Hunter* (Ky.) 286

6. A licensed carrier within a city, hauling for all persons who require his services, is liable as a common carrier while carrying goods outside of the city under an agreement to take them to a certain point, without any further contract, although he could not have been compelled to carry outside the city. *Farley v. Lavary* (Ky.) 383

7. A carrier may be charged as insurer for baggage delivered at the station before the starting of a train, only when it is delivered within the time reasonably necessary for obtaining the ticket, checking the baggage, etc. *Goldberg v. Ahnapee & W. R. Co.* (Wis.) 221

8. A rule that baggage will not be checked more than thirty minutes before train time cannot be held unreasonable as matter of law, nor can it be thus held to be reasonable to leave baggage in the evening for a train at 6 in the morning. *Goldberg v. Ahnapee & W. R. Co.* (Wis.) 221

NOTES AND BRIEFS.

See also HACKS.

Carriers; liability to passenger for injury by fellow passenger. 120

Liability for property taken by legal process; surrendering goods on bill of lading. 124

Liability for baggage before transportation begins. 222

Who are common carriers. 383

CASE.

1. A general creditor cannot maintain an action on the case for conspiracy of the debtor and other persons to dispose of the debtor's property fraudulently and defeat his claim, if there was no fraud in the creation of the debt. *Field v. Siegel* (Wis.) 433

2. The owner of land occupied by a tenant may sue in trespass on the case for the damage to his reversionary interest. *Russell v. Meyer* (N. D.) 637

CASHIER.

See BANKS, 7.

CHATTEL MORTGAGE.

See MORTGAGE, 1-7.

CHECKS.See **BANKS.****CITIZENS.**See **CONSTITUTIONAL LAW**, 5, 6.**CLAIMS.**See also **ACTION OR SUIT**, 5.

The claims which the state auditors are authorized to adjust under Mich. Const. art. 8, § 4, do not include requests, petitions, or claims for appropriations which are merely gratuitous, or which may be based upon sentimental or moral grounds which have not the semblance of any legal claim. *Allen v. Board of State Auditors* (Mich.) 117

CLERK.See **HOMESTEAD**, 1.**COAL.**See **CONSTITUTIONAL LAW**, 19.**COLLATERAL INHERITANCE TAX.**See **TAXES.****COLLECTION.**See **BANKS.****COLLEGE.**See **LIENS**, 1.**COLTS.**See **MASTER AND SERVANT**, 4.**COMMERCE.**

1. An agent of a laundry in another state, who collects garments and sends them out of the state to be washed and laundered, and afterwards redelivers them to their owners, is not engaged in commerce so as to be protected against the privilege tax imposed on his occupation by Tenn. Acts 1899, chap. 432, § 4. *Smith v. Jackson* (Tenn.) 416

2. A license tax on merchandise brokers is invalid as a regulation of interstate commerce, when applied to a citizen and resident of a city whose occupation is solely the solicitation of orders in the city by personal application and by exhibition of samples, for nonresident merchants, who are his principals, for the negotiation of sales of goods which are not in the state. *Adkins v. Richmond* (Va.) 583

3. An ordinance imposing a license tax on transient persons other than citizens of the municipality for selling goods is unconstitutional and void. *McGraw v. Marion* (Ky.) 583

NOTES AND BRIEFS.

Commerce; insurance as. 69
Burden on, by taxing agents for interstate business. 416
Validity of state laws affecting. 593

COMMISSIONERS.See **HOMESTEAD**, 1.**COMPLAINT.**See **EVIDENCE**, 19.

47 L. R. A.

COMPRESSED AIR.See **MASTER AND SERVANT**, 6.**COMPROMISE.**

1. A controversy between two persons, actually and in good faith existing, is a proper subject for a binding contract of settlement, no matter what may be the real merits of the claim on either side. *Galusha v. Sherman* (Wis.) 417

2. A settlement of a real controversy, when free from mutual mistake of fact or mistake upon one side and fraud upon the other, is binding upon the parties thereto, without regard to which gets the best of the bargain, or whether all the gain be in fact on one side and all the sacrifice on the other. *Galusha v. Sherman* (Wis.) 417

CONFIDENCE GAME.See **ATTEMPT**, 1; **COURTS**, 7; **INDICTMENT**, 2, 3.**CONFLICT OF LAWS.**See also **RECEIVERS.**

1. The law in the state in which real estate is situated furnishes the rule as to its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such conveyances, as well as their rights under the same. *Walling v. Christian & C. Grocery Co.* (Fla.) 608

2. A married woman authorized by decree of court to buy, sell, and convey both real and personal property as a *feme sole*, has no power to convey real property in another state, to which she subsequently removes, without the joinder of her husband, when by the laws of that state a married woman cannot lawfully convey property without the joinder of her husband. *Walling v. Christian & C. Grocery Co.* (Fla.) 608

3. The statutory liability of a stockholder in a foreign corporation for an unpaid deficiency of assets, which he assumes by the act of becoming a member of the corporation through the purchase of stock, is in fact a contractual liability springing from an implied promise, and, if the statute does not prescribe any remedy, it may be enforced in the state where he resides. *Howarth v. Angle* (N. Y.) 725

NOTES AND BRIEFS.

Conflict of laws; as to negotiable paper. 496
As to status of married woman. 610
As to enforcing liability of stockholder. 727

CONSIDERATION.Of Contract, see **CONTRACTS**, 1.**CONSIGNMENT.**See **FACTORS, NOTES AND BRIEFS.****CONSPIRACY.**See **CASE**, 1.

CONSTABLE.

See GARNISHMENT, 4.

CONSTITUTIONAL LAW.

See also AUDITORS; COUNTIES; COURTS, 3, 5; EMINENT DOMAIN, 4; HEALTH; INDICTMENT, 2; MANDAMUS, 3; OFFICERS, 2, 4; STATUTES, 2-4; VOTERS AND ELECTIONS, 3.

1. The passage of more than fifty acts amending special charters since the adoption of Ind. Const. 1851, and the continued acquiescence of the people and other departments of the state government therein, has but little, if any, force as to the construction of the Constitution respecting the power to extend the term of corporate existence, when only four statutes have purported to do that, and no case of that kind has been passed upon by the courts. *Bank of Commerce v. Wiltsie* (Ind.) 489

Arbitrary discrimination; monopoly.

2. To justify the treatment of corporations as a class for the purpose of legislation the classification must be founded upon differences either defined by the Constitution, or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. *Johnson v. Goodyear Min. Co.* (Cal.) 338

3. An exception of dealers in grain, live stock, and dressed meats from the provisions of Ill. act April 24, 1899, requiring commission merchants in cities of more than 50,000 population to be licensed, is not unconstitutional as an arbitrary discrimination, since the classification in this case is a natural one, as the commission merchants subject to the act deal in the small products of the farm, while other laws provide for the inspection of grain, live stock, and dressed meats. *Lasher v. People* (Ill.) 802

4. A municipality cannot give a monopoly of the business of keeping livery stables within the business portion of a city, by an ordinance which prohibits the maintenance therein of any such stables that are not already in existence and under operation. *Crowley v. West* (La.) 652

Equal privileges and immunities.

5. Renewing the special privileges and immunities contained in an old special charter of a corporation is a violation of Ind. Const. art. 1, § 23, prohibiting the grant to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not belong to all citizens. *Bank of Commerce v. Wiltsie* (Ind.) 489

6. An ordinance imposing a license tax on all merchants who use any stamps, coupons, tickets, cards, or other devices for the sale of goods, which entitle the purchaser to procure any goods free of charge from any other firm or corporation, does not impose a burden upon a portion, and not the whole, of a class of merchants in violation of the constitutional provision against granting to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens, since the ordinance applies

to all who see fit to use tickets of that kind. *Fleetwood v. Read* (Wash.) 205

Equal protection of laws.

7. The fire tax imposed by Kan. Laws 1895, chap. 263, is in violation of the constitutional provision for equal protection of the laws, because railroad companies are excluded by the provisions of the law from its benefits, although their property is subject to the tax. *Atchison, T. & S. F. R. Co. v. Clark* (Kan.) 77

8. The restriction on the freedom of contract of laborers employed by a trust or corporation employing ten or more persons, imposed by Kan. Laws 1897, chap. 145, prohibiting payment otherwise than in lawful money or by check or draft on a deposit of money, is in violation of U. S. Const. 14th Amend., prohibiting a state to deprive persons of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws. *State v. Haun* (Kan.) 369

9. A lien for wages on all the property of a corporation in preference to all other liens, except duly recorded mortgages and deeds of trust, which is imposed by Cal. Laws 1897, p. 231, in case of the failure of a corporation to pay its employees monthly, without even requiring any description of the property, or notice in any manner in order to make the lien valid; and an attorney's fee imposed by the statute in case of an action to enforce the employee's right; while such provisions do not apply to any other class of laborers,—constitute an unconstitutional discrimination against corporations and their employees. *Johnson v. Goodyear Min. Co.* (Cal.) 338

Due process of law.See also *supra*, 8.

10. Restricting persons to remedies at law, to the exclusion of equitable remedies, for contesting title to office or the vindication of political rights, is not a denial of due process of law or of the equal protection of the laws. *State ex rel. McCaffery v. Aloe* (Mo.) 393

11. The wholesomeness of trout as food does not make a statute prohibiting them to be sold or kept in possession for the purpose of sale operate to deprive the owner of property without due process of law, where the statute permits him to have them in possession for the purpose of eating them or giving them away. *State v. Schuman* (Or.) 153

12. A statute making it unlawful to permit the escape of natural gas into the open air from a well for longer than two days after it is constructed is not unconstitutional. *State v. Ohio Oil Co.* (Ind.) 627

13. An assessment for a street improvement made under the charter of the city of Norfolk, Virginia, § 25, under a resolution of the council declaring the improvement expedient, and after public notice of such resolution by publication in newspapers, is unconstitutional as a deprivation of property

without due process of law, where the notice wholly failed to designate any tribunal before which, or place where, or time when a party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property. *Norfolk v. Young* (Va.) 574

Guaranty of liberty and property rights.

14. The owner of land is not deprived of the inherent right to "the means of acquiring and possessing property," or of the constitutional guaranty against taking his property for public uses without just compensation, by a statute denying him any recovery for trespass on his lands by animals, unless he has inclosed the premises by a lawful fence. *May v. Poindexter* (Va.) 588

15. A statute making it unlawful to work more than eight hours per day in mines or smelters is in violation of Colo. Const. art. 2, § 3, guaranteeing liberty and the right to acquire, possess, and protect property. *Re Morgan* (Colo.) 52
See also *infra* as to police power.

16. The eight-hour law enacted by Kan. Laws 1891, chap. 114, limiting a day's work by persons employed by or on behalf of the state or of any county, city, township, or other municipality of the state, is a valid and constitutional direction of the state to its agents. *Re Dalton* (Kan.) 380

Police power.

See also **COURTS**, 3.

17. Legislation to protect a citizen against the consequence of his own acts is not within the constitutional exercise of the police power. *Re Morgan* (Colo.) 52

18. The sale of a commodity may be subject to the exercise of the police power, though its use would not necessarily subvert the morals, impair the health, or disturb the peace of society. *State v. Schuman* (Or.) 153

19. The prohibition against screening coal mined at ton or quantity rates, before the same is weighed and duly credited to the employees and accounted for at the legal rate of weights, being imposed by Kan. Laws 1893, chap. 188, without prohibiting the employment of miners at day wages or making contracts for wages based on the quantity of screened coal produced, does not affect the right of contract, and is a valid exercise of the police power. *State v. Wilson* (Kan.) 71

NOTES AND BRIEFS.

Constitutional law; interference with right of contract; eight-hour law. 53

Contract rights of nonresidents. 68

Equal protection of corporations. 71

Restrictions on right of contract; due process of law; police power; business affected with public interest. 72

Rights beyond control of state. 144

Police power as to fisheries; due process of law. 154

47 L. R. A.

Delegation of legislative power; police power to fix rates; due process of law in fixing charges. 320

Discrimination against corporations of a certain class; improper classification; right to due process and equal protection of laws. 338

Abridging freedom of contract. 370

As to eight-hour law. 382

Effect of contemporaneous construction. 489

Due process in local assessment. 574

Arbitrary discrimination in license law. 802

CONTRACTS.

See also **SPECIFIC PERFORMANCE**; **TELEPHONES**, 2.

1. Mutual promises of merchants to refrain from engaging in business after 6:30 p. m. of each day are sufficient loss or detriment in the way of financial transactions, or are sufficient gain and advantage from a social or healthful standpoint, to support a contract to close their places of business at that hour. *Stovall v. McCutchen* (Ky.) 287

2. An agreement to furnish crushed stone "in such quantities as may be desired," to be "delivered on street" in a certain city, without making any more definite provision as to the quantity to be furnished, though it is made with one who has a contract for paving a street in that city, does not bind the other party to furnish him at his option all the stone needed for paving such street, since it does not bind him to take such quantity. *Hoffman v. Maffioli* (Wis.) 427

3. Punctuation marks do not control the words of a contract, but are controlled by the words. *Holmes v. Phenix Ins. Co.* (C. C. App. 8th C.) 308

4. A contract to marry is not within the provision of the statute of frauds requiring agreements not to be performed within a year to be in writing. *Lewis v. Tapman* (Md.) 385

5. A contract to marry "within three years" may possibly be performed within a year, and is therefore not within a provision of the statute of frauds as to "an agreement not to be performed within a year." *Lewis v. Tapman* (Md.) 385

6. The slight restraint of trade resulting from a contract between merchants to close their places of business at a certain hour each day is not illegal. *Stovall v. McCutchen* (Ky.) 287

Public contracts.

7. Letting a contract for a garbage crematory, without making or filing any plan of the imposed plant, or adopting any system of garbage cremation, or specifying the dimensions of buildings or description of machinery to be used, but merely calling for a complete garbage cremation plant that will destroy a certain quantity of garbage

per day, leaving the bidders to submit plans and specifications showing a description of the buildings, machinery, furnaces, and appurtenances, is in violation of Wis. Laws 1874, chap. 184, which requires an advertisement for such work after a plan or profile of the work, accompanied with specifications or other appropriate and sufficient description of the work, has first been placed on file for the information of bidders and others. *Ricketson v. Milwaukee* (Wis.) 685

8. The right of a city to acquire a patented process without advertising for bids does not justify the letting of a contract for a complete garbage crematory, with the necessary buildings, machinery, and appurtenances, as well as the use of a patented process, without complying with the statutory requirements as to filing plans and specifications in letting contracts for public works, and without any compliance with the statutory provisions as to securing the right to use patented processes. *Ricketson v. Milwaukee* (Wis.) 685

9. A reservation in a contract for public work in favor of the city, of certain powers given to the board of public works by Milwaukee charter, chap. 5, § 20, should, to avoid ground for litigation, make full and complete reservations as to both the rights and powers of the board as pointed out. *Ricketson v. Milwaukee* (Wis.) 685

10. The court will hesitate to restrain the execution of a municipal contract on the ground that the board of public works did not exercise an independent judgment upon the bids submitted therefor, but acted conjointly with certain committees of the council, where it is not shown that the opinion of the board was influenced by their associates. *Ricketson v. Milwaukee* (Wis.) 685

NOTES AND BRIEFS.

Contracts; effect of punctuation.	309
Statute of frauds as to marriage contract.	385
Acceptance of offer; intent of parties; want of mutuality.	427
For public work; bids for; sufficiency of call for bids.	686

CONVENT.

See HABEAS CORPUS.

CONVICTS.

See AUDITORS; PUBLIC MONEY, 2.

CORPORATIONS.

See also APPEAL AND ERROR, 15; CONFLICT OF LAWS, 3; CONSTITUTIONAL LAW, 2, 3; EVIDENCE, 6; JUDGMENT, 2, 3; OFFICERS, 2; RECEIVERS.

1. The extension of an old special charter is within Ind. Const. art. 11, § 13, providing that "corporations other than banking shall not be created by special act." *Bank of Commerce v. Wiltse* (Ind.) 489

2. A subscription to the stock of a corporation is not an agreement to pay so much

money unless so expressed in the contract, but is a contract to enter into the relation of stockholder. *Rochester & K. F. Land Co. v. Raymond* (N. Y.) 246

3. A corporation which permits the transfer of stock by canceling the certificate and issuing a new one to the purchaser, and afterwards brings an action against him for the unpaid portion of the stock, ratifies the transaction, and cannot subsequently claim that the transfer is ineffectual to release the original shareholder from liability as such, on the ground that it was not made in good faith. *Rochester & K. F. Land Co. v. Raymond* (N. Y.) 246

4. A stockholder has a right to inspect and examine the books and records of the corporation at reasonable times, so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted, and his examination is made in the interests of the corporation. *State ex rel. Weinberg v. Pacific Brewing & M. Co.* (Wash.) 208

5. The recovery of judgment against a corporation, and the return of execution unsatisfied, as a condition of the maintenance of an action against a stockholder in a domestic corporation, are not necessary before suit by a receiver against a stockholder of a foreign corporation, which is permitted in the exercise of comity, since in such case service of process in the state could not be had against the corporation. *Howarth v. Angle* (N. Y.) 725

6. Receivers cannot maintain an action to enforce the liability of stockholders in a bank for its debts under Md. Acts 1888, chap. 294, for the amount of their respective shares of stock, since the fund arising from such liability is in no sense an asset of the corporation, and the receivers have no interest in it. *Colton v. Mayer* (Md.) 617

7. Restrictions on the contracts or business of foreign corporations cannot be upheld to the extent of altering or amending or repealing their charters under the laws of other states. *Johnson v. Goodyear Min. Co.* (Cal.) 338

NOTES AND BRIEFS.

Corporations; Constitutional Protection of, see CONSTITUTIONAL LAW.

Effect of transfer of shares of stock upon liability for unpaid subscriptions:—(I.) Introductory; (II.) statutes continuing liability; (III.) transfer prohibited; (IV.) generally transfer releases subscriber: (a) under statutory provisions; (b) corporation scheme contemplates release; (c) transfer must be perfected; (d) transfer must be bona fide; (e) after insolvency of corporation; (V.) transfer to or release by corporation; (VI.) right of creditors; (VII.) time of transfer. 246

Extension of life of. 490

Recovery of money paid on *ultra vires* contract. 615

Liability of stockholders; enforcement of, by receiver. 618

Liability of stockholders of foreign companies; nature of liability. 727

COSTS AND FEES.

See also *ESCHEAT*, 2.

Separate bills of costs for different defendants represented by different attorneys, and having different interests, may be recovered, including such items as retaining fees, fees for attendance on the trial, and term fees, where separate services were necessary and proper for such defendants. *Adams v. Beloit* (Wis.) 441

COTENANCY.

See also *ACTION OR SUIT*, 4; *DAMAGES*, 1; *MINES*, 2.

A tenancy in common is created by a deed in which the grantor makes an exception of a part not distinctly located, and continues until he exercises his right of election. *Smith v. Furbish* (N. H.) 226

COUNTIES.

See also *LIMITATION OF ACTIONS*.

An act of the legislature (Kan. Laws 1899, chap. 189) arbitrarily establishing a high school and requiring the people of a county to build and maintain it, without their consent, is not an unconstitutional interference with the right of local self-government. *State ex rel. McCausland v. Freeman* (Kan.) 67

NOTES AND BRIEFS.

Counties; liability of new county for debts of parent county. 460

COURTS.

See also *AUDITORS*.

1. A court has no jurisdiction to determine whether a vacancy exists in the office of senator for a certain county, so as to require the election of a new incumbent, when the senate, which is made the judge of the qualifications and elections of its members by Md. Const. art. 3, § 19, has not decided the question. *Covington v. Buffett* (Md.) 622

2. Whether or not a general law can be made applicable to a subject-matter not included in Ind. Const. art. 4, § 22, is a question of legislative judgment. *Bank of Commerce v. Wiltzie* (Ind.) 489

3. It is for the courts to determine what are the subjects upon which the police power is to be exercised, and the reasonableness of that exercise. *Re Morgan* (Colo.) 52

4. A court has no authority to establish reasonable rules and regulations for the extension of telephone lines, but its authority is limited to requiring the proper authorities to adopt such rules and regulations, and to passing upon the validity of such action when taken. *Michigan Teleph. Co. v. St. Joseph* (Mich.) 87

5. The authority to establish maximum 47 L. R. A.

water rates, conferred upon judges of the supreme judicial court by Mass. Stat. 1897, chap. 336, § 1, authorizing the judges, on petition of the selectmen of a town, or any persons deeming themselves aggrieved by the price charged for water, to fix maximum rates once in five years, which shall be binding upon the water company until revised or altered by the court,—does not make of the court a legislative commission to determine what rules shall govern people who are not yet in relation to each other, but requires the court to fix the extent of actual existing rights primarily for the party aggrieved, although secondarily it fixes a general rate for all parties and for the future as well as the past. *Re Janvrin* (Mass.) 319

6. The motives that prompt the enactment of an ordinance cannot be considered by the court in determining whether the ordinance is reasonable or unreasonable and oppressive. *Bennett v. Pulaski* (Tenn.) 278

Locality of jurisdiction.

7. A prosecution for obtaining money by the use of the confidence game should be instituted in the county where the offense was consummated, and not in that where preliminary acts were done, under a statute providing that local jurisdiction of all offenses shall be in the county where the offense is committed. *Graham v. People* (Ill.) 731

Disqualification of judge.

8. A judge is disqualified to sit in a cause in which the plaintiff is a corporation of which his wife is a stockholder, although there are no statutory provisions on the subject, and a husband in that state is not directly interested in the property of his wife during her lifetime, and she may encumber or dispose of it without his consent, but he is by law entitled to succeed to a portion of her estate upon her decease. *First Nat. Bank v. McGuire* (S. D.) 413

9. An objection to jurisdiction on account of the disqualification of the judge who tried the merits of the case is not waived by applying for an injunctive order to prevent some irreparable injury. *First Nat. Bank v. McGuire* (S. D.) 413

Rules of decision.

10. A judgment that a statute is invalid cannot be based on an admission. *State ex rel. McCaffery v. Aloe* (Mo.) 393

11. A decision of the Supreme Court of the United States, holding that an eight-hour law of a certain state does not violate the Federal Constitution, is not binding on the courts of another state in favor of the validity of such a law under the Constitution of that state. *Re Morgan* (Colo.) 52

NOTES AND BRIEFS.

Courts; imposing nonjudicial duties upon. 90

Power to decide as to reasonableness of by-law of corporation. 136

Imposing nonjudicial powers upon;

power to determine charges for use of property. 320

Disqualification of judge by reason of interest. 413

Authority to order railroad company to build depot. 570

COVENANT.

See also EVIDENCE, 5.

1. A covenant in a deed to a railroad company, by which the grantors agree to build a fence along the railroad, "or not hold such railroad responsible for any damage done to stock belonging to us," without any mention of assigns, is personal to the grantors, binding them only, and does not run with the land. *Brown v. Southern P. Co.* (Or.) 409

2. A covenant by a lessee of a part of a railroad right of way for warehouse purposes, binding him to hold the lessor harmless from losses, by whomsoever claimed, arising out of the destruction of property on the leased premises by fires set by the lessor's negligence, with a stipulation that the covenant shall be binding upon the assigns of both parties, will pass to a transferee of the railroad property and of the lease, so as to give the latter the same right to enforce the covenant which the original lessor had. *Northern P. R. Co. v. McClure* (N. D.) 149

3. A covenant of indemnity by a lessee against damages or claims for losses or injury suffered to property on the leased premises, by fires set by the lessor's engines, is directly connected with the estate and within the meaning of Wis. Rev. Codes, §§ 3784-3787, providing that certain specified covenants shall run with the land, and extending the provisions to covenants "appurtenant to such estates," covenants "for the direct benefit of the property or some part of it," and those which are "incidental thereto." *Northern P. R. Co. v. McClure* (N. D.) 149

4. Payment of taxes after they would have been barred except for suits instituted therefor, and after the suits have been delayed so long as to defeat the lien acquired by them, does not entitle a grantee to recover on covenants of warranty and against encumbrances. *Robinson v. Bierce* (Tenn.) 275

NOTES AND BRIEFS.

Covenants; running with land. 149

Breach by eviction. 275

Running with land. 409

CRIMINAL LAW.

See also ATTEMPT; BICYCLE PATHS, 1; COURTS, 7; EVIDENCE, 24; INDICTMENT; LIBEL AND SLANDER, 1.

NOTES AND BRIEFS.

Criminal law; attempt to commit crime; criminal intent. 108

CROSS-EXAMINATION.

See WITNESSES, 2.

47 L. R. A.

CUSTOM.

See EVIDENCE, 21.

CYCLONE INSURANCE.

See INSURANCE, 16.

DAMAGES.

See also EMINENT DOMAIN, 2; EVIDENCE, 23; NEW TRIAL, 1.

1. The damages recoverable for wrongful exclusion by a cotenant from a mine in which plaintiff has an undivided interest consist in the loss of profits that he would have made but for such exclusion. *Paul v. Cragnas* (Nev.) 540

2. Mistake or errors of a physician or surgeon who was employed, in the exercise of ordinary care, will not preclude the recovery of all the damages sustained from personal injuries. *Selleck v. Janesville* (Wis.) 691

3. The recovery of damages by a husband for the loss of his wife's services on account of personal injuries is not limited to the proved money value of her services as a hired servant, but include the loss or impairment of his right to conjugal society and assistance. *Selleck v. Janesville* (Wis.) 691

4. The value of the services of the husband himself in necessary attendance upon his wife may be recovered by him in an action for her personal injuries, but not in an amount beyond that for which he could have hired reasonably competent attendance and nursing by others. *Selleck v. Janesville* (Wis.) 691

5. The pollution of the water of a stream so as to render it unfit for use in a paper mill, resulting from the operation of a railroad through the premises, is to be considered in determining the amount of damages caused by the construction and operation of the railroad. *Rudolph v. Pennsylvania S. V. R. Co.* (Pa.) 782

6. The taking of a route for a railroad, which is afterwards abandoned, without building the road there, and another route selected, does not prevent recovery for consequential injuries caused by the operation of the road on the latter location. *Rudolph v. Pennsylvania S. V. R. Co.* (Pa.) 782

7. A single tract of land used for the purposes of a paper mill is not severed by the taking of a strip for a railroad and conveyance of an additional strip for coal and freight sidings, so as to prevent consideration of injury to the water which supplies the mill on one side of the road, when assessing consequential damages to the mill property on the other side of the road. *Rudolph v. Pennsylvania S. V. R. Co.* (Pa.) 782

NOTES AND BRIEFS.

See also APPEAL; FREIGHT.

For breach of promise of marriage. 385

For property damaged in eminent domain

case; effect of noise, smoke, and cinders from railroad. 755

Pollution of water as an element of damages for taking railroad right of way. 782

For injuries caused by eminent domain. 783

DAMNUM ABSQUE INJURIA.

See EMINENT DOMAIN, 4.

DAMS.

See DEEDS, 1-4.

DEBTOR AND CREDITOR.

See CASE, 1.

DECLARATIONS.

As Evidence, see EVIDENCE, 18, 19.

DEEDS.

See also INFANTS, 3; VENDOR AND PURCHASER.

1. An exception, and not merely a reservation, is created by a deed of land on one side of a river "reserving" to the grantor the right to build a dam across the river at any point against the land, with the right of flowage caused by the dam, and also an acre of land in the immediate vicinity of the dam, as the effect of the provision does not depend upon the choice of the particular word, but upon the nature and effect of the provision itself. *Smith v. Furbish* (N. H.) 226

2. A right of election belonging to a grantor who has reserved or excepted out of his grant a piece of land and the right to build a dam and the accompanying right of flowage, without defining the location by the deed, does not terminate by his failure to exercise it during his own life, but continues to his heirs. *Smith v. Furbish* (N. H.) 226

3. The right of location belongs to the grantor under a deed of land on one side of a river, from which he reserves the right to build a dam at any point against the land, with the right of flowage resulting therefrom, and also reserving or excepting an acre of land fronting on the river, in the immediate vicinity of the dam. *Smith v. Furbish* (N. H.) 226

4. The uncertainty of a reservation or exception of the right to build a dam at any point against lands conveyed, with the right of flowage and also 1 acre of land in the immediate vicinity of the end of the dam, does not render the provision void, as the exercise of a right of election by the grantor will remove the uncertainty. *Smith v. Furbish* (N. H.) 226

5. A forfeiture of a grantor's rights in land excepted from a deed, but not distinctly located, does not result from his failure to exercise his power of selection in a reasonable time, where the other party has not been damaged by the delay. *Smith v. Furbish* (N. H.) 226

6. The use of the word "heirs" is not necessary to create a title in fee, in New Hampshire, when there is an unqualified 47 L. R. A.

grant or reservation of land. *Smith v. Furbish* (N. H.) 226

7. The estate reserved to a grantor is not a life estate only, where in a deed of land on one side of a river he reserves the right to build a dam against it, with the accompanying right of flowage, and also to an acre of land in the immediate vicinity of the end of the dam, although his language is "reserving to myself," without using any words of inheritance. *Smith v. Furbish* (N. H.) 226

8. The destruction of an unrecorded deed by the grantee, and a conveyance, at his request, to a third person, by the grantor, will not give to the new grantee a legal title, although it will give him an equitable interest on which he may require a conveyance of the legal title from the grantee in the destroyed deed. *Russell v. Meyer* (N. D.) 637

NOTES AND BRIEFS.

Deed; exception or reservation in; indefiniteness or uncertainty of reservation; intention of grantor. 227

DEMONSTRATIVE EVIDENCE.

See DISCOVERY AND INSPECTION; EVIDENCE, 9-12.

DEPOT.

Control of, see CARRIERS, 1; also HACKS. See also RAILROADS, 1.

DESCENT AND DISTRIBUTION.

Law Governing, see CONFLICT OF LAWS, 1.
See also ESCHEAT, 1.

DISCOVERY AND INSPECTION.

An action by a father for the loss of the services of his minor daughter, occasioned by personal injuries, should not be dismissed because she, after reaching her majority, refused to obey an order of the court in which the action was pending, requiring her to submit to a physical examination of her person by a physician. *Bagwell v. Atlanta Consol. Street R. Co.* (Ga.) 486

NOTES AND BRIEFS.

Discovery; compelling plaintiff to submit to physical examination. 141
Physical examination of plaintiff. 486

DISTRICT ATTORNEY.

See OFFICERS, 1; VOTERS AND ELECTIONS, 22.

DIVORCE.

See HUSBAND AND WIFE, 4; JUDGMENT, 4.

DOMICIL.

See INFANTS, 1.

DRAINS.

A city has no right to discharge a sewer into a tail race which runs through a

culvert under a highway and is owned by the owner of the land. *Nevins v. Fitchburg* (Mass.) 312

NOTES AND BRIEFS.

Drains; liability of city for injury by sewers; discharge on private premises. 312

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 8, 10-13.

DURESS.

See also TRIAL, 2.

1. A contract with a party incapable of exercising his free will by reason of threats made by the other for the purpose of producing such condition and obtaining the contract may be repudiated on the ground of duress, at the option of the party threatened. *Galusha v. Sherman* (Wis.) 417

2. Threats which so act upon a person as to make him incapable of exercising his free will in the making of a contract may constitute duress which will avoid the contract, though they may not be such as would have that effect upon a person of ordinary firmness and courage. *Galusha v. Sherman* (Wis.) 417

NOTES AND BRIEFS.

Duress; by civil action; what constitutes; effect of threats. 418

EASEMENTS.

See also EMINENT DOMAIN, 1; EVIDENCE, 13; MUNICIPAL CORPORATIONS, 1.

A right of flowage which a deed by the proprietor of lands on both sides of a river in conveying one side of it reserves as part of a mill privilege for the benefit of a mill to be operated by water to be raised by a dam is to be deemed appurtenant to the land of which the mill and dam will be a part, and not merely an easement in gross. *Smith v. Furbish* (N. H.) 226

NOTES AND BRIEFS.

Easement; estate of inheritance in. 227

EIGHT-HOUR LAW.

See also CONSTITUTIONAL LAW, 15, 16.

NOTES AND BRIEFS.

Eight-hour law; constitutionality of. 53, 382

ELECTION OF REMEDIES.

See ACTION OR SUIT, 4.

ELECTIONS.

See DEEDS, 2; VOTERS AND ELECTIONS.

ELEVATED RAILROADS.

See APPEAL AND ERROR, 11; PUBLIC IMPROVEMENTS, 3-5.

EMINENT DOMAIN.

See also CONSTITUTIONAL LAW, 14; DAMAGES, 5-7.

1. The restriction of the height of buildings adjacent to Copley Square, made by 47 L. R. A.

Mass. Stat. 1898, chap. 452, if intended to benefit the public by promoting the beauty and attractiveness of a public park, and preventing unreasonable encroachments upon the light and air which it had previously received, justifies the expenditure of public money to pay compensation for property rights thereby injured by thus creating an easement of light, air, and view, and annexing it to the park in the exercise of eminent domain. *Knowlton v. Williams* (Mass.) 314

2. Diminution in the market value of property resulting from the noise, smoke, and cinders caused by the operation of a railroad does not "damage" the property, within the meaning of the Georgia Constitution (Civ. Code, § 5729), requiring compensation for private property damaged for public purposes, in the absence of any physical interference with the property or with a right or use appurtenant thereto. *Austin v. Augusta T. R. Co.* (Ga.) 755

3. The lawful operation of a public work owned by a corporation vested with the power of eminent domain, though causing depreciation in the value of private property, does not create liability on the ground that such property is "damaged for public purposes," within the meaning of the Georgia Constitution (Civ. Code, § 5729), unless a private corporation or private individual would be liable for similar acts under like circumstances; nor is a quasi public corporation liable where private property is depreciated in value as a result of the lawful use and enjoyment of the company's private property. *Austin v. Augusta T. R. Co.* (Ga.) 755

4. The use of the word "damaged" in that clause of the Georgia Constitution (Civ. Code, § 5729), which provides that private property shall not be taken or damaged for public purposes without just compensation, does not change the substantive law of damages or create a cause of action where none previously existed, nor does it abrogate the principle expressed in the phrase *Damnum absque injuria*, but preserves all existing causes of action for damages to private property, and prohibits exemptions of liability for such damages, even if occasioned by public uses. *Austin v. Augusta T. R. Co.* (Ga.) 755

5. Describing land only by outside boundaries, without defining a strip through it conveyed to a railroad company, is not ground for dismissing a petition for consequential damages from pollution of water by operation of the railroad. *Rudolph v. Pennsylvania S. V. R. Co.* (Pa.) 782

NOTES AND BRIEFS.

See also DAMAGES.

Eminent domain; taking private property for the comfort and pleasure of the whole people. 316

Poles as additional servitude in highway. 498

What constitutes a taking. 783

ENCUMBRANCES.

See COVENANT, 4.

ENFORCEMENT.

See ATTORNEY GENERAL.

EQUAL PRIVILEGES AND IMMUNITIES.

See CONSTITUTIONAL LAW, 5, 6.

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW, 7-9.

EQUITY.

See HOMESTEAD, 2; INJUNCTION, 2, 3; QUIA TIMET; TRIAL, 12.

ERROR.

See APPEAL AND ERROR.

ESCHEAT.

1. The expense, including reasonable counsel fees, of the successful defense by the state of actions for the proceeds of property which had been escheated in proceedings that were regular and in accordance with the statute, may be deducted from the recovery of such proceeds by subsequent claimants under Hill's (Or.) Ann. Laws, § 3141. *Young v. State* (Or.) 548

2. Failure to set up previous payment or the value of services of special counsel in successfully defending prior actions against the state for the recovery of the proceeds of escheated property will not prevent the deduction thereof from the recovery against the state in a subsequent action therefor, under Hill's (Or.) Ann. Laws, § 3141, which provides that such recovery shall be "without interest or costs to the state." *Young v. State* (Or.) 548

ESTOPPEL.

Of Insurer, see INSURANCE, 19-23.

1. An ordinary contract of consignment does not estop the consignor from setting up his title as against an innocent purchaser of the goods from the consignee, who buys them on the same day the goods were received, as part of his purchase of the entire stock and business. *Romeo v. Martucci* (Conn.) 601

2. A slight misstatement as to the cause of the injury, mistakenly made to an insurance company in the proofs of the injury, in behalf of the insured, by the physician who attended him, will not prevent the insured from showing the actual facts. *Wilkey Casualty Co. v. Sheppard* (Kan.) 650

EVIDENCE.

See also APPEAL AND ERROR, 17.

1. Judicial notice will be taken that telephone poles in a highway must be set near the side, outside the curb or ditch line, and therefore necessarily in line with trees in the highway. *Wyant v. Central Teleph. Co.* (Mich.) 497

Presumptions and burdens of proof.

2. A superintendent of the construction of a tunnel who visits the place once or twice a day is presumed to have as much knowledge as the men under him have with regard to the general requirements to make the place reasonably safe. *Hanley v. California Bridge & C. Co.* (Cal.) 597

3. There is no presumption that the law merchant as to the protest of a draft prevails in Asiatic Turkey. *Aslanian v. Doctumian* (Mass.) 495

4. The presumption of malice is rebutted in case of a privileged communication, and the burden of proving malice is on the party alleging it. *Nichols v. Eaton* (Iowa) 483

5. The surrender of possession without actual eviction imposes upon a grantee under covenants of warranty and against encumbrances the burden of showing that he surrendered to a paramount title, in order to recover on his warranties. *Robinson v. Bierce* (Tenn.) 275

6. The burden of proof that a stockholder's request for inspection of the books of the corporation is not made in the interests of the corporation is upon the corporation, when it refuses the request upon that ground. *State ex rel. Weinberg v. Pacific Brewing & M. Co.* (Wash.) 208

Best and secondary.

7. An objection to parol proof of the substance of a rule printed on a card and tacked up in a railroad depot is obviated by proof that the card had been destroyed in the burning of the station. *Goldberg v. Ahnapee & W. R. Co.* (Wis.) 221

Documentary demonstration.

8. A letter written by defendant pending a suit for breach of promise to marry, and adduced solely for the purpose of contradicting him, is not inadmissible for that purpose because it might have been, but was not, offered in chief. *Lewis v. Tapman* (Md.) 385

As to Physical Examination, see DISCOVERY.

9. Photographs not substantially necessary or instructive to show material facts or conditions, and which are of such a character as to arouse sympathy or indignation or divert the minds of the jury to improper or irrelevant considerations, should be excluded from evidence. *Selleck v. Janesville* (Wis.) 691

10. Photographs showing an injured foot in aggravated aspects, well calculated to arouse the sympathy of the jury, are inadmissible in an action by the husband of an injured woman to recover damages for nursing, medical attendance, and loss of services and society, where there was other evidence showing the expense and the extent of the impairment of her condition very fully. *Selleck v. Janesville* (Wis.) 691

11. An application to require a plaintiff to submit his neck to be photographed by the use of the Roentgen or X ray, in order to ascertain the nature of his injuries for which he sues, is properly refused if the application is not seasonably made, and if it does not sufficiently appear that the person

by whom it is proposed that the photograph be taken has the requisite skill and experience properly to apply the rays. *Wittenberg v. Onsgard* (Minn.) 141

12. A party ought not to be required to submit his person to the X-rays until it is so well established as a fact in science that the process is harmless that the courts will take judicial notice of it. *Wittenberg v. Onsgard* (Minn.) 141

Parol, to affect writing.

13. Parol evidence that a grantor agreed that he should not have any passway over land conveyed, because he did not need it, is admissible to rebut a claim of an implied reservation of a passway as an easement of necessity. *Lebus v. Boston* (Ky.) 79

Opinions and conclusions.

14. The opinion of a witness to the effect that an injury by one passenger to another would have been averted if the captain had acted with appropriate promptness is not competent evidence. *Tall v. Baltimore Steam Packet Co.* (Md.) 120

15. Testimony of a witness that a certain person was county auditor at a certain time is not inadmissible on the ground that it is a conclusion. *State v. Hoskins* (Iowa) 223

16. A physician's testimony that a person will require future attendance, by reason of an injury, on an average of twice a week, is incompetent as invading either the field of baseless conjecture or that of common knowledge. *Selleck v. Janesville* (Wis.) 691

17. Hypothetical questions put to an expert witness must be based upon facts admitted or established, or which, if controverted, might be legitimately found by the jury from the evidence, and should also embody all the facts relating to the subject upon which the opinion of the witness is asked. *Wittenberg v. Onsgard* (Minn.) 141

18. Declarations made by a man as to his own history and family relations are admissible after his death, for the purpose of identifying him, in an action by his relatives against the state to recover the proceeds of his estate, which had been escheated. *Young v. State* (Or.) 548

19. Complaints to a street commissioner of the bad condition of a sidewalk, and a resolution offered by an alderman for building a new walk, are inadmissible to show that the walk was defective, when there is no disputed issue as to notice. *Selleck v. Janesville* (Wis.) 691

Relevancy.

20. Evidence of one suing on a preliminary contract to renew a policy of insurance, that he relied upon it and would have procured other insurance had he not believed that the policy was renewed, is competent. *McCabe v. Aetna Ins. Co.* (N. D.) 641

21. Evidence of a custom on the part of an insurance agent to extend credit for premiums is admissible in an action on a preliminary contract with such agent for 47 L. R. A.

renewal of a policy, the premium for which was not paid. *McCabe v. Aetna Ins. Co.* (N. D.) 641

22. Evidence as to the habits of a team both before and after an accident is admissible in an action for injury by the accident, when the character or disposition of the team is in issue. *Walrod v. Webster County* (Iowa) 480

23. Evidence of the social degradation of the mother of the plaintiff in a suit for breach of promise to marry is not admissible either to bar the action or mitigate damages, when the defendant was not induced to make or continue the engagement, either by misrepresentation or wilful suppression of the facts concerning the plaintiff's family. *Lewis v. Tapman* (Md.) 385

Weight; sufficiency.

24. Evidence showing commission of a crime will not sustain an indictment charging an attempt to commit it, where the statutes make the consummated crime and the attempt different offenses. *Graham v. People* (Ill.) 731

25. A shortage in three loads of stone furnished under a contract is insufficient of itself to establish a shortage in any other loads delivered under the same contract. *Hoffman v. Maffioli* (Wis.) 427

NOTES AND BRIEFS.

Evidence; judicial notice of city streets. 145

Parol, to vary written contract; admissions of agent. 202

Of engagement to marry. 385

Presumption as to law merchant in foreign country. 495

Admissibility of declarations as to pedigree and identity. 548

Burden of proof as to accidental character of injury. 650

Of defects in sidewalk at former time. 692

Of damages in eminent domain case. 755

EXCEPTIONS.

See DEEDS, 1; NOTES AND BRIEFS; TRIAL, 9.

EXECUTORS AND ADMINISTRATORS.

See also GARNISHMENT, 1.

A discretion in the surrogate to withhold commissions from an executor who has not given proper attention to his duties is not denied by N. Y. Code Civ. Proc. § 2730, providing that on settlement of the executor's account the surrogate "must allow to him" certain commissions for his services. *Re Rutledge* (N. Y.) 721

NOTES AND BRIEFS.

Executors; garnishment of, see GARNISHMENT.

EXPERTS.

Opinions of, see EVIDENCE, 16, 17.
See also WITNESSES, 2.

EXPLOSION.

See **BLASTING; GAS, 1.**

EXTRADITION.

See also **HABEAS CORPUS, NOTES AND BRIEFS.**

1. A person is not a fugitive from justice subject to surrender by extradition warrant, when he comes into the state at the request and in pursuance of the business of the party who demands his surrender. *Re Tod* (S. D.) 566

2. A court or judge authorized to issue the writ of habeas corpus is not conclusively bound by the action of the executive in issuing an extradition warrant for an alleged fugitive, but may in fact determine whether or not an offense was charged, or whether or not the petitioner is a fugitive from justice, and whether or not the governor actually issued the warrant. *Re Tod* (S. D.) 566

3. An extradition warrant which the governor did not in fact issue is null and void, as the power to issue it is one which he cannot delegate. *Re Tod* (S. D.) 566

FACTORS.

See also **ESTOPPEL, 1.**

1. A consignment to the consignor's order, where the bill of lading with draft attached is sent to a bank to be delivered when the draft is paid, and stipulates that it must be surrendered in order to obtain the delivery of the goods, does not pass title to them, or entitle the person for whom they were sent to their delivery by the carrier without surrendering the bill of lading, although the bank refuses to surrender it to him, or accept his tender of the amount of the draft. *Hopkins v. Cowen* (Md.) 124

2. The sale of goods received on consignment is not within the scope of the consignee's authority, so as to pass title to them, even to an innocent purchaser, when made on the day the goods are received as part of a sale of the entire stock, fixtures, goodwill, and business. *Romeo v. Martucci* (Conn.) 601

NOTES AND BRIEFS.

Factors; sale of goods by; defrauding principal; rights of bona fide purchaser. 603

FALSE IMPRISONMENT.

See **PUBLIC MONEY, 2.**

NOTES AND BRIEFS.

False Imprisonment; Liability of Municipality for, see **MUNICIPAL CORPORATIONS.**

FALSE PRETENSES.

See **COURTS, 7.**

FEDERAL COURT.

See **JUDGMENT, 7.**

FENCES.

See also **ANIMALS, NOTES AND BRIEFS; CONSTITUTIONAL LAW, 14; COVENANT, 1.**

1. The common-law rule which requires 47 L. R. A.

the owner of animals to keep them on his own land or within inclosures is not in force in Virginia, being inconsistent with Va. Acts 1893-94, p. 941, and other legislation of the state making provisions as to what shall constitute a lawful fence, except in counties which have adopted what is known as the "No Fence Law," thereby restoring the common-law rule in those localities. *May v. Poindexter* (Va.) 588

2. A "lawful fence" required by Va. Acts 1893-94, p. 941, is a condition precedent to the right to recover for trespass on lands by the animals of others running at large. *May v. Poindexter* (Va.) 588

3. One who turns his cattle upon his neighbor's premises, which have not been inclosed with a lawful fence such as the statute requires in order to entitle the landowner to recover for trespass thereon by animals running at large, is liable for the damages thereby caused to the landowner, since the statute requiring a lawful fence as a protection against animals running at large does not repeal, or in any way impair, the full force and effect of the common-law rule with respect to wilful or malicious trespass, or the ancient maxim that no man shall take advantage of his own wrong in his prosecution or defense against another. *May v. Poindexter* (Va.) 588

FICTIONS.

The law does not resort to fictions without a motive, or for any other purpose than a compliance with the requirements of justice. *Smith v. Furbish* (N. H.) 226

FIRE.

Set by Railroad, see **RAILROADS, 2, 3.**

See also **COVENANT, 2; PROXIMATE CAUSE, 3; TRIAL, 5.**

It is not negligence to start a back fire to protect one's property from an approaching prairie fire, provided it is done with the care and diligence of an honest and prudent man in guarding his property. *Owen v. Cook* (N. D.) 646

NOTES AND BRIEFS.

Fires; liability for setting back fire. 647

FIRE DEPARTMENT.

See **PUBLIC MONEY, 1.**

FIRE TAX.

See **CONSTITUTIONAL LAW, 7.**

FISHERIES.

See also **CONSTITUTIONAL LAW, 11, 18.**

The possession within the state for the purpose of sale, of trout lawfully caught in another state, is subject to Or. Laws 1899, p. 199, making it unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time, without reserving any open season or making any saving clause under which trout may be sold. *State v. Schuman* (Or.) 153

NOTES AND BRIEFS.

Fisheries; prohibited possession or sale of fish; fish as property. 154

FLOWAGE.

Reservation of Right of, see DEEDS, 1-4.
See also EASEMENTS.

FOOD.

See CONSTITUTIONAL LAW, 11.

FOREIGN CORPORATIONS.

Judgment against Stockholders, see JUDGMENT, 3.
Suit by Receiver of, see RECEIVERS.
See also CONFLICT OF LAWS, 3; CORPORATIONS, 5-7.

FORFEITURE.

See DEEDS, 5; TIMBER.

FRANCHISE.

See also OFFICERS, 2; TELEPHONES, 1; WATERS, 2.

NOTES AND BRIEFS.

Franchise; right to transfer or mortgage privilege to use streets for telegraph, telephone, or other quasi-public purposes. 87
As a contract. 90, 104
Assignment of. 215

FRAUD AND FRAUDULENT CONVEYANCES.

See also APPEAL AND ERROR, 12; CASE, 1.

A creditor, knowing that his debtor is insolvent and engaged in disposing of his property in order that it may not be reached by pressing creditors, cannot purchase more than is necessary to protect himself, of such debtor, and pay him the difference in cash. Walling v. Christian & C. Grocery Co. (Fla.) 608

NOTES AND BRIEFS.

Fraud; action by general creditor for damages against third party on account of fraud in disposing of debtor's property or preventing plaintiff from collecting his claim. 433

FREEDOM.

Of Contract, see CONSTITUTIONAL LAW, 8, 15, 19.

FRIGHT.

1. No recovery can be had for sickness due to the purely internal operation of fright caused by a negligent act, even if the negligence was gross and the party in fault ought to have known that the result would follow his act. Smith v. Postal Teleg. Cable Co. (Mass.) 323

But see next case.

2. A physical injury resulting from a fright or other mental shock caused by the wrongful act or omission of another entitles the injured party to recover his damages, 47 L. R. A.

provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural or probable consequence thereof. Gulf, C. & S. F. R. Co. v. Hayter (Tex.) 325

NOTES AND BRIEFS.

Fright; recovery for injury caused by. 324, 325.

FUGITIVE.

See EXTRADITION, 1.

GAME LAWS.

See FISHERIES, NOTES AND BRIEFS.

GARBAGE.

See CONTRACTS, 7, 8.

GARNISHMENT.

1. Garnishment proceedings will not lie against an executor to reach a debt of the decedent, before a decree for the distribution of the assets in his hands, in the absence of statutory permission, although it has been placed in judgment in a suit revived against the executor. Hudson v. Wilber (Mich.) 345

2. A judgment debtor for a part of whose debt judgment has also been taken against a solvent garnishee cannot be required to accept a tender of the latter judgment, which the plaintiff has failed, without excuse, to collect, in lieu of having the amount thereof credited on his own judgment. Bowen v. Port Huron Engine & T. Co. (Iowa) 131

3. A judgment against a solvent garnishee, which the plaintiff fails to collect, without any excuse, constitutes a satisfaction of the claim against the original debtor for the amount thereof. Bowen v. Port Huron Engine & T. Co. (Iowa) 131

4. A constable is not liable to an assignee for money which he collected by garnishment, and paid over to the attaching creditor with notice that the title to the fund had been assigned by the attachment debtor before the garnishment was levied, if the garnishee acknowledged that it owed the fund, and paid it over as the property of the debtor. Merchants' & M. Nat. Bank v. Barnes (Mont.) 737

NOTES AND BRIEFS.

Garnishment; effect of judgment against garnishment to merge or satisfy liability of principal debtor. 131

Of executor or administrator:—(1.) Scope of the subject; (11.) application of statutes to executors and administrators: (a) general statement as to; (b) application to claims against estates generally; (c) rule after estate is ready for distribution; (d) general statutes as to attachment and garnishment; (e) statutes specifically applicable to executors and administrators; (f) statutes as to attachment execution; (g) statutes as to foreign attachment; (h) statutes as to attachment of absent, con-

sealed, and absconding debtors; (4) statute as to attachment of property not capable of manual delivery; (III.) interest and possession necessary to sustain; (IV.) garnishment of husband's interest in wife's legacy or distributive share; (V.) rule when the representative is the debtor; (VI.) effect of trust conferred upon representative; (VII.) set-off; (VIII.) the judgment; (IX.) exclusiveness of the remedy; (X.) summary. 345

GAS.

See also CONSTITUTIONAL LAW, 12; INJUNCTION, 1; MINES, 3-5.

1. An explosion of gas in a dwelling supplied by a low-pressure line, caused by connecting therewith a high-pressure line, leaving the gas uncontrolled by the regulator, does not render the gas company liable, in the absence of negligence on its part, where the connection was blunderingly made by an employee of another gas company, who was a trespasser in so doing. *McKenna v. Bridgewater Gas Co. (Pa.)* 790

2. Negligence of a gas company in the construction of a box inclosing a by-pass, by opening which high-pressure and low-pressure lines may be connected, is not shown by the fact that an expert employee of another company, with an expert's tool, consisting of a long lever or curb key, pried open the box and manipulated the gate. *McKenna v. Bridgewater Gas Co. (Pa.)* 790

3. The failure of a gas company's inspector to detect the fact that a plank box containing a by-pass for connecting high and low pressure lines had been broken into and the lines connected by someone who was either a blunderer or a criminal does not show negligence, when there was nothing externally indicating that the box had been opened or the gas tampered with. *McKenna v. Bridgewater Gas Co. (Pa.)* 790

NOTES AND BRIEFS.

Gas; possession of, in land. 628
Negligence causing explosion. 790

HABEAS CORPUS.

See also EXTRADITION, 2.

A girl seventeen years of age who enters a convent with the express purpose of becoming a nun, without previously obtaining parental consent, though received therein upon the supposition that she had obtained such consent, and told by the mother superior that she is at liberty to return home if she chooses, but who is allowed the privilege of remaining if she desires to do so, may be released by writ of habeas corpus on the petition of her mother, who is her only parent. *Prieto v. St. Alphonsus Convent of Mercy (La.)* 656

NOTES AND BRIEFS.

Habeas corpus; in case of extradition; questions reviewable on. 566
For infant. 657
47 L. R. A.

HACKS.

1. A common carrier, by rules and regulations which it deems necessary for the control of its business within its depot building, may grant special and exclusive privileges to hackmen to solicit business, provided such rules and regulations are reasonable and conduce to the comfort, convenience, and interest of its patrons. *Godbout v. St. Paul Union Depot Co. (Minn.)* 532

2. A hackman or private carrier for hire is not a party having such relations with a common carrier as will permit him to enter a depot to solicit business from passengers. *Godbout v. St. Paul Union Depot Co. (Minn.)* 532

3. Hackmen and private carriers, in common with all others in that business, have the right and privilege of soliciting public patronage, without being discriminated against by a railroad company, at all points without the railroad depot, when such points or places have been properly designated. *Godbout v. St. Paul Union Depot Co. (Minn.)* 532

4. All hackmen and persons engaged in the business of conveying passengers and baggage for hire have the right of entry, without discrimination, to the depots of a common carrier, to deliver or receive passengers or baggage, in pursuance of a contract or order, subject to proper rules and regulations for the interest of the traveling public. *Godbout v. St. Paul Union Depot Co. (Minn.)* 532

NOTES AND BRIEFS.

Hacks; discrimination between, at railroad depot. 532

HAIL INSURANCE.

See INSURANCE, 16.

HAY CAP.

See HIGHWAYS, 2.

HEALTH.

Regulations authorized by Colo. Const. art. 16, for the proper ventilation of mines, for escapement shafts, "and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein," embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations. *Re Morgan (Colo.)* 52

HEIRS.

See DEEDS, 2, 6.

HIGHWAYS.

See also BICYCLE PATHS; BRIDGE; DRAINS; EVIDENCE, 1; INJUNCTION; MUNICIPAL CORPORATIONS, 2; NUISANCE, 1; PUBLIC IMPROVEMENTS; WATERS, 1.

1. The owner of land in a highway is liable for damages caused by placing thereon objects of such a character as naturally to

frighten horses which are ordinarily gentle and well broken. *Lynn v. Hooper* (Me.) 752

2. A hay cap consisting of white cloth tied by the corners to stakes in the ground, so that it is moved by the wind, may constitute a nuisance for which the party maintaining it will be liable for the frightening of a horse on a highway, when it is placed within the limits of the highway, where it is naturally calculated to frighten a horse of ordinary gentleness. *Lynn v. Hooper* (Me.) 752

3. The right of a telephone company to place its lines in the streets under Mich. Acts 1883, p. 131, § 4, is not subject to the consent of the municipality, but the sole authority of the latter is the proper exercise of the police power to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner the company may erect its poles and stretch its wires so as to accomplish this result. *Michigan Teleph. Co. v. Benton Harbor* (Mich.) 104

4. A telephone company which has the right to string wires in a highway has a right to do the necessary trimming of trees in the highway in a proper manner, without first giving the landowner an opportunity to do it, being answerable for any unnecessary, improper, or excessive cutting. *Wyant v. Central Teleph. Co.* (Mich.) 497

5. The rule requiring drivers of vehicles drawn by horses, and riders of bicycles, to regard the ordinary rules of the road for each other's convenience and safety in the ordinary occupancy of streets, does not require the driver of a cart in an open, unobstructed highway to drive to one side in order that the bicyclist may be relieved of the necessity of deviating from a straight line. *Taylor v. Union Traction Co.* (Pa.) 289

6. Bicycles are not within the meaning of an ordinance giving vehicles a right of way upon street-railway tracks in the direction in which the cars usually run, over vehicles moving in the opposite direction, so that a bicyclist riding between the rails can compel an approaching vehicle to give way to him. *Taylor v. Union Traction Co.* (Pa.) 289

7. A bicyclist who rides between street-railway tracks towards a vehicle approaching from the opposite direction, under the erroneous impression that he can compel it to give way to him, until a collision is unavoidable, cannot hold the owner of the vehicle liable for injuries received by him from the collision. *Taylor v. Union Traction Co.* (Pa.) 289

NOTES AND BRIEFS.

See also BICYCLES; FRANCHISE.

Highways; permission to use as a contract. 90, 104

Power of municipalities as to occupation of, by corporations; police regulations as to. 105

47 L. R. A.

Police control of; public easement in. 145

Right to trim trees in. 499

Notice of defects in. 499

Liability for objects frightening horses in. 753

HOMESTEAD.

1. The appointment of commissioners to set off a homestead may be made by the clerk, when instructed by the court, as the clerk is but the hand of the court in the matter. *Benton v. Collins* (N. C.) 33

2. An allotment of a homestead and a sale of the excess of the owner's lands by a commissioner may be ordered by a court of equity, when it has control of the lands and all the parties interested are before the court. *Benton v. Collins* (N. C.) 33

3. The fact that lands are situated in two counties does not prevent the court from making an order for setting off a homestead and selling the lands which are in excess of the homestead, to satisfy a judgment against the owner. *Benton v. Collins* (N. C.) 33

HOSPITALS.

See STATE INSTITUTIONS.

NOTES AND BRIEFS.

Hospitals; liability of, for injuries. 577

HUSBAND AND WIFE.

Divorce in Other State, see JUDGMENT, 4.

See also ACTION OR SUIT, 1, 7; CONFLICT OF LAWS, 2; CONTRACTS, 4, 5; DAMAGES, 3, 4; EVIDENCE, 23; JUDGMENT, 6; PARENT AND CHILD.

1. A man is excused for breach of a contract of marriage when, after it is made, he has, without fault on his part, developed a grave malady of such a character that marriage would endanger his life or health. *Sanders v. Coleman* (Va.) 581

2. An agreement to marry is not void merely because its performance is intended to depend on the happening of a contingency. *Lewis v. Tapman* (Md.) 385

3. A wife has no right of action against another woman for the alienation of her husband's affections, unaccompanied by adultery. *Houghton v. Rice* (Mass.) 310

4. Merely paying an allowance to one's wife in compliance with an order of court after abandoning her, without furnishing her any other support, is not sufficient to prevent granting her a divorce under a statute authorizing a divorce for "wilful desertion for three years, with total neglect of duty." *Tirrell v. Tirrell* (Conn.) 750

5. The duty of supporting a child which by divorce decree is given to the care and custody of the mother is still left to the father, if the decree makes no provision on that subject. *Keller v. St. Louis* (Mo.) 391

NOTES AND BRIEFS.

Husband and Wife; as to Support of Children, see INFANTS.

Action for alienation of husband's affections. 311

Jurisdiction of divorce suit; notice to nonresident party. 546

Desertion as ground of divorce. 751

HYPOTHETICAL QUESTION.

See EVIDENCE, 17.

IMPEACHMENT.

See WITNESSES, 3.

IMPRISONMENT.

Under Wrongful Conviction, see AUDITORS; PUBLIC MONETS, 2.

INDEPENDENT CONTRACTOR.

See NEGLIGENCE.

INDICTMENT.

1. An indictment in the words of the statute for driving a team of horses upon a bicycle path is not sufficient when it fails to allege that such path is a public bicycle path, or part of a public highway. *State v. Bradford* (Minn.) 144

2. A statute making an indictment for obtaining money by the use of the confidence game sufficient which charges felonious obtaining of money from a certain person by means and by the use of the confidence game is not unconstitutional. *Graham v. People* (Ill.) 731

3. An indictment charging an attempt to obtain money by the use of the confidence game is not insufficient, although it fails to state all the acts constituting the offense with which the accused is charged, where the statutes provide for punishment of those who attempt to obtain money by the use of the confidence game, and provide that an indictment shall be sufficient which charges the attempt to obtain money by such game, and that every indictment shall be deemed sufficiently technical which states the offense in the language of the statute creating the offense. *Graham v. People* (Ill.) 731

NOTES AND BRIEFS.

Indictment; sufficiency of; statutory form. 733

INFANTS.

See also HABEAS CORPUS; HUSBAND AND WIFE, 5; MASTER AND SERVANT, 4; PARENT AND CHILD.

1. A child during minority, unless sooner emancipated, remains under authority of father and mother, and is without legal capacity to leave the parental domicile permanently and select another domicile or residence without consent of the parents. The period of this incapacity is limited by law, and cannot in any case be either enlarged or diminished by evidence, however cogent, or 47 L. R. A.

by argument, however persuasive. *Prieto v. St. Alphonsus Convent of Mercy* (La.) 656

2. An infant rescinding a purchase of a bicycle, and claiming the return of installments paid upon it, must account for the use of the wheel and its deterioration in value while in his possession. *Rice v. Butler* (N. Y.) 303

3. A conveyance by an infant may be disaffirmed and the land recovered by him on his coming of age, without restoring the consideration received for it, when it is not in his possession or control on arriving at full age, but has been dissipated by him while still a minor. *Bullock v. Sprowls* (Tex.) 326

NOTES AND BRIEFS.

Infants; bicycles as necessities of. 307

Power to disaffirm conveyance. 327

Duty to support after divorce. 391

Control of, by parents. 657.

INFORMATION.

See ATTORNEY GENERAL, 1.

INHERITANCE TAX.

See TAXES, 2-4, NOTES AND BRIEFS.

INJUNCTION.

See also CONTRACTS, 10; MINES, 3; PLEADING; PROHIBITION, 2.

1. The right of the state to maintain an action for injunction against the unlawful escape of natural gas from a well into the open air is not precluded by statutory remedies for penalties and for the closing of the well at the owner's expense. *State v. Ohio Oil Co.* (Ind.) 627

2. Equity has no jurisdiction of a suit merely to bar the entrance of a person to office by injunction and to declare his title to the office invalid. *State ex rel. McCaffery v. Aloe* (Mo.) 393

3. A chancery court has no power to protect by injunction purely political rights, such as the rights of citizens as voters. *State ex rel. McCaffery v. Aloe* (Mo.) 393

4. An injunction against the removal of a building from a town until the bonded and warranted indebtedness of the town shall be paid cannot be granted at the suit of taxpayers on the ground that its removal will so far diminish the taxable property of the town as to render it difficult for the town to meet its current expenses and the principal and interest of its indebtedness, and impose an excessive burden of taxation on the remaining taxpayers. *St. Lawrence v. Gross* (S. D.) 572

5. An injunction is the proper remedy to prevent the breach of a contract between merchants for closing their places of business at a certain hour each day, since it is necessary in order to prevent a multiplicity of actions or to prevent a repeated and recurring cause of action. *Stovall v. McCutchen* (Ky.) 287

6. An ordinance making a street assess-

ment by the front foot, without showing affirmatively that the question of benefit to the land was taken into consideration, will not entitle a landowner to an injunction against the collection of the assessment, if it is found as a fact that the land was actually benefited in excess of the cost so assessed, and it does not appear that the cost and expense were not fairly apportioned between the lots affected. *Schroder v. Overman* (Ohio) 156

NOTES AND BRIEFS.

Injunction; to determine right to office.	394
Against removal of property.	572
Suit by state for.	628

INNOCENCE.

See *APPEAL AND ERROR*, 17.

INSOLVENCY.

See also *FRAUD AND FRAUDULENT CONVEYANCES; TRUSTS*.

A mortgage by a merchant of all his property for the security of certain creditors will not constitute in law an assignment for creditors, invalid because partial, where the mortgagor intends to keep up his business if he can, and does not intend to divest himself of title to and control over the property. *Noyes v. Ross* (Mont.) 400.

INSPECTION.

See *APPEAL AND ERROR*, 15.

INSTRUCTION.

To Jury, see *TRIAL*, 10.

INSURANCE.

See also *ANNUITY; ESTOPPEL*, 2; *EVIDENCE*, 21; *MANDAMUS*, 5; *TAXES*, 1.

Foreign company.

See also *MANDAMUS*, 5.

1. A foreign insurance company cannot be denied a license to do business by reason of the similarity of its name to that of a domestic corporation, under Ill. act May 31, 1879, § 1, providing that foreign companies may be licensed on compliance with certain conditions, and 1 Starr & C. (Ill.) Ann. Stat. chap. 78, § 2, providing that no license shall be issued until all of the requirements have been complied with, although by § 4 of the latter act the superintendent of insurance has the right to reject any name or title applied for by any company, if it is too similar to one already appropriated, as this section refers only to domestic corporations. *People ex rel. Traders' F. Ins. Co. v. Van Cleave* (Ill.) 795

Agents.

See also *infra*, as to *Estoppel*.

2. A provision in a statute governing the relations of foreign insurance companies to the state, and requiring certain things to be done by agents representing them, that the term "agent" shall include "any person who shall in any manner aid in transacting insurance business" of any company not incorporated by the laws of the state, does not make a broker procuring insurance for a property owner the agent of the insurer so as to bind it with his knowledge. *United Firemen's Ins. Co. v. Thomas* (C. C. App. 7th C.) 450

3. An insurance broker who, having authority to procure a certain amount of insurance on certain property in companies to be chosen by him, signs applications and delivers them to the recognized agents of the insurer, is not, by the fact that he is by them allowed a commission upon the business, to be considered as the agent of the insurer so as to bind it by his knowledge; and it is immaterial that the policy is delivered to him without requiring prepayment of the premium. *United Firemen's Ins. Co. v. Thomas* (C. C. App. 7th C.) 450

4. An insurer is not chargeable with knowledge of other insurance obtained by one while acting as agent for the insured, merely because it makes him its agent to deliver a policy drawn in accordance with a contract made upon his representations while so acting. *United Firemen's Ins. Co. v. Thomas* (C. C. App. 7th C.) 450

5. A parol contract by an agent of a foreign insurance company, for the renewal of a policy which had been originally issued by him will be deemed to have been made by him in his representative capacity, when he was authorized to issue renewals. *McCabe v. Aetna Ins. Co.* (N. D.) 641

6. An agent of a foreign insurance company has power to make a parol contract for the renewal of a policy, when he is expressly authorized to make insurance and issue and deliver policies. *McCabe v. Aetna Ins. Co.* (N. D.) 641

The contract.
7. A preliminary contract to insure property or renew insurance thereon is not within the provisions of the policies of the insurer respecting renewals, waivers, etc. *McCabe v. Aetna Ins. Co.* (N. D.) 641

8. A provision of an insurance policy to the effect that "none of its terms can be modified nor any forfeiture under it waived save by an agreement in writing signed by the president or secretary of the company" never became binding or effective on the assured, who made his contract with the general agent and manager of the insurance company within the state before the policy was written, when he did not assent to this provision, had no knowledge of it, and was not informed that the policy to be issued would contain any such provision. *Cole v. Union C. L. Ins. Co.* (Wash.) 201

9. A receipt for part payment of the premium on an insurance policy, which is wholly in writing, must control the printed terms of an application which conflict with it, when the delivery of the application and the giving of the receipt are to be regarded as contemporaneous acts. *Cole v. Union C. L. Ins. Co.* (Wash.) 201

10. A certificate of membership and the

application therefor, which provide against liability in case of death by suicide, constitute a contract between the parties prevailing over by-laws of the association which do not authorize such limitation upon liability. *McCoy v. Northwestern Mut. Rel. Asso. (Wis.)* 681

Change or amendment.

11. By-laws may be unreasonable and invalid as to persons who are members of a beneficial association when they are adopted, although reasonable and valid as to those who subsequently become members. *Thibert v. Supreme Lodge K. of H. (Minn.)* 136

12. Changes, amendments, and repeals of the by-laws of a beneficial insurance association are subject to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and also subject to the implied condition of being reasonable. *Thibert v. Supreme Lodge K. of H. (Minn.)* 136

13. A change and amendment of a by-law of a beneficial insurance association, which makes each member subject to suspension on failure to pay the amount of each assessment levied on the last day of each month, and provides that notice of the assessments shall be at the option of each subordinate lodge, is unreasonable and invalid as to one who became a member when the by-laws entitled him to written or printed notice, on the first day of each month, of the assessments and levies for the preceding month; and, if he has no knowledge of the assessments, it is immaterial that the subordinate lodge has, by a by-law, designated a newspaper for the publishing of such notices, and that a copy containing the notice has been mailed to him. *Thibert v. Supreme Lodge K. of H. (Minn.)* 136

Construction.

14. The rule that an insurance policy is to be construed in favor of the insured does not apply when there is no ambiguity in the policy, no inconsistent or conflicting provisions, and nothing requiring construction or interpretation. *Holmes v. Phenix Ins. Co. (C. C. App. 8th C.)* 308

15. A person insured against accidents as a barber and restaurant keeper is not, while engaged in hunting rabbits merely as an incident of his daily life, and not for hire or profit, following a more hazardous employment, within provisions in the policy restricting the liability of the insurer. *Willey Casualty Co. v. Sheppard (Kan.)* 650

16. A policy of insurance against loss or damage by wind storms, cyclones, or tornadoes does not cover damage by hail, though accompanied by damage caused by wind, under a provision of the policy denying liability for damage "from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles, unless other damage occur," since the words "unless other damage occur" are restricted to the last mem-

ber of the sentence referring to damage by wind, and do not affect the clause as to damage from hail or lightning. *Holmes v. Phenix Ins. Co. (C. C. App. 8th C.)* 308

Effect of other insurance.

17. That insurance in other companies is effected at the same time as a policy providing that it shall be void "if insured now has, or shall hereafter make or procure," any other contract of insurance on the same property will not prevent the operation of such provision. *United Firemen's Ins. Co. v. Thomas (C. C. App. 7th C.)* 450

18. An express provision in a policy, forbidding other insurance, will override any supposed agreement to consent to such insurance from the fact that the insurer's agent knew of an intention to procure it. *United Firemen's Ins. Co. v. Thomas (C. C. App. 7th C.)* 450

Estoppel; waiver.

19. A policy of life insurance cannot be broadened out by the application of the law of waiver or estoppel, so as to cover a case of death by suicide which is excluded from the policy by its terms. *McCoy v. Northwestern Mut. Rel. Asso. (Wis.)* 681

20. Waiver of a clause against other insurance is not effected by knowledge of the insurer's agent, when the policy was issued, of an intent to procure it. *United Firemen's Ins. Co. v. Thomas (C. C. App. 7th C.)* 450

21. An offer by an insurance company of a sum smaller than that claimed by the insured, and an averment of the same in the answer of the insurance company, waive the defense that the insured is not entitled to anything because the injury resulted from exposure to unnecessary danger. *Willey Casualty Co. v. Sheppard (Kan.)* 650

22. An agreement between the general agent of a foreign insurance company and a person who takes a policy, by which the latter is given credit for a part of the first premium in ignorance of any stipulation contained in the policy thereafter issued, which denies the right of the agent to make such contract, estops the insurance company to deny the acts of the agent or to assert the invalidity of the agreement. *Cole v. Union C. L. Ins. Co. (Wash.)* 201

23. An insurance company which receives informal and incomplete proofs of loss and retains them, but requests formal proofs, which are furnished, and thereafter treats the contract as in force, is deemed to have waived the objection that the proofs were not furnished in time. *Willey Casualty Co. v. Sheppard (Kan.)* 650

Premium.

24. Prepayment of the premium for the renewal term is not necessary to make a valid preliminary contract with an insurance agent for renewal. *McCabe v. Aetna Ins. Co. (N. D.)* 641

Limitation of time for action.

25. A stipulation that suit can be brought on an insurance policy only "within twelve months next after the fire" gives the in-

sured twelve months after the accrual of his right of action, where the policy provides that suit shall not be sustainable until after full compliance with numerous requirements, and that the loss shall not be payable until sixty days after notice and proofs of loss and an award by appraisers, if appraisal is required. *Sample v. London & L. F. Ins. Co. (S. C.)* 696

26. A contract limitation in an insurance policy requiring suit to be brought within twelve months after loss is not subject to Iowa Code 1873, tit. 17, chap. 2, providing that after the commencement of an action which fails for any cause except negligence in its prosecution a new suit brought within six months "shall for the purpose herein contemplated" be a continuation of the first. *Harrison v. Hartford F. Ins. Co. (Iowa)* 709

NOTES AND BRIEFS.

Insurance; restricting interstate business. 69

Certificate of, as affected by subsequent by-law; change of contract; notice of assessment; waiver of nonpayment of premium. 136

Condition as to prepayment of premium; effect of oral negotiations; ignorance of conditions; application as part of contract; binding effect of conditions. 202

Of bicycles. 307

Construction of policy in favor of insured; effect of punctuation. 309

Broker as agent; construction of policy; effect of agent's knowledge. 451

Contracts to renew policies; power of agent. 641

Against accident; waiver of defense to; effect of change of occupation. 650

Conflict between by-laws and certificate, or policy, of a mutual benefit society or insurance company. 681

Stipulation limiting time for suit on insurance policy:—(I.) Scope of the note; (II.) fire-insurance policies: (a) limitation for fixed period after loss; (1) general statement as to; (2) the literal construction; (3) the relative construction; (b) limitation for fixed period after fire: (1) general statement as to; (2) the literal construction; (3) the relative construction; (III.) accident-insurance policies; (IV.) life-insurance policies; (V.) marine and other miscellaneous insurance policies; (VI.) what will prevent or delay the running of the limitation; (VII.) to what actions the limitation applies; (VIII.) summary. 696

License of foreign company; power of superintendent; choice of name. 796

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

1. City ordinances for the regulation of the business of retailing intoxicating liquors, which is not prohibited by the general L. R. A.

eral laws of the state, cannot, under the pretext of public regulation, prohibit or harass those engaged in the business by arbitrary, oppressive, unreasonable, and vexatious restrictions. *Bennett v. Pulaski (Tenn.)* 278

2. An ordinance requiring the curtains to front windows and doors of the lower story of a business house to be hoisted, raised up, or otherwise removed from sunset to sunrise during night is unreasonable and invalid as applied to a retail liquor dealer, when the business is not prohibited by state law. *Bennett v. Pulaski (Tenn.)* 278

3. An ordinance requiring saloons to be closed between 10 P. M. and 4 A. M., and also on Sunday, is a reasonable and valid exercise of the power to regulate such business. *Bennett v. Pulaski (Tenn.)* 278

4. An ordinance making it a misdemeanor to let a person in or out of a saloon during the hours in which the saloon is required to be closed is unreasonable and void. *Bennett v. Pulaski (Tenn.)* 278

5. An ordinance requiring the insertion in every saloon license of the legal hours in which the saloon keeper is permitted to do business is not invalid, as it is harmless, though useless. *Bennett v. Pulaski (Tenn.)* 278

6. An ordinance making it penal to receive intoxicating liquors within a municipality without paying a specific tax of a given amount for the privilege of so doing, notwithstanding the fact that the liquors have been lawfully purchased elsewhere, is not authorized by the general welfare clause in the municipal charter, although the sale of such liquors within the municipality is absolutely prohibited. *Henderson v. Heyward (Ga.)* 366

JOINT DEBTORS.

See ACTION OR SUIT, 3.

JOINT RESOLUTIONS.

See APPROPRIATIONS.

JOINT TENANTS.

See COTENANCY.

JUDGE.

See COURTS, 8, 9.

JUDGMENT.

Effect of Decision as Precedent, see COURTS, 11.

See also GARNISHMENT, 2, 3; STATUTES, 4.

1. A judgment on a verdict directed for the defendant is not *res judicata* where the record shows that the verdict was directed because the suit was prematurely brought. *Harrison v. Hartford F. Ins. Co. (Iowa)* 709

2. Stockholders of a corporation need not be before the court to be bound by a decree appointing a receiver for the corporation and giving him authority to sue for assets, so far as the question of title to the assets is concerned. *Howarth v. Angle (N. Y.)* 725

3. A stockholder in a foreign corporation may, when sued by a receiver appointed at the domicile of the corporation to compel contribution to corporate liabilities as provided by the statutes of such domicile, controvert all the essential facts,—such as insolvency, amount of deficiency, and the like, whether they are established by the judgment appointing the receiver, or not. *Howarth v. Angle* (N. Y.) 725

4. Interstate comity requires that a decree of divorce pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce. *Felt v. Felt* (N. J. Err. & App.) 546

5. The probate of a will by a court having jurisdiction of the matter cannot be collaterally attacked years afterwards by a proceeding to annul it, merely because one of the two witnesses to the will was incompetent to attest it by reason of interest, and was therefore not a "credible witness," within the meaning of Ill. Rev. Stat. chap. 148, § 2, requiring attestation by "two or more credible witnesses." *Chicago Title & T. Co. v. Brown* (Ill.) 798

6. A judgment recovered by a wife for her own injuries in an action to which her husband is not a party is not a bar to a subsequent action by him for the loss of her services. *Selleck v. Janesville* (Wis.) 691

7. The restriction on the lien of judgments of Federal courts declared by Iowa Code 1873, § 2882, as amended by Acts 1878, chap. 129, which provide that such liens should extend only to the county in which the judgment was rendered and counties in which a copy thereof should be filed, was ineffectual prior to the act of Congress of August 1, 1888, which authorized such legislation by the states, but such judgments had operation throughout the district in which the court had jurisdiction. *Blair v. Ostrander* (Iowa) 469

NOTES AND BRIEFS.

See also GARNISHMENT; LEVY.

Of Federal court; lien of:—(I.) Similarity of liens of Federal judgments to those of judgments in state courts; (II.) derivation of liens; (III.) territorial extent of lien: (a) generally; (b) as limited by state recording acts; (IV.) time of attaching; 47 L. R. A.

(V.) statutes of limitation; (VI.) suspending the lien; (VII.) judgments rendered in another state; (VIII.) priority of judgment in favor of United States; (IX.) decree in admiralty. 469

Of divorce in other state; effect of. 546

Of other states; effect of; as to personal capacity. 611

What questions concluded by. 709

JUDGMENT ROLL.

See APPEAL AND ERROR, 6.

JUDICIAL NOTICE.

See EVIDENCE, 1.

JURISDICTION.

See COURTS.

JURY.

Trial by, see TRIAL.

JUSTICE OF THE PEACE.

See APPEAL AND ERROR, 1; OFFICERS, 3; VOTES AND ELECTIONS, 21.

LARCENY.

See CARRIERS, 5.

LAUNDRY.

See COMMERCE, 1.

LAW MERCHANT.

See EVIDENCE, 3.

LAW OF THE ROAD.

See HIGHWAYS, 5-7.

LEASE.

See MINES, 1.

LEGISLATURE.

See also COURTS, 1.

NOTES AND BRIEFS.

Legislature; determining vacancy in office of member. 622

LEVY AND SEIZURE.

See also GARNISHMENT, 4.

NOTES AND BRIEFS.

Levy; sheriff's duty as to adverse claims to proceeds of judgments in his hands, except in cases of rival executions. 737

LIBEL AND SLANDER.

See also EVIDENCE, 4; TRIAL, 3.

1. A belief in the truth of the charge is not a defense in a criminal prosecution for libel, where the publication is not shielded by any privilege. *State v. Hoskins* (Iowa) 223

2. A communication by a principal to his agent, touching the business of the agency, is not actionable without proof that the principal was actuated by malice toward the person to whom the communication relates. *Nichols v. Eaton* (Iowa) 483

3. Exceeding the privilege of a communi-

eration about a matter in which both parties have an interest does not destroy the privilege, but the excess of statement is material only as bearing on the question of malice. *Nichols v. Eaton* (Iowa) 483

4. Any privilege that may exist by virtue of the common interest of the parties when a creditor is writing to his debtor, complaining of a delay in the payment of the debt by a third person through a bank, does not extend to the imputation of evil motives and dishonesty to such third person by use of the following language: "We know S. very well, and firmly believe he has misinstructed his St. Louis bank here in order to make interest on your money. We sincerely hope, for your own good, and ours, too, that you will never have anything more to do with S. when the business has to come through our hands, as we do not like his business methods, and we are afraid to deal with him." *Sullivan v. Strahorn-Hutton-Evans Commission Co.* (Mo.) 859

5. The publication of charges against a candidate for the office of judge is not privileged when the charges are published outside the judicial district for which the judge is to be elected. *State v. Hoskins* (Iowa) 223

NOTES AND BRIEFS.

Libel; privilege as to criticism; comment on candidate for office. 223
Privileged communication. 484
Privilege as to communication. 861

LICENSE.

Of Foreign Insurance Company, see INSURANCE, 1; MANDAMUS, 5.

Of Saloon, see INTOXICATING LIQUORS, 5.

To Use Mine, see MINES, 1.

See also COMMERCE; CONSTITUTIONAL LAW, 3, 6; MINES, 1.

1. A tax on occupation or business is not within the constitutional provision requiring uniformity of taxation. *Fleetwood v. Read* (Wash.) 205

2. An ordinance requiring a license of \$100 for the use of trading stamps by merchants, and imposing for its violation a fine of not less than \$50, nor more than \$100, or imprisonment not exceeding thirty days, or both, is not void on the ground that it is oppressive. *Fleetwood v. Read* (Wash.) 205

3. The raising of revenue by license tax is authorized by 1 Ballinger's (Wash.) Ann. Codes & Stat. subd. 33, § 739, authorizing licenses "for any lawful purpose,"—especially when considered with other statutory provisions which expressly authorize cities of some classes to issue licenses for purposes of revenue as well as of regulation of business. *Fleetwood v. Read* (Wash.) 205

NOTES AND BRIEFS.

License; extent of power as to; for revenue; discrimination in case of. 206

Arbitrary discrimination in respect to. 802

LIENS.

See also JUDGMENT, 7; LIS PENDENS, STATUTES, 4.

1. A mechanic's lien will not attach to buildings of a state university erected in place of one that has been destroyed by fire, although authority has been given by statute to the rector and visitors of the university to raise money by deed of trust on the property, to provide for erecting such buildings, where the university is in the strictest sense a public institution, owned, governed, and controlled by the state, and its property is dedicated to public uses. *Phillips v. University of Virginia* (Va.) 284

2. Enriching the soil and beautifying the ground by planting flowers, shrubs, and trees on it, without making any erection, structure, building, or fixture, except a rustic bridge, the mode or materials of constructing which are not shown, and which is an item of but little importance, will not sustain a mechanic's lien under Shannon's (Tenn.) Code, § 3531, authorizing liens for a house, fixtures, machinery, "or improvements made" upon land, in favor of the mechanic or undertaker, founder or machinist, who does the work or furnishes the materials or puts thereon any fixtures, machinery, or material, and in favor of all persons who do work or furnish material "for the building contemplated." *Nanz v. Cumberland Gap Park Co.* (Tenn.) 273

NOTES AND BRIEFS.

See also JUDGMENT.

Liens; mechanics; liberal construction of statute. 273

On buildings of state university. 284

LIFE ANNUITY.

See ANNUITY.

LIFE ESTATE.

See DEEDS, 7.

LIMITATION OF ACTIONS.

By Stipulation in Insurance Policy, see INSURANCE, 25, 26.

1. The obligation imposed by statute upon a county to pay bonds of another county from which it was formed is in the nature of a specialty, and not governed by a statute limiting the time for bringing actions upon contract obligations or liabilities founded upon an instrument in writing. *Robertson v. Blaine County* (C. C. App. 9th C.) 459

2. The limitation period for bringing an action against a county upon an obligation of another county from which it was formed, payment of which is imposed upon it by statute, must begin at or after the date of the imposition of the obligation. *Robertson v. Blaine County* (C. C. App. 9th C.) 459

3. An obligation created by the passage of a new and independent act casting the burden of paying a county debt upon another county is within the rule that when pay-

ment is provided for out of a particular fund the debtor cannot plead the statute of limitations to a suit thereon, without first showing that the particular fund has been provided. *Robertson v. Blaine County* (C. C. App. 9th C.) 459

NOTES AND BRIEFS.

Limitation of actions; laches as a defense. 276

Against trustee by beneficiary. 460

LIMITATION OF LIABILITY.

See ACTION OR SUIT, 3.

LIS PENDENS.

Eight years' unexplained delay in prosecuting suits for taxes will defeat the lien thereby acquired on the property, where except for the suits the taxes would be barred by statute. *Robinson v. Bierce* (Tenn.) 275

LIVERY STABLE.

See also CONSTITUTIONAL LAW, 4.

An ordinance prohibiting any livery stables within a certain part of a city, except those that are already in existence and under operation, is invalid under La. act No. 136 of 1898, which provides for regulations as to the cleaning and keeping in order of stables, but does not provide for their suppression. *Crowley v. West* (La.) 652

NOTES AND BRIEFS.

Livery stables; municipal regulation of. 652

LOCAL SELF GOVERNMENT.

See COUNTIES.

MALICE.

See EVIDENCE, 4; TRIAL, 3.

MANDAMUS.

1. The court will not dismiss a mandamus proceeding in the first instance, upon its attention being called to the fact that it is not prosecuted in the name of the proper party, but will give an opportunity to amend by striking out the name of the unnecessary party, and inserting the name of the party beneficially interested. *State ex rel. Weinberg v. Pacific Brewing & M. Co.* (Wash.) 208

2. A mandamus proceeding is properly brought in the name of the state on the relation of the party beneficially interested, where statutes do not define the writ, or prescribe for it a form of title, or declare in whose name it shall be prosecuted, but preserve the ancient method of suing out the writ, and prescribe that it must be issued upon affidavit on the application of the party beneficially interested. *State ex rel. Weinberg v. Pacific Brewing & M. Co.* (Wash.) 208

3. The unconstitutionality of a legislative act cannot be set up by executive officers in defense of a mandamus to compel 47 L. R. A.

the performance of ministerial acts ordered by the legislature. *State, New Orleans Canal & Bkg. Co. v. Heard* (La.) 512

4. A state auditor and a state treasurer may be compelled by mandamus to warrant and pay a sum expressly appropriated by statute, notwithstanding their contention that the act is unconstitutional. *State, New Orleans Canal & Bkg. Co., v. Heard* (La.) 512

5. Mandamus may be issued to compel the superintendent of insurance to license a foreign insurance company, when it has complied with the requirements of the statutes in the matter. *People ex rel. Traders' F. Ins. Co. v. Van Cleave* (Ill.) 795

NOTES AND BRIEFS.

Mandamus; in name of party beneficially interested; in name of state; as a special proceeding; as a civil action. 209

Unconstitutionality of statute as defense against mandamus to compel its enforcement:—Introductory statement; constitutional change or judicial declaration of invalidity; ministerial duties; to compel tax; the payment of public money; judicial officers; other decisions; practice matters; cases in which defense was made without any discussion; conclusion. 512

MARK.

See SIGNATURE.

MARKING BALLOTS.

See VOTERS AND ELECTIONS.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER.

See REFERENCE.

MASTER AND SERVANT.

Constitutionality of Statutes Restricting Contracts between, see CONSTITUTIONAL LAW, 8, 15, 16, 19.

See also HEALTH; NEGLIGENCE; STATUTES, 3.

1. A person who enters into the employ of another assumes all the risks and perils usually incident to the employment, and included in such risks and perils are those which it is a part of his duty to take knowledge of by observation. *Coyle v. A. A. Griffling Iron Co.* (N. J. Err. & App.) 147

2. The validity of a servant's contract to take the risk of an unsafe working place is not affected by the fact that he does not know and appreciate the particulars of the danger, if he knows there is danger, and expressly contracts in regard to it without caring to know the particulars. *O'Maley v. South Boston Gaslight Co.* (Mass.) 161

3. There is an implied contract to assume the risks when a servant agrees to work in a business involving obvious dangers by reason of the inferior machinery with which he knows it is carried on, al-

though the statute makes the employer liable for injuries from defects in the ways, works, or machinery arising from, or not discovered or remedied owing to, the employer's negligence. *O'Maley v. South Boston Gaslight Co. (Mass.)* 161

4. The risk of the sufficiency of a stirrup strap will be assumed by a minor who has had two years' experience in riding colts, where, after his complaint of its insufficiency, his employer's foreman makes a test of it in his presence, and informs him that it is sufficient, from which he becomes satisfied that it is so, and uses it in his employment. *Davis v. Forbes (Mass.)* 170

5. The caving in of the completed portion of a tunnel, causing injury to a servant employed in constructing the tunnel, is not one of the risks assumed by the servant, but the completed portion is to be deemed an appliance or means furnished by the master by which the remaining work is to be prosecuted, and which it is the duty of the master to make safe. *Hanley v. California Bridge & C. Co. (Cal.)* 597

6. The use of compressed air in the construction of a tunnel does not, under the law of Canada, create a liability to employees as an absolute insurer of the machinery and appliances and system adopted, but the duty of the employer in this respect is discharged by appointing competent superintendents and workmen, and authorizing them to procure all necessary machinery and appliances. *Turner v. St. Clair Tunnel Co. (Mich.)* 112

7. A workman in a tunnel who has had no knowledge of or experience in running tunnels is not chargeable, as matter of law, with contributory negligence in working therein without having the tunnel timbered to prevent the fall of overhanging rock, when his fellow workmen, who are experienced in the business, give him no intimation that the tunnel is dangerous, and the superintendent of the work, who visits the place daily, gives no warning and takes no steps for the safety of the workmen. *Hanley v. California Bridge & C. Co. (Cal.)* 597

8. The maxim *Volenti non fit injuria* applies in case of an injury to a servant by falling from a run along which he was employed to wheel coal, and which was without guards to prevent his falling off and being injured, even under a statute making the employer liable for injuries to servants from defects in the ways, works, or machinery which arise from, or have not been discovered or remedied owing to, the negligence of the employer or of a person in his service charged with the duty of seeing that such things are in proper condition. *O'Maley v. South Boston Gaslight Co. (Mass.)* 161

9. The ejection of a trespasser from the footboard of a locomotive, though his presence there does not interfere with the manipulation of the machinery by the engineer, whose position is inside the cab, is within the authority of the engineer, when 47 L. R. A.

he has possession and control of the engine, so as to charge the railroad company with liability for his wrongful conduct in exercising the authority. *Galveston, H. & S. A. R. Co. v. Zantzing (Tex.)* 282

10. An employer is not liable for injuries resulting from failing to promptly furnish medical attendance to one injured in his employment, even though he is responsible for the original injury. *Davis v. Forbes (Mass.)* 170

NOTES AND BRIEFS.

Master and servant; assumption of risks of unsafe machinery. 147

Volenti non fit injuria as a defense to actions by injured servants:—(I.) Introductory; (II.) meaning and effect of the maxim, as a matter of verbal construction; (III.) relation of the maxim to the doctrine of a contractual assumption of risks; (IV.) maxim not available as a defense, unless plaintiff's knowledge of danger is shown; (V.) logical significance of the servant's knowledge; (VI.) how far voluntary action may be inferred from the servant's knowledge of a risk; generally; (VII.) specific circumstances bearing on question whether servant was *volens*: (a) fact that risk was one ordinarily incident to the service; (b) fact that risk was known to the servant when he entered the employment; (c) fact that risk was not known to the servant when he entered the employment; (d) fact that conditions were or were not under the control of the servant; (e) fact that work was undertaken by servant *ex proprio motu*; (f) fact that servant complained of the dangerous condition; (g) fact that servant's motive for continuing work was his fear of dismissal; (h) fact that duty violated was statutory; (i) necessity of proving consent to particular risk; (j) circumstances indicating master's acceptance of the responsibility; (VIII.) negligence of the servant of a person other than the plaintiff's employer not a risk assumed; (IX.) relation of the maxim to the defense of contributory negligence; (XI.) bearing of the servant's knowledge upon the question whether he was negligent. 161

Providing safe place for workmen; assumption of risks. 597

MAXIMS.

See also FENCES, 3.

1. *Damnum absque injuria*. McGraw v. Marion (Ky.) 593

2. No man shall take advantage of his own wrong in his prosecution or defense against another. *May v. Poindexter (Va.)* 588

3. *Res ipsa loquitur*. Tall v. Baltimore Steam Packet Co. (Md.) 120

4. *Salus populi suprema est lex*. Re Morgan (Colo.) 52

5. *Sic utere tuo ut alienum non lædas*. Re Morgan (Colo.) 52

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Maxims; res ipsa loquitur. 120
 Volenti non fit injuria. 162

MECHANIC'S LIEN.

See LIENS.

MEDICAL ATTENDANCE.

See MASTER AND SERVANT, 10.

MERCHANTS.

See CONSTITUTIONAL LAW, 6; INJUNCTION, 5.

MILITARY RESERVATION.

See VOTERS AND ELECTIONS, 1.

MINES.

See also ACTION OR SUIT, 4; CONSTITUTIONAL LAW, 12, 19; DAMAGES, 1; INJUNCTION, 1.

1. A lease of an undivided one-third interest in a mining claim, and not a mere license, is made by an instrument by which the party of the first part "hereby leases" such interest from date for a period of one year, while the party of the second part "agrees to work said mine in a workmanlike manner and leave the same in as good condition as it is at this time," and to pay royalty for all ores taken therefrom. Paul v. Oragnas (Nev.) 540

2. The estate or right of possession of the owner of an undivided interest in a mine is not limited or restricted with respect to his own property by his cotenant's lease of the other portion of the mine. Paul v. Cragnas (Nev.) 540

3. The continuous and persistent waste of natural gas, to the detriment of the community at large and in violation of statute, is a nuisance which may be abated by injunction. State v. Ohio Oil Co. (Ind.) 627

4. Wells producing both oil and gas are within the prohibition of the Indiana act of 1893, prohibiting the escape of gas from a well more than two days after it is constructed. State v. Ohio Oil Co. (Ind.) 627

5. The title to natural gas does not vest in any private owner until it is reduced to actual possession. State v. Ohio Oil Co. (Ind.) 627

NOTES AND BRIEFS.

Mines; possession of oil or gas in lands. 629

MISTAKE.

See VENDOR AND PURCHASER.

MONOPOLY.

Constitutionality of, see CONSTITUTIONAL LAW, 4.

MORTGAGE.

See also ACTION OR SUIT, 7.

1. A relationship between a mortgagor 47 L. R. A.

and a mortgagee in a chattel mortgage will not invalidate it as against other creditors, if the mortgage is given for a debt that is honestly due. Noyes v. Ross (Mont.) 400

2. A reasonable monthly allowance to a mortgagor, provided for in a chattel mortgage as compensation for his services to the mortgagee after the latter takes possession, will not make the mortgage fraudulent. Noyes v. Ross (Mont.) 400

3. A provision for the retention of possession by a mortgagor of a stock of goods, with the right to sell them in the ordinary and usual course of trade, does not make the instrument invalid, provided it appears that the sales are to be for the benefit of the mortgagee, and the mortgagor is to account to him for the proceeds of the sales. Noyes v. Ross (Mont.) 400

4. A provision that a mortgagor of a stock of goods may retain his necessary living expenses out of the proceeds of sales for which he is to account to the mortgagee does not make the mortgage invalid. Noyes v. Ross (Mont.) 400

5. Creditors who have no title or right of possession to mortgaged property cannot complain that the mortgagee takes possession thereof and sells at auction before the maturity of his debt, and without any authority contained in his mortgage to sell at that time. Noyes v. Ross (Mont.) 400

6. A provision that a mortgagor may give credit for thirty days on sales from a mortgaged stock of goods, for which he is to account to the mortgagee, does not show bad faith, or make the mortgage invalid. Noyes v. Ross (Mont.) 400

7. Credit sales should, under a chattel mortgage of a stock of goods permitting the mortgagor to retain possession and sell for cash or credit, all be deemed cash payments paid over to apply on the debt, in favor of other creditors of the mortgagor, although they are in fact uncollected at the time of the accounting. Noyes v. Ross (Mont.) 400

8. The balance of a mortgage debt after deducting the amount for which the property was bought by the mortgagee on foreclosure is not a "lawful charge," within the meaning of Ala. Code 1896, §§ 3507-3510, which require a creditor of the mortgagor, on redeeming from the foreclosure sale, to pay the purchase money and all "lawful charges." First Nat. Bank v. Elliott (Ala.) 742

NOTES AND BRIEFS.

Mortgage; of right to use streets for quasi-public purposes. 87

On chattels; validity of; permission to sell goods; stipulation as to mortgagor's expenses. 402

Lawful charges on redemption from. 742

MUNICIPAL CORPORATIONS.

License Tax by, see COMMERCE; LICENSE.

Liability for Discharge of Sewer, see DRAINS.

See also CONSTITUTIONAL LAW, 4; CONTRACTS, 7-9; COURTS, 6; INTOXICATING LIQUORS, 1-3, 6; LIVERY STABLES; PUBLIC IMPROVEMENTS; STATUTES, 2; WATERS, 2, 3.

1. A city may be required by the legislature to pay the expense of acquiring an easement for a public park in the city, such as an easement of light, air, and view created by limiting the height of adjacent buildings. *Knowlton v. Williams* (Mass.) 314

2. A municipal corporation is not liable for injury to a person who is struck by a bicycle ridden by another person on a sidewalk, by reason of the failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks. *Jones v. Williamsburg* (Va.) 294

3. The enforcement of a void and unconstitutional ordinance or by-law by officers of a municipal corporation will render the municipality liable to a person who is thereby injured. *McGraw v. Marion* (Ky.) 593

NOTES AND BRIEFS.

Municipal corporations; as to Letting Contracts, see CONTRACTS.

Power to build waterworks; authorizing construction by others. 215

Municipal liability for arrest and imprisonment under valid ordinance. 593

NATURAL GAS.

See MINES, 3.

NEGLIGENCE.

Contract against Liability for, see COVENANTS, 2.

See also FRIGHT, 1; HIGHWAYS, 5-7; MASTER AND SERVANT, 7, 8; PROXIMATE CAUSE; RAILROADS, 2, 3; TRIAL, 5, 6.

The employment of a competent engineer to direct a work is not the fulfillment of a duty to avoid doing injury to another, when, notwithstanding the engineer's competency, the work as constructed does cause injury. *Lion v. Baltimore City Pass. R. Co.* (Md.) 127

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Negligence; of person in sudden peril. 788

NEGOTIABLE PAPER.

See BILLS AND NOTES.

NERVOUS SHOCK.

See FRIGHT.

NEW TRIAL.

See also APPEAL AND ERROR, 9.

1. Inadequacy of damages may be a ground of setting aside a verdict and ordering a new trial. *Benton v. Collins* (N. C.) 33

2. A new trial on the single issue of the amount of damages may be allowed, although this cuts off some evidence which, 47 L. R. A.

if introduced on other issues, might mitigate damages, where all such evidence is admissible on the issue as to damages. *Benton v. Collins* (N. C.) 33

3. A grant of a new trial on one or more of several issues is in the sound discretion of the court, where the matter involved is entirely distinct and separable from the matters involved in the other issues. *Benton v. Collins* (N. C.) 33

NOTICE.

Imputed by Agent's Knowledge, see INSURANCE, 2-4.

See also ACTION OR SUIT, 2; APPEAL AND ERROR, 2; BANKS, 6; BRIDGE; CONSTITUTIONAL LAW, 13; NUISANCE, 2, 3; PUBLIC IMPROVEMENTS, 6.

NUISANCE.

See also HIGHWAYS, 2; MINES, 3; PLEADING.

1. A substantially built dwelling house with a brick foundation extending into a street constitutes a public nuisance. *Valparaiso v. Bozarth* (Ind.) 487

2. A notice or request to remove a building which encroaches on a street is not necessary before bringing an action to abate it as a nuisance, when brought against the person who erected the building with constructive notice of the street line by a recorded plat, although such person was only a lessee of the premises, and in good faith believed that the building was entirely outside the street line, and in fact it encroached less than other houses and improvements on the street. *Valparaiso v. Bozarth* (Ind.) 487

3. Notice to the original wrongdoer of injury caused by a structure made by him is not necessary to make him liable to the owner of property injured thereby, although the latter becomes the owner thereof after the construction of the work which does the injury. *Lion v. Baltimore City Pass. R. Co.* (Md.) 127

NOTES AND BRIEFS.

Nuisance; necessity of notice of, before suit. 128

Of livery stable. 652

OCCUPATION TAX.

See LICENSE, 1.

OFFICERS.

See also BANKS, 8; CONSTITUTIONAL LAW, 10; INJUNCTION, 2.

1. A woman cannot be elected prosecuting attorney under Mich. Const. art. 10, § 3, which provides that such officers shall be "chosen by the electors," while there is no express provision conferring on women the right to hold this office. *Oren v. Abbott* (Mich.) 92

2. A statute providing that certain incorporated associations shall each select one of the members of a state board of inspec-

tors from which commission merchants must procure licenses is in violation of Ill. Const. art. 4, § 22, which prohibits any law granting "to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever," since the power to appoint such inspectors, who are general officers of the state, must be deemed a franchise. *Lasher v. People* (Ill.) 802

3. A vacancy in the office of a justice of the peace to be filled by appointment by judges of the circuit court, under Mo. Acts 1891, p. 175, is not created by the failure to elect an incumbent at an election which results in a tie vote, under Mo. Const. art. 14, § 5, providing that all officers "shall hold office during their official terms and until their successors shall be duly elected or appointed and qualified." *State ex rel. Crow v. Smith* (Mo.) 560

4. Executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. *State, New Orleans Canal & Bkg. Co. v. Heard* (La.) 512

NOTES AND BRIEFS.

See also **VOTERS AND ELECTIONS.**

Officers; eligibility of women. 93

Right to hold over beyond term. 562

OIL.

NOTES AND BRIEFS.

Oil; in land; ownership and possession of. 629

OPTION.

Option; of Contract, see **CONTRACTS**, 2.

ORDINANCE.

See **COURTS**, 6; **MUNICIPAL CORPORATIONS**, 3.

PARDON.

NOTES AND BRIEFS.

Pardon; power of legislature to grant. 118

PARENT AND CHILD.

See also **DISCOVERY AND INSPECTION**; **HUSBAND AND WIFE**, 5; **INFANTS**, **NOTES AND BRIEFS.**

A mother is not entitled to damages for injuries to a minor child, the care and custody of which have been given to her by a divorce decree, where the father is still charged with the duty of supporting the child. *Keller v. St. Louis* (Mo.) 391

PARKS.

See also **EMINENT DOMAIN**, 1; **MUNICIPAL CORPORATIONS**, 1.

A building erected above the height limited by statute in front of a public park is a purpresture which, while not in a strict and narrow sense a public nuisance, is in 47 L. R. A.

the nature of a public nuisance, and to be dealt with in equity as such. *Knowlton v. Williams* (Mass.) 314

PARLIAMENTARY LAW.

NOTES AND BRIEFS.

Parliamentary law; casting vote by presiding officer in deciding tie on election. 561

PARTNERSHIP.

The inclusion in a partnership mortgage, of the debt of one of the partners, will not invalidate the mortgage in favor of subsequent lien creditors of the partnership. *Noyes v. Ross* (Mont.) 400

PARTY.

See **ACTION OR SUIT**, 6, 7; **MANDAMUS**, 2.

PASSENGER.

See **CARRIERS.**

PATENTS.

See **CONTRACTS**, 9.

PAYMENT.

See **CONSTITUTIONAL LAW**, 8.

PHOTOGRAPHS.

See **EVIDENCE**, 9-12

PHYSICAL EXAMINATION.

See **DISCOVERY AND INSPECTION**, **NOTES AND BRIEFS.**

PHYSICIANS.

Opinion of, as Evidence, see **EVIDENCE**, 16.

See also **DAMAGES**, 2; **MASTER AND SERVANT**, 10; **WITNESSES**, 2.

PLEADING.

See also **APPEAL AND ERROR**, 20; **COURTS**, 10.

A complaint for an injunction against the removal of a building on the ground that a nuisance will be thereby created by leaving a dangerous excavation under the sidewalk and a part of the street is insufficient, where there is no allegation that the owner threatens or intends to leave his premises in a dangerous condition. *St. Lawrence v. Gross* (S. D.) 572

POLICE POWER.

See **COURTS**, 3.

POLITICAL RIGHTS.

Protection of, see **INJUNCTION**, 3.
See also **CONSTITUTIONAL LAW**, 10.

POLLUTION.

Of Water, see **DAMAGES**, 5.

PRESUMPTION.

See **EVIDENCE.**

PRINCIPAL AND AGENT.

As to Insurance Agent, see **INSURANCE**, 2-4.

1. A subagent intrusted with the collection of a debt due from a third party may not apply the proceeds of the same to the payment of a claim due himself from the principal agent from whom it came, knowing that it belongs to such party, or in any way divert the funds so collected from a quick and speedy transmission to the owner thereof. *Milton v. Johnson* (Minn.) 529

2. A principal agent who has forwarded collections to a subagent, directing him to make any use of the funds other than the usual one of their application to the payment of the debt to the principal, if such subagent complies with such direction, becomes responsible therefor to the principal. *Milton v. Johnson* (Minn.) 529

NOTES AND BRIEFS.

Principal and agent; liability for act of subagent. 529

PRIVILEGED COMMUNICATIONS.

See **EVIDENCE**, 4; **LIBEL AND SLANDER**, 3-5.

PRIVILEGE TAX.

See **COMMERCE**, 1.

PROBATE.

See **JUDGMENT**, 5.

PROHIBITION.

1. Remedy by motion to dissolve an injunction, and an appeal on final judgment, will not preclude a writ of prohibition against an injunction to test the title to an office, when the term of office will probably expire before the appeal can be heard and decided. *State ex rel. McCaffery v. Aloe* (Mo.) 393

2. The dissolution of an injunction on issuing an order to show cause why a writ of prohibition should not issue against the injunction suit may be ordered, although it is only necessary for the information of those concerned, so that there can be no doubt as to the effect of the rule to show cause, which of itself, if not qualified, would dissolve the injunction. *State ex rel. McCaffery v. Aloe* (Mo.) 393

NOTES AND BRIEFS.

Prohibition; object of writ of; effect of right of appeal; petition for. 393

PROXIMATE CAUSE.

See also **CARRIERS**, 4; **FRIGHT**, 2.

1. Defects in the railing of a bridge were the proximate or efficient cause of the accident, when the railing was broken by a team of horses one of which was frightened by a flash of lightning, if the accident would not have happened had the railing been sufficient, although, on the other hand, it would not have happened except for the lighting. *Walrod v. Webster County* (Iowa) 480
47 L. R. A.

2. One whose negligence concurred with some other cause, both operating proximately at the same time in producing the injury, is liable therefor, whether the other cause was one for which he was responsible or not. *Walrod v. Webster County* (Iowa) 480

3. A back fire set for the purpose of protecting property from an approaching prairie fire, and which runs until it meets the main fire, will not be deemed the proximate cause of the destruction of property which would have been destroyed by the main fire if no back fire had been set, but the original fire is the proximate cause of the loss. *Owen v. Cook* (N. D.) 646

4. A person starting to cross a railroad track, but prevented from doing so by a train, and who, on finding that the safety gates have been closed, takes a dangerous position, disregards a call to get back, and resists the gateman's efforts to remove him to a safe place, cannot recover from the railroad company for being thrown down in the tussle, in consequence of which his leg is cut off by the train, since his resisting the effort to save him is the proximate cause of his injury. *McAnally v. Pennsylvania R. Co.* (Pa.) 788

NOTES AND BRIEFS.

Proximate cause; what constitutes; of injury by fright of horse. 480

PUBLIC CONTRACTS.

See **CONTRACTS**, 7-9.

PUBLIC IMPROVEMENTS.

See also **APPEAL AND ERROR**, 11; **CONSTITUTIONAL LAW**, 13; **INJUNCTION**, 6.

1. Land not laid out into lots need not be subdivided for the purpose of a street assessment, although, if divided, one portion of it taken alone would not be of sufficient value to support the assessment upon it, where taken as a whole it is of sufficient value for the assessment upon it all. *Schroder v. Overman* (Ohio) 156

2. Paving a street at the expense of the adjoining property, which has been previously charged with an improvement of the street by graveling to grade, is not in violation of the Wisconsin general charter law, § 177, providing that the "expense of maintenance, relaying, keeping in repair, and cleaning of streets" which have once been "constructed to grade and graveled, planked, macadamized, or paved," shall be paid from the general city or ward fund, when this is construed with § 175, which authorizes the city to "level, relevel, grade, regrade, gravel, regravel, macadamize, pave, and repave said streets" at the expense, in whole or in part, of the property benefited. *Adams v. Beloit* (Wis.) 441

3. The franchise and right of way of an elevated railroad company which operates its road upon a structure about 20 feet high, supported by pillars about 40 feet apart, and resting on the street at the curb lines, and having stations reached by stairs

from the street, constitute property subject to assessment for benefits by paving the street. *Lake Street Elev. R. Co. v. Chicago (Ill.)* 624

4. A paving assessment may be levied on that part of the franchise or right of way of an elevated railroad company which extends along the street which is paved, without being levied on the franchise or right of way as an entirety. *Lake Street Elev. R. Co. v. Chicago (Ill.)* 624

5. An ordinance requiring an elevated railroad company to restore the pavements, gutters, sidewalks, water pipes, sewer pipes, or gas pipes, in case there is any disturbance of the same during the construction of the elevated road, does not constitute a contract limiting the liability of the company to such repairs, so as to preclude it from being assessed for benefits on account of a pavement. *Lake Street Elev. R. Co. v. Chicago (Ill.)* 624

6. A notice of an assessment for a local improvement must be such that persons of ordinary intelligence may understand when, where, and before whom they have the right to appear to protect themselves from illegal or erroneous assessments, without being compelled to employ attorneys to determine these questions for them. *Norfolk v. Young (Va.)* 574

7. A city cannot be compelled to repay an assessment for a street improvement to the lot owner from whom it was collected, on account of the failure to complete the work and the fact that his property was not benefited by the work done, when it does not appear that the money accruing from the assessment has not been legally and honestly expended on the improvement. *Rogers v. St. Paul (Minn.)* 537

NOTES AND BRIEFS.

Public improvements; assessments for; due process of law in; notice to parties; opportunity to be heard. 574

Assessment of street railway for. 624

PUBLIC MONEY.

Appropriation of, see APPROPRIATIONS.

1. The use of moneys raised by taxation for the benefit of a volunteer fire department not employed by a municipality, and for whose services no expense is assumed or incurred by the municipality, is unconstitutional, as such use of public moneys is not for a public purpose. *Re Page (Kan.)* 68

2. The use of public moneys of the state to pay a convict for wrongful conviction and imprisonment is a mere gratuity, subject to Mich. Const. art. 4, § 45, requiring the assent of two thirds of the legislature for an appropriation for private purposes. *Allen v. Board of State Auditors (Mich.)* 117

3. Any balance remaining to the credit of any separate fund of state moneys created by law, after warrants against it have been satisfied, may be applied by the legislature to any lawful purpose under the Const. 47 L. R. A.

stitution. *State, New Orleans Canal & Bkg. Co. v. Heard (La.)* 512

NOTES AND BRIEFS.

Public moneys; power of legislature to give away; paying moral obligation. 118

Recovering back money paid for assessment. 537

PUNCTUATION.

See CONTRACTS, 3.

NOTES AND BRIEFS.

Punctuation; as affecting interpretation of writing. 309

PURPRESTURE.

See PARKS.

QUA TIMET.

The remedy of a bill *quia timet*, by which one may go into a court of chancery to prevent the occurrence of events which he fears will be so disastrous that they will be beyond remedy in a court of law is not available merely because one fears that, if events are left to take their course, he will be forced to plead in a court of law, when the remedy at law will be ample. *State ex rel. McCaffery v. Aloe (Mo.)* 393

RAILROADS.

Compensation for Land Taken or Injured by, see DAMAGES, 5-7.

Consequential Damages Caused by, see EMINENT DOMAIN, 2.

See also ACTION OR SUIT, 2; CONSTITUTIONAL LAW, 7; COVENANT, 1, 2; MASTER AND SERVANT, 9; PROXIMATE CAUSE, 4.

1. Authority of railroad commissioners to order a railroad company to build and maintain a depot or station house for which there is a clear and pressing public necessity, at a certain station, is conferred by S. D. Laws 1897, chap. 110, § 2, giving them "general supervision of all railroads," and providing that they shall inform a railroad corporation of "the improvements and changes which they adjudge to be proper" whenever in their judgment "any addition to or change of its stations or station houses . . . is reasonable and expedient in order to promote the security, convenience, and accommodation of the public." *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co. (S. D.)* 569

2. Negligence in piling wood near a railroad, where it is in danger of fire, will not relieve the railroad company from liability for negligence in setting it on fire, if it has full knowledge of the situation, and by the exercise of ordinary care and skill might avoid the injury. *Boston Excelsior Co. v. Bangor & A. R. Co. (Me.)* 82

3. Contributory negligence of the owner of property destroyed by fire communicated by a locomotive engine is no defense to the railroad company, under Me. Rev. Stat. chap. 51, § 64, which imposes an absolute

liability on the corporation for damages.
 Boston Excelsior Co. v. Bangor & A. R. Co.
 (Me.) 82

NOTES AND BRIEFS.

Railroads; duty as to trespassers on right
 of way; liability for fire; contributory negli-
 gence. 82

Injury to bicyclists at crossing. 301

Compelling construction of depot. 570

RAILWAY COMMISSIONERS.

See RAILROADS, 1.

RATES.

See CONSTITUTIONAL LAW; COURTS,
 NOTES AND BRIEFS.

RECEIPT.

See INSURANCE, 9.

RECEIVERS.

See also ATTORNEYS; CORPORATIONS, 6;
 JUDGMENT, 2, 3.

A receiver of a foreign corporation who, by the law of the state in which he is appointed, has title to the right of action against stockholders to enforce their statutory liability, may be allowed by comity to enforce such liability in another state where a stockholder resides, when the amount of his liability has been definitely ascertained and is only his proportion of the ascertained deficiency of assets, and it does not appear that there is any other stockholder or any creditor of the corporation in that state, or that injury will be thereby done to any citizen of the state, or any established policy of the state thereby interfered with. *Howarth v. Angle* (N. Y.) 725

NOTES AND BRIEFS.

Receivers; right to enforce stockholder's liability. 618

Double employment of attorneys in receivership. 794

RECORD.

On Appeal, see APPEAL, 5-8.

REDEMPTION.

See MORTGAGE, 8.

REFERENCE.

The assistance of a master, when needed by the court in hearing such matters as have always been heard by masters under the equity practice of the court, will be presumed to have been intended by the legislature, when it has authorized a novel proceeding not known to the common law, without stating whether it shall be deemed a proceeding at law or a proceeding in equity. *Re Janvrin* (Mass.) 319

REPLEVIN.

NOTES AND BRIEFS.

Replevin; requisites of cause of action. 125

RESERVATION.

See DEEDS, NOTES AND BRIEFS.

RESIDENCE.

See APPEAL AND ERROR, 13.

RES JUDICATA.

See JUDGMENT.

RÉSUMÉ.

For *Résumé* of Contents of Book, see 865.

REVENUE.

See LICENSE, 3.

RIVER.

See BOUNDARY.

ROENTGEN RAYS.

See EVIDENCE, 11, 12.

SALE.

See ESTOPPEL, 1; FACTORS, NOTES AND BRIEFS.

SALOON.

See INTOXICATING LIQUORS.

SCHOOLS.

See COUNTIES.

SCREENING COAL.

See CONSTITUTIONAL LAW, 19.

SEAL.

See ANNUITY.

SEARCH AND SEIZURE.

NOTES AND BRIEFS.

Search and seizure; constitutional protection against. 68

SENATE.

See COURTS, 1.

SET-OFF AND COUNTERCLAIM.

NOTES AND BRIEFS.

Set-off; in garnishment of executor. 348

SETTLEMENT.

See COMPROMISE.

SEWERS.

See DRAINS.

SHERIFF.

See LEVY, NOTES AND BRIEFS.

SHIPPING.

See ACTION OR SUIT, 3.

SIGNATURE.

A signature to a paper by a mark made by a person for the purpose of identifying himself as a party thereto constitutes a good signature at common law, without any attestation thereof by a subscribing witness. *Finley v. Prescott* (Wis.) 696

SLANDER.

See LIBEL AND SLANDER.

SLEEPING CARS.

See CARRIERS, 5.

SPECIFIC PERFORMANCE.

1. A court will not undertake to frame a decree of specific performance of a contract, where it involves a continuous and long series of acts of supervision requiring special knowledge and skill and repeated examinations and new directions, such as would be required in enforcing a contract for opening and developing mining property which consists of a large number of mining claims of different kinds, and for erecting a quartz mill modern in every particular, with stamps of a certain weight, or its "equivalent," without specifying where the mill is to be built or when the contract is to be performed. *Stanton v. Singleton* (Cal.) 334

2. A contract to expend \$10,000 in "opening and developing" mining property which consists of a large number of mining claims, both quartz and placer, and in erecting a ten-stamp quartz mill, without any provision as to the place for it or the time in which the money should be expended, except that active operations should be commenced within thirty days, cannot be specifically enforced for want of certainty and exactness in its provisions. *Stanton v. Singleton* (Cal.) 334

3. The ownership of an undivided one-third part of mining property by a person who has not executed a contract made by his cotenants for the opening and developing of the property, and who is not a party to the action, will preclude a decree for the enforcement of the contract in favor of the party who was to be let into possession and perform it. *Stanton v. Singleton* (Cal.) 334

STAMP.

See CONSTITUTIONAL LAW, 6.

STATE.

Action by, for Injunction, see INJUNCTION, 1.

See also CLAIMS; MANDAMUS, 2; STATUTES, 4.

The state has a right to maintain a suit in its courts, both in its sovereign capacity and by virtue of its corporate rights. *State v. Ohio Oil Co.* (Ind.) 627

NOTES AND BRIEFS.

State; consent to be sued. 117

Action by, to protect public interest. 628

STATE AUDITORS.

See AUDITORS.

STATE INSTITUTION.

See also ACTION OR SUIT, 5; LIENS, 1.

The Eastern State Hospital of Virginia, which was created and exists for 47 L. R. A.

purely governmental purposes, and is under the exclusive ownership and control of the state and supported by the state, having no stockholders and no members except directors, who are without any interest in it or its affairs, but are appointed by the governor and are in fact public rather than corporate officials, liable to fines for any failure to perform their duties,—is not liable for injury to an inmate occasioned by the negligence or misconduct of the persons in charge of the hospital. *Maia v. Eastern State Hospital* (Va.) 577

NOTES AND BRIEFS.

State institutions; lien on property of state university. 284

Liability of, for injuries. 577

STATUTE OF FRAUDS.

See CONTRACTS, 4, 5.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

See also APPROPRIATIONS; CORPORATIONS, 1; COURTS, 2, 10.

1. The recital of a particular mischief in the preamble of a statute does not limit the broader scope of the language of the act, which is neither ambiguous nor doubtful in meaning. *State v. Ohio Oil Co.* (Ind.) 627

2. The option to adopt the provisions of a general statute, given by Wis. Rev. Stat. 1898, chap. 40b, § 926, to cities incorporated under special charters, does not bring that statute into conflict with Wis. Const. art. 4, §§ 31, 32, prohibiting any special or private law to amend municipal charters, and providing that laws for such purposes must be general and uniform in their operation throughout the state. *Adams v. Beloit* (Wis.) 441

3. Regulations as to payment of wages of employees of corporations, contained in Kan. Laws 1897, chap. 145, cannot be upheld as amendments or alterations of corporate charters, as the statute is entitled, "An Act to Secure to Laborers and Others the Payment of Their Wages," without any reference to corporate charters, while the Constitution provides that no bill shall contain more than one subject, which shall be expressed in its title. *State v. Haun* (Kan.) 369

4. The re-enactment of a state statute which was ineffectual when passed, because it attempted to regulate the lien of judgments of Federal courts without any authority to do so, is not necessary in order to make the statute operative, after Congress has removed the obstacle to such state legislation or conferred authority for it. *Blair v. Ostrander* (Iowa) 469

5. Re-enacting an existing general statute, and making it applicable only to a particular county, do not repeal, supersede, or

affect the operation of the general law.
May v. Poindexter (Va.) 588

6. No repeal of the provision of Michigan telephone act of 1883, giving permission to use the streets without consent of the municipality, is made by Mich. Pub. Acts 1895, No. 215, chap. 22, § 14, which in general terms give the common council authority to regulate or prohibit the use of signs, awning posts, and telegraph and other poles in or over the streets. Michigan Teleph. Co. v. Benton Harbor (Mich.) 104

NOTES AND BRIEFS.

Statutes; constitutional provisions as to enactment; in form of joint resolution. 117
Local laws for local affairs. 316
Constitutional provisions as to title; special legislation. 370
Special legislation to amend city charters; local adoption of statute. 442
Special, to amend charter of city. 489
Construction of. 570

STIPULATION.

See TRIAL, NOTES AND BRIEFS.

STOCK.

See CORPORATIONS; NOTES AND BRIEFS.

STOCKHOLDER.

Of Foreign Corporation; Suit against, by Receiver, see RECEIVERS.
See also CORPORATIONS, 4-6; EVIDENCE, 6.

STREET ASSESSMENT.

See PUBLIC IMPROVEMENTS.

STREET RAILWAYS.

See HIGHWAYS, 6.

NOTES AND BRIEFS.

See PUBLIC IMPROVEMENTS.

Street railways; injury to bicyclists.

302

STREETS.

See HIGHWAYS.

SUBAGENT.

See PRINCIPAL AND AGENT.

SUCCESSION TAX.

See TAXES, 2-4.

SUICIDE.

See INSURANCE, 10, 19.

SUNDAY.

See INTOXICATING LIQUORS, 3.

SURFACE WATER.

See WATERS, 1.

SURROGATE.

See EXECUTORS AND ADMINISTRATORS.

TAIL RACE.

See DRAINS.

47 L. R. A.

TAXES.

On Privilege to Receive Intoxicants in Municipality, see INTOXICATING LIQUORS, 6.

See also CONSTITUTIONAL LAW, 7; COVENANT, 4; LICENSE, 1; LIES PENDENS; PUBLIC MONEY, 1.

1. A tax of 10 per cent on the premiums paid or contracted to be paid for insurance by contracts made with companies not authorized to do business in the state is in violation of the constitutional rule of uniformity, as it taxes the contracts without taking any account of their value or of the solvency of the insurers, and is imposed only on contracts made with companies that are not authorized to do business in the state. Re Page (Kan.) 68

2. The mandate of equality of taxation as near as may be in Minn. Const. art. 9, § 1, extends to inheritance taxes authorized by a proviso to that section, which specifies that above a fixed and specified sum they may be uniform or graded or progressive. Drew v. Tift (Minn.) 525

3. An exemption from inheritance taxes authorized by Minn. Const. art. 9, § 1, must be uniform and apply equally to all persons and corporations, and therefore Minn. Laws 1897, chap. 293, is unconstitutional because it excludes from such tax real property and persons and corporations whose property is exempt by law from taxation, and also gives a larger exemption to lineal heirs than to collaterals, and does not lay the tax on the excess of the value of the property received above a uniform exempted sum, but upon the entire sum received, if it is more than the exempted amount. Drew v. Tift (Minn.) 525

4. Imposing a higher rate of inheritance taxes on collateral heirs and distributees than upon lineals does not violate Minn. Const. art. 9, § 1, which expressly authorizes a graded or progressive tax. Drew v. Tift (Minn.) 525

NOTES AND BRIEFS.

Taxes; rule of uniformity. 68
In nature of local assessment for benefits; rule of uniformity. 77
Limiting to public purposes. 118
On inheritances; equality of. 525

TELEPHONES.

See also COURTS, 4; EVIDENCE, 1; HIGHWAYS, 3, 4; STATUTES, 6.

1. The permission granted to a telephone company to maintain its lines in a municipality can be alienated to another company without the consent of the city, by virtue of 3 How. (Mich.) Ann. Stat. § 4904e, which expressly authorizes corporations to alienate their property. Michigan Teleph. Co. v. St. Joseph (Mich.) 87

2. The acceptance of the privileges granted by laws of the state to a telephone company, and permission to use streets duly given by a municipality, followed by the expenditure of money by the corporation in

valuable improvements, constitutes a contract which neither state nor municipality can impair or destroy, unless the power to do so is reserved in the grant itself or in the Constitution. *Michigan Teleph. Co. v. St. Joseph (Mich.)* 87

TENANTS IN COMMON.

See COTENANCY.

TENDER.

See GARNISHMENT, 2.

THREATS.

See DURESS.

TICKETS.

See CONSTITUTIONAL LAW, 6.

TIE VOTE.

See VOTERS AND ELECTIONS, 21.

TIMBER.

A forfeiture of a right to timber on land, given by a deed, does not result from a neglect to remove the timber for an unreasonable time. *Smith v. Furbish (N. H.)* 226

TOLL.

NOTES AND BRIEFS.

Tolls; on bicycles. 303

TORNADO INSURANCE.

See INSURANCE, 16.

TOWN.

NOTES AND BRIEFS.

Town; liability for act of officer. 313

TRADING STAMPS.

See CONSTITUTIONAL LAW, 6; LICENSE, 2.

TREES.

See HIGHWAYS, 4.

TRESPASS.

See also CASE, 2; FENCES, 2, 3.

1. One who has the equitable title and full right to call for the legal title may, as against a trespasser, maintain the same action as one who has the entire ownership of land, legal and equitable. *Russell v. Meyer (N. D.)* 637

2. The owner of unoccupied land may sue for trespass. *Russell v. Meyer (N. D.)* 637

NOTES AND BRIEFS.

Trespass; sufficiency of equitable title to sustain action for trespass to land;—(I.) Action against owner of legal title; (II.) action against mere wrongdoer generally; (III.) action for permanent injury; (IV.) statutory action. 637

TRIAL.

See also MASTER AND SERVANT, 7.

1. A waiver of jury trial by parties may 47 L. R. A.

be disregarded by the court in its discretion, and the issues submitted to the jury. *Wittenberg v. Onsgard (Minn.)* 141

Questions for court or jury.

2. What constitutes duress is matter of law; whether duress exists in a particular transaction or not is matter of fact. *Galusha v. Sherman (Wis.)* 417

3. A question for the jury as to malice of the writer of a defamatory letter is raised, although the question of privilege is for the court, where violent language is used, and improper and evil motives are attributed. *Sullivan v. Strahorn-Hutton-Evans Commission Co. (Mo.)* 859

4. Whether compensation for the pollution of a stream by operation of a railroad had been made when land was appropriated for the first railroad across the premises is a question for the jury, on an issue as to damages from the subsequent construction of another railroad. *Rudolph v. Pennsylvania S. V. R. Co. (Pa.)* 782

5. The question of negligence in starting a back fire to protect property is not for the jury, when fair-minded men could not draw an inference of negligence from the undisputed facts. *Owen v. Cook (N. D.)* 646

6. Neglect of the duty to keep a reasonable watch over the safety of sleeping passengers and their persons is a question for the jury, where the only person whose duty it was under the rules of the company to keep a lookout in the car had taken charge of it after a long and fatiguing passage which to some extent disqualified him for the duties of a watchman, and he on two occasions during the night, when the train had stopped at stations, voluntarily absented himself for at least twenty minutes at a time. *Pullman's Palace Car Co. v. Hunter (Ky.)* 286

Objections and exceptions.

7. An objection to the whole of an affidavit is properly overruled, if part is admissible in evidence. *Walrod v. Webster County (Iowa)* 480

8. Failure to object to evidence when offered is ground for refusing to strike it out afterward, if no reason was given for the failure to object. *Walrod v. Webster County (Iowa)* 480

9. An exception to the direction of a verdict is sufficient to present the question whether there is a case for the jury, without requesting that any fact be submitted. *Rochester & K. F. Land Co. v. Raymond (N. Y.)* 246

Instructions; submission to jury.

10. A formal statement of the issues by the court to the jury need not present all the issues if they are all fairly and sufficiently presented in other portions of the charge. *Walrod v. Webster County (Iowa)* 480

11. All the evidence submitted by plaintiff is within the rule that upon motion for nonsuit the evidence should be interpreted

most strongly against defendant. *Hanley v. California Bridge & Constr. Co.* (Cal.) 597

Findings.

12. Findings in an equity case should cover specifically and severally each material fact in issue. *Galusha v. Sherman* (Wis.) 417

Verdict.

13. A special verdict is one which determines specifically the ultimate facts which are in issue, not one which determines evidential facts on which such ultimate facts rest. *Russell v. Meyer* (N. D.) 637

NOTES AND BRIEFS.

Trial; power of court to vacate or set aside stipulation; stipulation as a contract. 141

Question for jury as to good faith in case of alleged libel. 223

Effect of verdict in equity case. 403

TROUT.

See CONSTITUTIONAL LAW, 11; FISH-ERIES.

TRUSTS.

The general deposit by an administrator, of moneys of the estate in a bank owned by him, destroys its identity if any portion of the money in the bank is afterward checked out, so that it is impossible to trace the fund as a trust fund into the hands of the bank's assignee in case of insolvency, although more than the amount of such deposit remains in the bank. *Shute v. Hinman* (Or.) 265

NOTES AND BRIEFS.

Trusts; lien or preference of creditor in trust property. 265

Liability of receiver of trust fund misappropriated. 530

TUNNEL.

See MASTER AND SERVANT, 5-7.

UNDERTAKING.

See APPEAL AND ERROR, 3, 4.

VACANCY.

See OFFICERS, 3.

VENDOR AND PURCHASER.

See also DEEDS, 8.

A mutual mistake as to the location of boundary lines which are pointed out by vendor to vendee, when the result is that the latter gets only about half the quantity of land bargained for and less than half in value, will justify a rescission of the contract, although there is no fraud and no intentional misrepresentation. *Bigham v. Madison* (Tenn.) 267

VENUE.

See ATTEMPT, 1; COURTS, 7.
47 L. R. A.

VERDICT.

See APPEAL AND ERROR, 9, NOTES AND BRIEFS.

VIEW.

See APPEAL AND ERROR, 10.

VOTERS AND ELECTIONS.

See also APPEAL AND ERROR, 7, 13; INTERJUNCTION, 3; OFFICERS, 3.

1. Residence in a military reservation of the Federal government will not give one a right to vote at a state election held in the county where the reservation is located. *McMahon v. Polk* (S. D.) 830

2. The legislature has power to define and prescribe what shall constitute a lawful ballot. *Slaymaker v. Phillips* (Wyo.) 842

Official duty as to ballot.

3. It is not an unreasonable and unconstitutional restriction of the right of suffrage to require an indorsement by the official stamp and of the name or initials of the judge of election on the outside of an official ballot. *Slaymaker v. Phillips* (Wyo.) 842

4. A constitutional provision fixing the qualification of voters is not violated by a statute making void ballots not properly indorsed by the election officers. *Slaymaker v. Phillips* (Wyo.) 842

5. The absence of the official stamp or of the judge's name or initials on the exterior of the ballot when so folded as to conceal its face will cause its rejection under Wyo. Sess. Laws 1890, chap. 80, § 130, providing that a "ballot which is not indorsed by the official stamp or has not the name or initials of the judge of election . . . shall be void and shall not be counted." *Slaymaker v. Phillips* (Wyo.) 842

6. The mere failure of an election officer to perform some prescribed duty, in the absence of any fraud or imposition practised upon the voter, will not deprive him of his ballot, unless the language of the statute allows no other alternative. *Hope v. Flentge* (Mo.) 806

Aiding voter.

7. The fact that election judges went into the booths with electors in violation of the statute will not render the ballots void if there was no design to influence the electors unduly, unless they were in fact imposed upon or some advantage taken of them. *Hope v. Flentge* (Mo.) 806

8. Aid to a voter in casting his ballot, given by the judges of election without requiring a preliminary oath from him as the statute requires, does not make his vote invalid in the absence of any fraud on his part, —at least if the voter was one who was entitled to such assistance on making the oath. *Hope v. Flentge* (Mo.) 806

Crossing ballot.

9. More than one cross at the head of party tickets on the same ballot will annul it, although one of the parties had no candi-

dates for offices named on the ticket. *McMahon v. Polk* (S. D.) 830

10. A ballot is not vitiated by the fact that the cross is blurred as though by ink from a rubber stamp, if the outline of a perfect cross is traced or indicated by pencil marks. *McMahon v. Polk* (S. D.) 830

11. That the lines forming the cross extend slightly beyond the line of the circle will not vitiate the ballot. *McMahon v. Polk* (S. D.) 830

12. A vote should be counted which contains a cross opposite the name of a candidate, although it is partially obscured by a heavy printed line on the paper. *McMahon v. Polk* (S. D.) 830

13. A cross made by a rubber stamp provided for the purpose is sufficient to mark a ballot. *McMahon v. Polk* (S. D.) 830

14. A ticket is not vitiated by the fact that besides the cross within the circle another appears just outside the circle, as though made by inadvertently placing the stamp upon the paper. *McMahon v. Polk* (S. D.) 830

15. A mark opposite the name of a candidate, and the erasure of his rival's name, in addition to the mark in the circle, will not vitiate the ballot, where there is nothing to show a design to thus mark the ticket for the purpose of invading the secrecy of the ballot. *McMahon v. Polk* (S. D.) 830

16. A voter is imperatively required to cross out all but one of the groups of candidates upon his ballot, by Mo. Rev. Stat. 1889, § 4781, as amended by Mo. act April 18, 1893, which declares that "he shall prepare his ballot by crossing out the groups he does not wish to vote." *Hope v. Flentge* (Mo.) 806

17. A single name in one of the columns for party tickets on an official ballot, other columns of which have full lists of candidates, is a "group" within the meaning of a statute requiring the voter to cross out the groups he does not wish to vote. *Hope v. Flentge* (Mo.) 806

18. Leaving two columns uncrossed on an official ballot in violation of a statute which requires the voter to cross out the groups he does not wish to vote renders the ballot void as an entirety, and not merely as to the offices for which candidates are named in each column, although there is but one name in one of the columns, while in the other column there is a full list of candidates. *Hope v. Flentge* (Mo.) 806

Canvass or contest.

19. A recount of the ballots of a precinct will not be ordered because of rejected ballots, if there is no way of identifying what ballots, if any, were rejected. *Hope v. Flentge* (Mo.) 806

20. A provision in a section of an election law which provides for the canvassing of the votes, requiring the rejection only of surplus and duplicate votes, is not in conflict with a prior section making void ballots not properly indorsed, so as to nullify the prior
47 L. R. A.

section, and require such ballots to be counted. *Slaymaker v. Phillips* (Wyo.) 842

21. The power to decide between candidates for justice of the peace who have an equal number of votes, which Mo. Rev. Stat. 1889, § 6090, attempts to give to county courts, is denied by the Missouri Constitution, which provides for the election of justices of the peace, without making any provision, or authorizing the general assembly to make any provision, for deciding in case of a tie, while it does make such provision in respect to other officers. *State ex rel. Crow v. Kramer* (Mo.) 551

22. An omission to state in a contest of election to the office of state's attorney, that plaintiff was learned in the law, which is a constitutional qualification for the office, will be cured by an allegation in the answer that plaintiff was at the time of the election the legally qualified and acting state's attorney. *McMahon v. Polk* (S. D.) 830

NOTES AND BRIEFS.

Voters and elections; decision of tie vote at election:—(I.) In the absence of statutory provisions; (II.) statutory provisions applicable to tie vote: (a) general statement as to; (b) decision by lot: (1) constitutionality and construction; (2) effect of, on contest and right to contest; (c) casting vote by presiding officer; (d) appointment or election on failure to elect or to fill vacancy; (III.) summary. 551

Marking official ballot:—(I.) Validity and construction of law; (II.) official marks: (a) general rule; (b) printer's marks; (c) failure to indorse ballot; (d) erroneous or mistaken marking of ballot by official; (e) correction of errors; (III.) voter's marks: (a) preliminary statement; (b) failure to indicate intent; (c) failure to use cross; (d) imperfect cross; (e) device other than cross; (f) blots; (g) superfluous lines or marks: (1) distinguishing marks; (2) harmless marks; (h) mark with wrong implement; (i) mark in wrong place: (1) on back of ballot; (2) out of square; (3) on wrong side of name; (4) not opposite candidate's name; (j) conflicting marks; (k) alteration of ballot: (1) erasure of names; (2) addition of names; (l) attempted erasure of vote mark; (m) partial failure to vote. 806

WAGES.

See CONSTITUTIONAL LAW, 8, 9; STATUTES, 3.

WAIVER.

See INSURANCE, 20.

WAREHOUSEMEN.

See COVENANT, 2.

WARRANT.

See EXTRADITION, 3.

WARRANTY.

See COVENANT, 4.

WATERS.

See also **BOUNDARY**; **COURTS**, 5; **DAMAGES**, 5; **TRIAL**, 4.

1. Changing the accustomed flow of surface water on a street, and concentrating it in underground drains and a vault, where but part of the water formerly had flowed on the surface, is done at the peril of providing adequate means to discharge the water so gathered, and to discharge it in a way that will not be injurious to others. *Lion v. Baltimore City Pass. R. Co.* (Md.) 127

2. A grant of a franchise to a water company, without any words of exclusion or of limitation upon the right of the city, does not preclude the city from subsequently establishing waterworks of its own, although the result may be to destroy the value of the franchise. *North Springs Water Co. v. Tacoma* (Wash.) 214

3. The grant of power to a city by charter to construct, or authorize others to construct, waterworks, is not in the alternative so as to preclude the city, after granting a franchise which is not exclusive, from subsequently constructing waterworks of its own. *North Springs Water Co. v. Tacoma* (Wash.) 214

NOTES AND BRIEFS.

See also **DAMAGES**.

Waters; liability for waters gathered in-
to vault. 128

Right to unimpeded flow from mill
through tail race. 313

Right to, as part of real estate. 783

WILLS.

See **JUDGMENT**, 5.
47 **L. R. A.**

NOTES AND BRIEFS.

Wills; validating probate; suit to revoke
probate. 799

WITNESSES.

See also **EVIDENCE**, 8.

1. The communication by a woman to her family, of the fact of her engagement to marry, when admissible to show the mutuality of the agreement, may be proved by her own testimony. *Lewis v. Tapman* (Md.) 385

2. A medical expert who had diagnosed an injury as dislocation of the cervical vertebrae, complicated with a fracture, and testified that the accepted treatment of a dislocation of cervical vertebrae as laid down by the medical authorities is a reduction of the dislocation, may be asked on cross-examination whether a certain work admitted by him to be a standard authority does not lay down that, where the dislocation is complicated with a fracture, a physician would not be justified in attempting to reduce the dislocation. *Wittenberg v. Onsgard* (Minn.) 141

3. Affidavits, or those parts of them which contain statements at variance with the testimony of a witness on the stand, are properly admitted in evidence to impeach him. *Walrod v. Webster County* (Iowa)

WOMEN.

See **OFFICERS**, 1.

NOTES AND BRIEFS.

Women; eligibility to office. 93

X-RAYS.

See **EVIDENCE**, 11, 12.

L. R. A. CASES AS AUTHORITIES

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L. R. A. CASES AS AUTHORITIES.

CASES IN 47 L. R. A.

47 L. R. A. 33, *BENTON v. COLLINS*, 125 N. C. 83, 34 S. E. 242.

Grounds for new trial.

Cited in *Hall v. Hall*, 131 N. C. 186, 42 S. E. 562, holding that new trial may be granted as to one or more issues, and judgment affirmed as to others; *Gray v. Little*, 127 N. C. 306, 37 S. E. 270, holding that inadequacy of damages for malpractice may be ground for new trial; *Tathwell v. Cedar Rapids*, 122 Iowa, 55, 97 N. W. 96, and *Bodie v. Charleston & W. C. R. Co.* 66 S. C. 314, 44 S. E. 943, sustaining power of trial court to grant new trial for inadequacy of damages in action for personal injuries.

Annotation in 47 L. R. A. 33, referred to with approval in *Barette v. Carr*, 75 Vt. 428, 56 Atl. 93, holding that verdict in action for assault may be set aside for inadequacy.

Review of ruling on motion for new trial.

Followed in *Burns v. Ashboro & M. R. Co.* 125 N. C. 306, 34 S. E. 495, holding decision of trial judge as to adequacy of recovery for personal injuries not reviewable.

Allotment of homestead.

Cited in *Jordan v. Newsome*, 126 N. C. 558, 36 S. E. 154, holding that court will realLOT homestead reserved, but irregularly allotted.

47 L. R. A. 52, *Re MORGAN*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071.

Statutory limitation of hours of labor.

Followed without discussion in *Re Sweeney*, 26 Colo. 452, 58 Pac. 1116.

Cited in *Seattle v. Smyth*, 22 Wash. 329, 79 Am. St. Rep. 939, 60 Pac. 1120, holding ordinance forbidding contractor upon public works to permit day laborer or mechanic to work more than eight hours per day, void; *State v. Buchanan*, 29 Wash. 605, 59 L. R. A. 344, footnote p. 342, 92 Am. St. Rep. 930, 70 Pac. 52, sustaining prohibition against employment of women more than ten hours per day in certain establishments; *Wenham v. State*, 65 Neb. 406, 58 L. R. A. 830, 91 N. W. 421, sustaining statute limiting hours of work of women in certain employments; *State v. Cantwell*, 179 Mo. 274, 78 S. W. 569, sustaining act prohibiting working of laborers under ground more than eight hours daily; *Re Ten-Hour Law*, 24 R. I. 611, 61 L. R. A. 615, footnote p. 612, 54 Atl. 602,

which sustains limitation to ten hours a day of work of street railway employees.

Cited in footnotes to *Re Dalton*, 47 L. R. A. 380, which sustains eight-hour law applicable only to employees of state, municipality, or subdivision of state: *Fiske v. People*, 52 L. R. A. 291, which holds void, restriction of hours of labor on city contracts to eight hours per day; *Cleveland v. Clements Bros. Constr. Co.* 59 L. R. A. 775, which holds void, act limiting to eight hours a day work of laborers on public contract.

Statutory protection of employees.

Cited in footnotes to *Indianapolis Union R. Co. v. Houlihan*, 54 L. R. A. 787, which sustains statute making railroad company liable to employees for injuries by negligence of specified servants; *Chicago, W. & V. Coal Co. v. People*, 48 L. R. A. 554, and *Consolidated Coal Co. v. People*, 56 L. R. A. 266, which sustains statute for inspection, at owner's expense, of coal mines as often as inspector deems necessary.

Liberty to contract.

Cited in *Greenwich Ins. Co. v. Carroll*, 125 Fed. 128, holding statute prohibiting insurance companies to contract as to amount of agent's commissions, void.

47 L. R. A. 67, *STATE ex rel. McCAUSLAND v. FREEMAN*, 61 Kan. 90, 58 Pac. 959.

Effect of failure of majority to vote.

Cited in *Sumner County High School Trustees v. Sumner County*, 61 Kan. 799, 60 Pac. 1057, holding that failure of majority to vote against continuance of summer school continues same. .

Statutory hours of labor.

Cited in *State v. Atkin*, 64 Kan. 177, 97 Am. St. Rep. 343, 67 Pac. 519, and *Re Dalton*, 61 Kan. 264, 47 L. R. A. 383, 59 Pac. 336, sustaining statute providing that eight hours shall constitute a day's work for laborers employed on public work.

47 L. R. A. 68, *Re PAGE*, 60 Kan. 842, 58 Pac. 478.

Uniformity of taxation.

Cited in *Hamilton v. Wilson*, 61 Kan. 517, 48 L. R. A. 240, 59 Pac. 1069, holding act providing for taxation of judgments, void.

Cited in note (60 L. R. A. 340, 360) on constitutional equality in United States in relation to corporate taxation.

Validity of ordinance.

Distinguished in *Re Gray*, 64 Kan. 854, 68 Pac. 658, denying court's power to inquire into validity of city ordinance upon application of one arrested for violation and committed for trial.

47 L. R. A. 71, *STATE v. WILSON*, 61 Kan. 32, 58 Pac. 981.

Statutes restricting contracts.

Cited in *State v. Haun*, 61 Kan. 171, 47 L. R. A. 378, 59 Pac. 340, holding act prescribing manner of paying wages to miners, void.

Disapproved in *Re Preston*, 63 Ohio St. 439, 52 L. R. A. 525, footnote p. 523,

81 Am. St. Rep. 642, 59 N. E. 101, holding statute against screening coal before weighing and crediting to miner, void.

47 L. R. A. 77, ATCHISON, T. & S. F. R. CO. v. CLARK, 60 Kan. 326, 58 Pac. 477.

Uniformity of taxation.

Followed in 60 Kan. 831, 58 Pac. 561, holding statute providing for fire tax invalid as to railroads excluded from its benefit and protection.

Cited in Hamilton v. Wilson, 61 Kan. 518, 48 L. R. A. 241, 59 Pac. 1069, holding statute providing for taxation of judgments invalid, because of exemption of certain classes of judgments.

47 L. R. A. 79, LEBUS v. BOSTON, 107 Ky. 98, 92 Am. St. Rep. 333, 51 S. W. 609, 52 S. W. 956.

Easements in passageways.

Cited in Muir v. Cox, 110 Ky. 566, 62 S. W. 723, holding that vendee of part of one of several lots allotted in partition and subject to easement of passageways takes subject to passageway between such lot and part retained by vendor.

Sale of property by cotenant.

Cited in Irvine v. McCreary, 108 Ky. 502, 49 L. R. A. 421, 56 S. W. 966, denying right of cotenant to sell right to cut logs from land owned in common, so that purchaser can convey good title.

47 L. R. A. 82, BOSTON EXCELSIOR CO. v. BANGOR & A. R. CO. 93 Me. 52, 44 Atl. 138.

Railroad company's absolute liability for fires.

Cited in Bowen v. Boston & A. R. Co. 179 Mass. 527, 61 N. E. 141, holding owner of mill destroyed by fire communicated by locomotive entitled to recover, without proof of exercise of ordinary care; Indiana Clay Co. v. Baltimore & O. S. W. R. Co. 31 Ind. App. 261, 67 N. E. 704, holding instruction that jury may consider character of roof and whether water appliances maintained, error, in action for damage for loss of building by fire set by sparks from locomotive.

Cited in footnote to Kansas City, Ft. S. & M. R. Co. v. Blaker, 64 L. R. A. 81, which holds placing structure on railroad right of way with company's consent not contributory negligence preventing recovery for burning of other property by fire spreading therefrom.

47 L. R. A. 87, MICHIGAN TELEPH. CO. v. ST. JOSEPH, 121 Mich. 502, 80 Am. St. Rep. 520, 80 N. W. 383.

Right to place poles and wires in street.

Cited in Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 512, 47 L. R. A. 106, 80 N. W. 386, enjoining city's interference with poles and wires of telephone company; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 47, 82 N. W. 821, restraining city's interference with electric light poles and wires lawfully in street.

Cited in footnote to Northwestern Teleph. Exchange Co. v. Minneapolis, 53 L. R. A. 175, which requires council's discretion in compelling telegraph com-

pany to put underground, wires placed overhead under ordinance, to be reasonably exercised.

Contractual rights in street.

Cited in note (50 L. R. A. 146) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

47 L. R. A. 92, OREN v. ABBOTT, 121 Mich. 540, 80 N. W. 372.

47 L. R. A. 104, MICHIGAN TELEPH. CO. v. BENTON HARBOR, 121 Mich. 512, 80 N. W. 386.

Municipal control of streets.

Cited in Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 47, 82 N. W. 821, restraining city from interfering with poles and wires of electric light company lawfully erected in street; State *ex rel.* Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 39, 86 N. W. 657, denying city's authority to regulate telephone rates and demand right to use poles and line free, as condition of company's privilege to use street; *Re* Johnston, 137 Cal. 121, 69 Pac. 973, holding ordinance making it misdemeanor to lay pipes in street without permit, void.

47 L. R. A. 108, PEOPLE v. YOUNGS, 122 Mich. 292, 81 N. W. 114.

Attempt to commit crime.

Cited in People v. Webb, 127 Mich. 32, 86 N. W. 406, holding statute defining attempt to commit crime declaratory of common law.

Cited in footnote to Groves v. State, 59 L. R. A. 598, which holds mere preparatory acts for commission of crime not an attempt.

47 L. R. A. 112, TURNER v. ST. CLAIR TUNNEL CO. 121 Mich. 616, 80 N. W. 720.

Duty to furnish safe place.

Cited in footnotes to Hanley v. California Bridge & Constr. Co. 47 L. R. A. 597, which denies assumption by servant of risk of caving in of completed part of tunnel; Finn v. Cassidy, 53 L. R. A. 877, which holds safe *per se* place not provided by contractor having employees work in tunnel under foundation of chimney, with knowledge that undisturbed earth saturated with water; Ellsworth v. Metheney, 51 L. R. A. 389, which holds mine owner required to properly guard electric wire in passageway where miners accustomed to go; Cox v. American Agri. Chemical Co. 60 L. R. A. 629, which holds master sending servant to clean out drain filled with decaying animal matter not, as matter of law, free from duty to protect and warn as to danger from deadly gases.

47 L. R. A. 117, ALLEN v. STATE AUDITORS, 122 Mich. 324, 80 Am. St. Rep. 573, 81 N. W. 113.

Grant of judicial powers.

Cited in footnote to State *ex rel.* Ellis v. Thorne, 55 L. R. A. 956, which sustains statute for appointing commissioners by circuit judge to review and correct apportionment of state and county taxes.

47 L. R. A. 120, *TALL v. BALTIMORE STEAM PACKET CO.* 90 Md. 248, 44 Atl. 1007.

Carrier's liability for injury to passenger by one not under his control.

Cited in *United R. & Electric Co. v. State*, 93 Md. 624, 54 L. R. A. 943, footnote p. 942, 86 Am. St. Rep. 453, 49 Atl. 923, holding carrier liable for injuries inflicted on passenger by drunken passenger permitted to return after removal; *Fewings v. Mendenhall*, 88 Minn. 342, 60 L. R. A. 604, 97 Am. St. Rep. 519, 93 N. W. 127, denying street car company's liability to passenger injured by being hit by stone thrown by strike sympathizer.

Cited in footnotes to *Savannah, F. & W. R. Co. v. Boyle*, 59 L. R. A. 104, which denies carrier's liability for shooting passenger by negro tramp attempting to escape from arrest for stealing ride; *Spangler v. St. Joseph & G. I. R. Co.* 63 L. R. A. 634, which holds carrier liable for injury to passenger by missile thrown through window by fellow passengers known to be intoxicated and to have threatened revenge on those interfering with their disorderly conduct.

Cited in note (55 L. R. A. 719) on carrier's liability for assault on passenger by strikers, mob, or third persons.

47 L. R. A. 124, *HOPKINS v. COWEN*, 90 Md. 152, 44 Atl. 1062.

47 L. R. A. 127, *LION v. BALTIMORE CITY PASS. R. CO.* 90 Md. 266, 44 Atl. 1045.

Notice as basis of liability.

Cited in *Guest v. Church Hill*, 90 Md. 695, 45 Atl. 882, holding notice to city of its causing nuisance by failing to provide outlet for surface water after change of grade unnecessary before suit; *Davis v. Rich*, 180 Mass. 236, 62 N. E. 375, holding owner liable to one falling over ridge of ice formed from water conveyed to walk because of visible defect in spout.

Liability for act of independent contractor.

Cited in footnotes to *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 117, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former, though building heated by independent contractor; *Hoff v. Shockley*, 64 L. R. A. 538, which holds property owner not liable for injuries to traveler by obstructions placed in street, without danger signals, by independent contractor for construction of building.

47 L. R. A. 131, *BOWEN v. PORT HURON ENGINE & THRESHER CO.* 109 Iowa, 255, 77 Am. St. Rep. 539, 80 N. W. 345.

Levy as satisfaction of judgment.

Cited in *Valley Nat. Bank v. Des Moines Nat. Bank*, 116 Iowa, 546, 90 N. W. 342, holding that levy of execution upon personal property works as satisfaction of judgment, when to abandon it would injure subsequent lienors.

47 L. R. A. 136, *THIBERT v. SUPREME LODGE, K. OF H.* 78 Minn. 448, 79 Am. St. Rep. 412, 81 N. W. 220.

Benefit association's amendment of provisions.

Followed in *Tebo v. Supreme Council, Royal Arcanum*, 89 Minn. 11, 93 N.

W. 513, holding amendment of by-laws of benefit association prohibiting members to engage as freight brakeman void as to member who was brakeman before amendment.

Cited in footnotes to *Bragaw v. Supreme Lodge K. & L. of H.* 54 L. R. A. 602, which denies power of benefit society to change at will, contract of insurance made with each member; *Strauss v. Mutual Reserve Fund Life Asso.* 54 L. R. A. 605, which holds unauthorized, changes in constitution and by-laws destroying value of contract with insured; *Gaut v. Supreme Council A. L. of H.* 55 L. R. A. 465, which denies power of benefit society to reduce amount of certificate after payment of assessments for years; *Parish v. New York Produce Exchange*, 56 L. R. A. 149, which denies power to bind dissenting members by amending by-laws so as to distribute among living members, fund accumulated for persons dependent on members at time of death; *Shipman v. Protected Home Circle*, 63 L. R. A. 347, which holds adoption of by-law relieving benefit society from liability in case of suicide applicable to existing members who agreed to be bound by all rules enacted.

Compliance with existing laws.

Cited in footnote to *Peterson v. Gibson*, 54 L. R. A. 836, which holds provision in benefit certificate for compliance with constitution and by-laws refers to existing ones only.

Waiver of unreasonable assessment.

Cited in *Mutual Reserve Fund Life Asso. v. Taylor*, 99 Va. 219, 37 S. E. 854, holding that vote at stockholders' meeting for increase of assessment estops member to claim rate unreasonable.

47 L. R. A. 141, *WITTENBERG v. ONSGARD*, 78 Minn. 342, 81 N. W. 14.

47 L. R. A. 144, *STATE v. BRADFORD*, 78 Minn. 387, 81 N. W. 202.

Bicycle law.

Cited in footnotes to *Foote v. American Product Co.* 49 L. R. A. 764, which holds bicyclist entitled to keep to right unless reason for exception shown; *Richardson v. Danvers*, 50 L. R. A. 127, which holds bicycle not within statute for keeping highways reasonably safe for carriages.

Charging crime in language of statute.

Cited in footnote to *Haughn v. State*, 59 L. R. A. 789, which holds that following language of statute in indictment for bunco steering insufficient.

47 L. R. A. 147, *COYLE v. A. A. GRIFFING IRON CO.* 63 N. J. L. 609, 44 Atl. 665.

Assuming risk of employment.

Cited in footnote to *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Effect of violation of duty of self-protection.

Cited in *McGrath v. Delaware, L. & W. R. Co.* 68 N. J. L. 428, 53 Atl. 207, holding railroad employee's failure to notice defective condition of block used

to put under wheel of car to stop it, bar to his recovery for crushing of hand by wheels.

Direction of verdict.

Cited in *Anderson v. Central R. Co.* 68 N. J. L. 270, 53 Atl. 391, and *Meyer v. Madreperla*, 68 N. J. L. 260, 96 Am. St. Rep. 536, 53 Atl. 477, holding that in reviewing action of trial court in controlling verdict by peremptory instruction, question is whether jury could properly find contrary verdict.

47 L. R. A. 149, *NORTHERN P. R. CO. v. McCLURE*, 9 N. D. 73, 81 N. W. 52.

Continuing covenants.

Cited in *Kennedy Bros. v. Iowa State Ins. Co.* 119 Iowa, 36, 91 N. W. 831, holding covenant in lease of part of right of way for elevator, protecting railroad company for loss to building by fire from trains, binding upon successors to lessee.

Cited in footnote to *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad.

Railroad company's right to limit liability.

Cited in *Missouri, K. & T. R. Co. v. Carter*, 95 Tex. 477, 68 S. W. 159, holding railroad company's right to limit liability for damage caused by fire to property in its possession, but not as carrier, not prohibited by statute forbidding limitation of carrier's liability.

47 L. R. A. 153, *STATE v. SCHUMAN*, 36 Or. 16, 78 Am. St. Rep. 754, 58 Pac. 661.

Game laws and interstate commerce.

Cited in *Re Davenport*, 102 Fed. 544, denying state's authority to forbid traffic in game imported from another state where it was lawfully killed.

Cited in footnotes to *State v. Snowman*, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunting; *Smith v. State*, 51 L. R. A. 404, which sustains statute prohibiting possession of quail during close season; *People v. Buffalo Fish Co.* 52 L. R. A. 803, which holds void, act prohibiting possession of certain fish during close season.

Presumption from possession of stolen property.

Cited in *State v. Sally*, 41 Or. 368, 70 Pac. 396, holding refusal to instruct jury that if possession of property, alleged to have been stolen, was credibly explained, presumption of guilt is overcome, no error.

47 L. R. A. 156, *SCHRODER v. OVERMAN*, 61 Ohio St. 1, 76 Am. St. Rep. 354, 55 N. E. 158.

Local assessment; basis of.

Cited in *Cincinnati, L. & N. R. Co. v. Cincinnati*, 62 Ohio St. 482, 49 L. R. A. 571, 57 N. E. 229, denying right to assess entire cost of land taken for highway on remaining land of same owner; *Adams v. Shelbyville*, 154 Ind. 477, 49 L. R. A. 802, footnote p. 797, 77 Am. St. Rep. 484, 57 N. E. 114, sustaining statute providing for local assessments by frontage, with provision for hearing grievances before final assessment; *Indianapolis v. Holt*, 155 Ind. 240, 57 N. E. 966, holding assessment for street improvements by front-foot rule, prima facie

correct, but not exclusive right to make assessment according to benefits; *Shoemaker v. Cincinnati*, 68 Ohio St. 614, 68 N. E. 1, holding assessment for local improvements based upon frontage instead of in terms according to benefits, valid.

Cited in footnotes to *Ramsey County v. Robert P. Lewis Co.* 53 L. R. A. 421, which sustains annual frontage tax on land in front of which water pipes laid; *Barber Asphalt Paving Co. v. French*, 54 L. R. A. 492, which sustains paving assessment according to frontage; *King v. Portland*, 55 L. R. A. 812, which upholds street improvement assessment, plan of which not obviously shown to impose burdens in substantial excess of benefit; *Webster v. Fargo*, 56 L. R. A. 156, which sustains statute assessing entire cost of paving on abutters according to frontage; *Sears v. Street Comrs.* 62 L. R. A. 145, which authorizes consideration of benefit to abutting property from newly located passenger station in assessing cost of improving streets leading thereto.

— **Notice of.**

Cited in footnote to *Norfolk v. Young*, 47 L. R. A. 574, which holds insufficient, notice of assessment failing to show when, where, or before whom assessment may be contested.

— **Decision of legislature as to benefit.**

Cited in footnote to *Smith v. Worcester*, 59 L. R. A. 728, which holds conclusive, decision of legislature that land owners within assessment district are benefited by sewer.

— **Recovery of money paid for.**

Cited in footnote to *Rogers v. St. Paul*, 47 L. R. A. 537, which denies right to recover back money paid on assessment for uncompleted street improvement.

— **New assessment.**

Cited in footnote to *Kersten v. Milwaukee*, 48 L. R. A. 831, which holds injunction against wrongful paving assessment will not prevent new assessment.

47 L. R. A. 161, *O'MALEY v. SOUTH BOSTON GASLIGHT CO.* 158 Mass. 135, 32 S. E. 1119.

— **Assumption of risk.**

Cited in *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 272, 65 N. E. 918, holding that one driving in park for pleasure does not assume risk of injury from falling of temporary bridge over wide ditch.

— **By servants.**

Cited in *Daigle v. Lawrence Mfg. Co.* 159 Mass. 379, 34 N. E. 458, holding that employee assumes risk of injury while removing waste from inside of cylinder; *Kleinest v. Kunhardt*, 160 Mass. 231, 35 N. E. 458, holding servant cannot recover for injuries due to catching hand in pulley to prevent falling on soapy floor, if conditions same when employment began; *Kanz v. Page*, 168 Mass. 218, 46 N. E. 620, denying liability to employee injured by piece of iron falling from ceiling in engine room, where he was sent by superintendent to clear out rubbish after explosion of fly wheel; *Murch v. Thomas Wilson's Sons & Co.* 168 Mass. 411, 47 N. E. 111, denying ship owner's liability to employee for injuries caused by rolling from lounge in boat against hot stove while asleep; *French v. Columbia Spinning Co.* 169 Mass. 534, 48 N. E. 269, denying company's liability to serv-

ant injured by inadvertently stepping too near end of running board to clean coupling 6 feet farther on; *Davis v. Forbes*, 171 Mass. 555, 47 L. R. A. 177, 51 N. E. 20, denying employer's liability to boy of two years' experience in riding colts, for injury resulting from breaking of stirrup strap which latter knew to be defective; *Gleason v. Smith*, 172 Mass. 52, 51 N. E. 460, denying right of recovery of person of several years' experience, injured by revolving knife in ordinary molding machine in perfect condition; *Johansen v. Eastmans Co.* 44 App. Div. 272, 60 N. Y. Supp. 708, holding servant, unfamiliar with machinery, does not assume risk of injury from rapidly revolving shaft not protected as required by statute; *Knisley v. Pratt*, 148 N. Y. 379, 32 L. R. A. 369, 42 N. E. 986, denying employer's liability to servant who assumed obvious risk of unguarded cogwheels; *Anderson v. C. N. Nelson Lumber Co.* 67 Minn. 82, 69 N. W. 630, holding assumption of risk of injury not changed by mere fact that statute requires employer to guard shingle saws; *Dempsey v. Sawyer*, 95 Me. 302, 49 Atl. 1035, holding question as to reassumption of risk for jury, where servant continues in service after notifying master of defective condition of saw, who promises to remedy defects, and referring particularly to annotation in 47 L. R. A. 161; *Munn v. L. Wolff Mfg. Co.* 94 Ill. App. 126, denying right of recovery of employee exposing himself to danger with knowledge of unguarded condition of machinery; *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 261, 45 C. C. A. 517, 106 Fed. 648, holding that minor of four weeks' experience in factory assumes risk incident to greasy condition of floor; *Green v. Western American Co.* 30 Wash. 109, 70 Pac. 310, holding that minor does not assume risk of injury from caving in of walls, where statute requires operator to furnish timbers to support works; *St. Louis Cordage Co. v. Miller*, 63 L. R. A. 563, footnote p. 551, 61 C. C. A. 491, 126 Fed. 509, which holds defense of assumption of risk not limited by existence of contributory negligence; *Drake v. Auburn City R. Co.* 173 N. Y. 473, 66 N. E. 121, holding that street car conductor who has been over line about two hundred times assumes risk of injury from contact with tree near track; *Fisk v. Fitchburg R. Co.* 158 Mass. 239, 33 N. E. 510, denying company's liability to employee injured while descending side of train, by contact with wooden awning without apparent defect; *Gleason v. New York & N. E. R. Co.* 159 Mass. 69, 34 N. E. 79, holding that railroad employee assumes risk of injury from falling into space between planking between rails of track; *Goodes v. Boston & A. R. Co.* 162 Mass. 289, 38 N. E. 500, denying liability for death of brakeman while uncoupling cars, by contact with switch-stand located close to track; *Cassady v. Boston & A. R. Co.* 164 Mass. 170, 41 N. E. 129, denying freight handler's recovery for injuries from car door falling upon him, after he had swung it against roof and hooked it; *Caron v. Boston & A. R. Co.* 164 Mass. 531, 42 N. E. 112, holding that brakeman working in freight yard assumes risk of dangers incident to coupling cars; *Content v. New York, N. H. & H. R. Co.* 165 Mass. 270, 43 N. E. 94, denying liability to brakeman injured while on side ladder of moving car by contact with unusually wide car standing on side track; *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 471, 63 N. E. 541, affirming recovery for death of car repairer while working under car, as result of "kicking" cars from main track onto siding, and referring particularly to annotation in 47 L. R. A. 161; *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 76, 37 C. C. A. 504, 96 Fed. 303, holding continuance with company without complaint, knowing it has not complied with requirement as to blocking switches, not constitute assumption

of risk; *Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 155, 59 L. R. A. 702, footnote p. 698, 91 N. W. 1034, which holds risk of excessive speed assumed by brakeman accepting or continuing in employment with knowledge and without complaint.

Cited in footnotes to *McGuire v. Bell Teleph. Co.* 52 L. R. A. 437, which holds risk of employer's lack of right to inspect third person's poles used, not assumed by telephone company lineman; *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry; *Cox v. American Agri. Chemical Co.* 60 L. R. A. 629, which holds risk of injuries from unknown dangerous gases not assumed by servant undertaking to clean drain filled with decaying animal matter.

Cited in note (49 L. R. A. 42, 47, 49, 50) on contributory negligence in entering or remaining in employment.

Annotation in 47 L. R. A. 161, referred to particularly in *Adolff v. Columbia Pretzel & Baking Co.* 100 Mo. App. 206, 73 S. W. 321, holding risk of operating dangerous machine not assumed *per se* by minor employee employed for less dangerous work, by undertaking it under threat of discharge unless she did so.

Employers' liability to servants.

Cited in footnote to *Tarbell v. Rutland R. Co.* 56 L. R. A. 656, which holds void, contract by next of kin releasing employer from liability for future injuries to employee.

Cited in notes (41 L. R. A. 123) on knowledge as element of employer's liability to injured servant; (48 L. R. A. 763) on servant's right of action for injuries received in obeying direct command; (48 L. R. A. 798, 808) on liability for injuries received in performance of duties outside scope of original contract; (57 L. R. A. 843) on statutory liability of employers for defects in condition of their plant.

47 L. R. A. 170, *DAVIS v. FORBES*, 171 Mass. 548, 51 N. E. 20.

Assuming risk of employment.

Cited in *Leazotte v. Boston & M. R. Co.* 70 N. H. 7, 45 Atl. 1084, holding that servant voluntarily continuing in employment of one habitually negligent assumes risk; *Carver v. Minneapolis & St. L. R. Co.* 120 Iowa, 350, 94 N. W. 862, holding that mail carrier does not assume risk of injury from collision with mail bag thrown from passing train into unaccustomed place, and referring particularly to annotation in 47 L. R. A. 170.

Cited in footnotes to *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 258, which holds risk of block on which minor employee works, slipping on greasy floor, assumed; *Marino v. Lehmaier*, 61 L. R. A. 812, which holds risk of employment not assumed *per se* by child whose employment is forbidden by statute because of immature age.

Cited in notes (47 L. R. A. 161) on *volenti non fit injuria* as defense to actions by injured servants; (49 L. R. A. 38) on contributory negligence in entering or remaining in employment.

Employers' statutory liability.

Cited in note (57 L. R. A. 843) on statutory liability of employers for defects in condition of their plant.

Duty or implied authority to furnish medical aid.

Cited in *Vorass v. Rosenberry*, 85 Ill. App. 627, denying parent's liability for medical aid furnished adult son.

Cited in footnote to *Spelman v. Gold Coin Min. & Mill. Co.* 55 L. R. A. 640, which denies presumption of general manager's implied authority to bind mining company for medical aid to injured employees.

47 L. R. A. 201, *COLE v. UNION CENT. L. INS. CO.* 22 Wash. 26, 60 Pac. 68.

Agent's power to bind insurance company.

Cited in *Nixon v. Travellers' Ins. Co.* 25 Wash. 259, 65 Pac. 195, holding agent's agreement to extend time of payment of premium not binding on company; *German Ins. Co. v. Shader* (Neb.) 60 L. R. A. 920, footnote p. 918, 93 N. W. 972, which holds provision against liability for loss occurring before premium paid waived by receiving premium after all property destroyed.

Cited in footnotes to *McCabe v. Aetna Ins. Co.* 47 L. R. A. 641, which sustains authority of agent of foreign insurance company orally to renew policy issued by him; *Kocher v. Supreme Council C. B. L.* 52 L. R. A. 861, which denies power of officers of benefit society to waive judgment of assessments for death benefits.

47 L. R. A. 205, *FLEETWOOD v. READ*, 21 Wash. 547, 58 Pac. 665.

Tax on occupations; uniformity of taxation.

Cited in *Stull v. De Mattos*, 23 Wash. 77, 51 L. R. A. 895, 62 Pac. 451, sustaining license tax of \$25 per day on sales of merchandise at auction; *Lent v. Portland*, 42 Or. 493, 71 Pac. 645, sustaining ordinance imposing annual license tax of \$1 to \$15 on attorneys; *State v. Clark*, 30 Wash. 446, 71 Pac. 20, holding exemption of estates below \$10,000 from provisions of inheritance tax law not void for lack of uniformity.

Cited in footnotes to *Knisely v. Cotterel*, 50 L. R. A. 87, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; *Morton v. Macon*, 50 L. R. A. 485, which denies power to subject to prohibitory license tax, business of loaning money on household furniture; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds, void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; *Price v. People*, 55 L. R. A. 588, which sustains license fee on employment agencies; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for peddling license; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business less than \$1,000.

Class legislation.

Cited in footnote to *People ex rel. Valentine v. Coolidge*, 50 L. R. A. 493, which holds void, act requiring large bond from merchants selling farm produce.

47 L. R. A. 208, *STATE ex rel. WEINBERG v. PACIFIC BREWING & MALT-ING CO.* 21 Wash. 451, 58 Pac. 584.

Inspection of corporate books.

Cited in footnote to *Cincinnati Volksblatt Co. v. Hoffmeister*, 48 L. R. A. 732, which holds absolute, stockholder's right to inspect corporate books.

47 L. R. A. 214, *NORTH SPRINGS WATER CO. v. TACOMA*, 21 Wash. 517, 58 Pac. 773.

Right to use street.

Cited in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 257, 91 N. W. 1081, holding city's grant to water company of right to use streets beyond statutory twenty-five years void as to excess.

Cited in note (50 L. R. A. 146) on privilege of using streets as a contract within constitutional provision against impairing obligations of contracts.

Distinguished in *State ex rel. Spokane & B. C. Teleph. & Teleg. Co. v. Spokane*, 24 Wash. 58, 63 Pac. 1116, holding refusal of municipality to grant to telephone company same rights to use of streets as had been granted other telephone company, not violation of constitutional provision against grant of exclusive privileges.

Establishment and regulation of municipal water supply.

Cited in footnote to *Skaneateles Waterworks Co. v. Skaneateles*, 46 L. R. A. 687, which upholds power of village establishing own water works as against existing water company, to impose rates for fire protection on property where village works not used.

Cited in note (61 L. R. A. 38, 82) on establishment and regulation of municipal water supply.

47 L. R. A. 221, *GOLDBERG v. AHNAPEE & W. R. CO.* 105 Wis. 1, 76 Am. St. Rep. 899, 80 N. W. 920.

Patron's right to sleep in waiting room.

Cited in footnote to *Central R. Co. v. Motes*, 62 L. R. A. 507, which sustains regulation against patrons sleeping or lying down on benches in waiting room while awaiting arrival or departure of trains.

47 L. R. A. 223, *STATE v. HOSKINS*, 109 Iowa, 656, 77 Am. St. Rep. 560, 80 N. W. 1063.

Privileged communications.

Cited in *Nichols v. Eaton*, 110 Iowa, 513, 47 L. R. A. 485, 80 Am. St. Rep. 319, 81 N. W. 792, holding communication by life insurance company to agent concerning alleged forgery of examining physician, privileged.

— Of political candidates.

Cited in footnotes to *Eikhoff v. Gilbert*, 51 L. R. A. 451, which denies privilege to circular to voters announcing that candidate for re-election has championed legislation opposed to moral interests of community; *Wofford v. Meeks*, 55 L. R. A. 214, which holds libelous, publication imputing to county officials prostitution of county finances by awarding contracts to persons of same political faith; *Coffin v. Brown*, 55 L. R. A. 732, which denies right to falsely attack character of appointee of governor to prevent latter's re-election.

47 L. R. A. 226, *SMITH v. FURBISH*, 68 N. H. 123, 44 Atl. 398.

Conveyance of standing timber.

Cited in note (55 L. R. A. 533) on conveyance of title to standing timber without conveying title to land.

Liability for damming back water.

Cited in note (59 L. R. A. 830, 834) on liability for damming back water of stream.

Construction of covenants.

Cited in *Gill v. Ferrin*, 71 N. H. 424, 52 Atl. 558, holding taxes which purchaser orally agrees to pay not within general covenant of warranty against encumbrances; *First Nat. Bank v. Portsmouth Sav. Bank*, 71 N. H. 550, 53 Atl. 1017, holding easements created by mutual covenant not to change building, extinguished by subsequent alterations by common consent; *Weed v. Woods*, 71 N. H. 583, 53 Atl. 1024, holding that deed reserving premises so long as religious society may want them creates determinable fee.

Proof required to show title.

Cited in *Currier v. Thompson*, 70 N. H. 251, 46 Atl. 1055, holding lack of possession and absence of proof of deed applicable to property, defeat claim of title.

47 L. R. A. 246, *ROCHESTER & K. F. LAND CO. v. RAYMOND*, 158 N. Y. 576, 53 N. E. 507.

Transfer of stock as affecting liability for unpaid subscriptions.

Cited in *Beals v. Buffalo Expanded Metal Constr. Co.* 49 App. Div. 594, 63 N. Y. Supp. 635, holding subscriber not released from liability upon unpaid subscriptions when corporation insolvent, by assigning agreement to make advances, sums to be repaid upon completion of certain contracts, and assignee to assume obligations; *Sinclair v. Fuller*, 158 N. Y. 614, 53 N. E. 510, holding that stockholder may make bona fide transfer of stock when not indebted to corporation or its creditors; *Sigua Iron Co. v. Brown*, 171 N. Y. 501, 64 N. E. 194, holding that transferee's acceptance of stock certificate implies promise to pay calls upon assessable stock.

Cited in footnote to *Vermont Marble Co. v. Declez Granite Co.* 56 L. R. A. 728, which holds liability for unpaid subscription not defeated by transfer of stock without transferee's consent.

Equitable lien on bank stock.

Cited in footnote to *Buffalo German Ins. Co. v. Third Nat. Bank*, 48 L. R. A. 107, which denies equitable lien on national bank stock under by-law in conflict with act of Congress.

47 L. R. A. 265, *SHUTE v. HINMAN*, 34 Or. 578, 56 Pac. 412, 58 Pac. 882.

Right to follow trust funds.

Applied in *Dunham v. Siglin*, 39 Or. 299, 64 Pac. 661, decreeing to *cestui que trust* funds deposited by deceased trustee in separate depository, unmixed with other funds.

Cited in *Lincoln v. Morrison* (*Lincoln Sav. Bank & S. D. Co. v. Morrison*), 64 Neb. 828, 57 L. R. A. 888, 90 N. W. 905, holding *cestui que trust* entitled to profits on portion of fund chargeable with trust.

47 L. R. A. 267, *BIGHAM v. MADISON*, 103 Tenn. 358, 52 S. W. 1074.

Rescission of contract.

Cited in *Zunker v. Kuehn*, 113 Wis. 425, 88 N. W. 605, rescinding contract to
L. R. A. AU.—VOL. IV.—69.

exchange definite lands of good "record title" when one has record title to only portion of tract.

47 L. R. A. 270, *GIVAN v. BANK OF ALEXANDRIA* (Tenn. Ch.) 52 S. W. 923.
Bank's liability for collections.

Cited in footnotes to *Wilson v. Carlinville Nat. Bank*, 52 L. R. A. 632, which holds failure to collect check, due to negligence of collecting bank, not preclude recovering amount from depositor to whom forwarding bank had given credit for amount, where due care exercised in selecting collecting bank; *Second Nat. Bank v. Merchants' Nat. Bank*, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker, without hearing from similar note previously sent.

47 L. R. A. 273, *NANZ v. CUMBERLAND GAP PARK CO.* 103 Tenn. 299, 76 Am. St. Rep. 650, 52 S. W. 999.

47 L. R. A. 275, *ROBINSON v. BIERCE*, 102 Tenn. 428, 52 S. W. 992.
Back tax as affecting warranty.

Cited in *Bruington v. Barber*, 63 Kan. 29, 64 Pac. 963, holding existence of tax deed seven years old, no breach of warranty.

47 L. R. A. 278, *BENNETT v. PULASKI* (Tenn. Ch.) 52 S. W. 913.
Regulation of sale of liquor.

Cited in footnotes to *Newbern v. McCann*, 50 L. R. A. 476, which holds void, ordinance against proprietor or employee entering saloon on Sunday without permit from mayor or recorder; *State v. Barge*, 53 L. R. A. 428, which sustains ordinance against liquor dealer keeping room for lounging, drinking, or immoral purposes; *Campbellsville v. Odewalt*, 60 L. R. A. 723, which holds void, ordinance subjecting to fine, possessor of premises on which liquor furnished in violation of law, although without his knowledge or consent.

Restrictions on department stores.

Cited in note (48 L. R. A. 261) on legal restrictions on department stores.

Right of courts to consider propriety of statutes.

Cited in footnote to *Com. ex rel. Elkin v. Moir*, 53 L. R. A. 837, which holds wisdom, propriety, justice, or motive for passage not considered in determining validity of statute for government of cities.

47 L. R. A. 282, *GALVESTON, H. & S. A. R. CO. v. ZANTZINGER*, 93 Tex. 64, 77 Am. St. Rep. 829, 53 S. W. 379.

Liability for servant's tortious acts.

Cited in footnote to *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw it at boys playing on cotton bales.

— Of railroad company.

Cited in *Claiborne v. Missouri, K. & T. R. Co.* 21 Tex. Civ. App. 652, 57 S. W. 336, holding company liable for engineer's putting on steam suddenly, causing trespasser whom he saw climbing over tender, to fall off.

Cited in footnotes to *Dorsey v. Kansas City, P. & G. R. Co.* 52 L. R. A. 92, which holds carrier liable for death of trespasser falling under wheels in escaping from rocks thrown by brakeman; *Enright v. Pittsburgh Junction R. Co.* 53 L. R. A. 330, which denies right to eject or frighten ten-year-old boy from rapidly moving train; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Alsever v. Minneapolis & St. L. R. Co.* 56 L. R. A. 748, which sustains liability for injuries by engineer operating blow-off cock to frighten children; *Palmisano v. New Orleans City R. Co.* 58 L. R. A. 405, which denies master's liability for injury to boy running blindly against moving car, after release by employee who had caught and lectured him; *Southern R. Co. v. James*, 63 L. R. A. 257, which holds master liable for injury by night watchman shooting trespasser while running away after having been arrested by him.

47 L. R. A. 284, *PHILLIPS v. UNIVERSITY OF VIRGINIA*, 97 Va. 472, 34 S. E. 66.

Right to sue public corporation.

Cited in *Maia v. Eastern State Hospital*, 97 Va. 509, 47 L. R. A. 578, 34 S. E. 617, denying public hospital corporation's liability for injury to inmate resulting from manager's negligence.

Enforcement of mechanic's lien.

Cited in footnote to *Kirchman v. Standard Oil Co.* 52 L. R. A. 318, which holds lienor not estopped to enforce lien by mistaken statement of its payment, without knowledge of other person's intention to buy property.

47 L. R. A. 286, *PULLMAN'S PALACE CAR CO. v. HUNTER*, 107 Ky. 519, 54 S. W. 845.

47 L. R. A. 287, *STOVALL v. McCUTCHEN & CO.* 107 Ky. 577, 92 Am. St. Rep. 373, 54 S. W. 969.

Contracts in restraint of trade.

Cited in footnotes to *Tuscaloosa Ice Mfg. Co. v. Williams*, 50 L. R. A. 175, which holds void, contract by owner of ice machine to abandon manufacture of ice in certain town for five years, giving other party monopoly of business; *Steichen v. Fehleisen*, 51 L. R. A. 412, which holds individual partners not bound by firm agreement not to re-engage in certain business for specified period; *Pohlman v. Dawson*, 54 L. R. A. 913, which holds agreement on sale of business not to engage in barber business in any manner, violated by working as employee in other shop.

47 L. R. A. 289, *TAYLOR v. UNION TRACTION CO.* 184 Pa. 465, 40 Atl. 159.

Bicycle law; liability to bicyclist.

Cited in *Rowland v. Wanamaker*, 20 Pa. Co. Ct. 622, 7 Pa. Dist. R. 249, holding bicyclist negligent by carelessly riding into pole of wagon; *Beer v. Clarion Twp.* 17 Pa. Super. Ct. 540, denying liability to bicyclist carelessly striking guard log, throwing her into stream, through town's failure to erect guard rails; *Richardson v. Danvers*, 176 Mass. 414, 50 L. R. A. 127, footnote p. 127, 79 Am. St. Rep. 320, 57 N. E. 688, holding bicycle not within statute for keeping highways rea-

sonably safe for carriages; *Des Moines v. Keller*, 116 Iowa, 650, 57 L. R. A. 243, footnote p. 243, 93 Am. St. Rep. 268, 88 N. W. 827, sustaining ordinance requiring bicyclists to carry lamps, and referring particularly to annotation in 47 L. R. A. 289.

Cited in footnotes to *Foot v. American Product Co.* 40 L. R. A. 764, which holds bicyclist entitled to keep to right unless reason for exception shown; *Ellis v. Frazier*, 53 L. R. A. 454, which holds invalid, imposition of tax of specified amount on all bicycles for construction of bicycle path; *Hagerstown v. Klotz*, 54 L. R. A. 940, which sustains city's liability for injury by bicycle ridden at immoderate speed in violation of ordinance; *Lee v. Port Huron*, 55 L. R. A. 308, which holds city liable for injury to bicyclist from defective sidewalk; *Belles v. Kellner*, 57 L. R. A. 627, which denies presumption of negligence from leaving gentle horse untied in street, with driver only 5 to 8 feet away; *Roberts v. Parker*, 57 L. R. A. 764, which holds exempt from levy, bicycle used by painter and paper hanger in earning living; *Hendry v. North Hampton*, 64 L. R. A. 70, which holds town liable to bicyclist for injuries caused by defect making highway unsuitable for ordinary travel.

Cited in note (47 L. R. A. 294) on bicycle law.

47 L. R. A. 294, *JONES v. WILLIAMSBURG*, 97 Va. 722, 34 S. E. 883.

Municipal liability for nuisance and injuries.

Cited in *Miller v. Newport News*, 101 Va. 436, 44 S. E. 712, denying city's liability for failure to provide sewers to carry off surface water.

Cited in footnotes to *Hagerstown v. Klotz*, 54 L. R. A. 940, which sustains city's liability for injury by bicycle ridden at immoderate speed in violation of ordinance; *Prather v. Spokane*, 59 L. R. A. 346, which holds city locating turn in bicycle path at street corner within 4 feet of gutter of cross street, into which persons are liable to ride, liable to traveler injured by going over curb after dark; *Dudley v. Flemingsburg*, 60 L. R. A. 575, which denies city's liability for injuries by failure to prevent coasting in streets.

Bicyclist's care at railroad crossings.

Cited in footnote to *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which holds bicyclist required to exercise same care as pedestrian in crossing railroad.

47 L. R. A. 303, *RICE v. BUTLER*, 160 N. Y. 578, 73 Am. St. Rep. 703, 55 N. E. 275.

Infant's rights and liabilities under contract.

Cited in *Pierce v. Lee*, 36 Misc. 870, 74 N. Y. Supp. 926, holding that infant may rescind executed contract by returning what he received under it; *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813, sustaining infant's right to recover instalments paid vender of bicycle after forfeit of wheel for breach of contract; *Peck v. Cain*, 27 Tex. Civ. App. 43, 63 S. W. 177, holding married infant who leased premises for ten years not liable for rent after his abandonment thereof.

Bicycle law.

Cited in note (47 L. R. A. 307) on bicycle law.

47 L. R. A. 308, *HOLMES v. PHENIX INS. CO.* 39 C. C. A. 45, 98 Fed. 240.

Construction of insurance policy.

Cited in *Hartford F. Ins. Co. v. Nelson*, 64 Kan. 117, 67 Pac. 440, holding policy insuring one against loss by wind storms, exempting damage by hail, not cover loss caused by breaking of windows by hail, although such loss would not have occurred in absence of wind storm.

47 L. R. A. 310, *HOUGHTON v. RICE*, 174 Mass. 366, 75 Am. St. Rep. 351, 54 N. E. 843.

Right of action for alienation of husband's affection.

Cited in *Dixon v. Amerman*, 181 Mass. 430, 63 N. E. 1057, holding death of defendant bar to suit by wife for adultery with husband; *Wolf v. Frank*, 92 Md. 140, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132, sustaining wife's right of action for alienation of husband's affections.

Cited in footnotes to *Dietzman v. Mullin*, 50 L. R. A. 808, and *Betser v. Betser*, 52 L. R. A. 630, which sustain wife's right of action for alienating her husband's affections.

47 L. R. A. 312, *NEVINS v. FITCHBURG*, 174 Mass. 545, 55 N. E. 321.

Duty and liability of municipality as to drainage.

Cited in *Boston Belting Co. v. Boston*, 183 Mass. 260, 67 N. E. 428, holding city liable for negligently causing pollution of stream by sewage coming from storm overflows.

Cited in note (61 L. R. A. 694) on duty and liability of municipality with respect to drainage.

47 L. R. A. 314, *KNOWLTON v. WILLIAMS*, 174 Mass. 476, 55 N. E. 77.

Reaffirmed on final decree in 178 Mass. 330, 59 N. E. 812.

Expense of parks.

Cited in *Re De Las Casas*, 178 Mass. 218, 59 N. E. 664, holding incorporation of new town, separating it from district liable for support of parks, does not relieve it from share of expense.

Building restrictions.

Cited in *Parker v. Com.* 178 Mass. 203, 59 N. E. 634, holding land owners entitled to compensation for restrictions on right to build above specified height.

47 L. R. A. 319, *Re JANVRIN*, 174 Mass. 514, 55 N. E. 381.

Establishment and regulation of water supply.

Cited in note (61 L. R. A. 104) on establishment and regulation of municipal water supply.

Jurisdiction of suit relating to water rates.

Cited in *San Diego Land & Town Co. v. Jasper*, 189 U. S. 440, 47 L. ed. 894, 23 Sup. Ct. Rep. 571, holding that so long as board of supervisors defends suit to have water rates fixed by them declared void, there is sufficient party respondent to enable court to consider merits of controversy.

Admissibility of evidence as to custom.

Cited in *Campbell v. Dearborn*, 175 Mass. 185, 55 N. E. 1042, holding evidence

as to manner of piling lumber in other yards inadmissible in action for personal injuries from breaking of board on pile; *Fay v. Harrington*, 176 Mass. 275, 57 N. E. 369, excluding evidence of style of dresses usually worn by dancing women, in action for libel in publishing statement as to indecency of performance.

47 L. R. A. 323, *SMITH v. POSTAL TELEG. CABLE CO.* 174 Mass. 576, 75 Am. St. Rep. 374, 55 N. E. 380.

Fright and mental pain as elements of damage.

Cited in *Homans v. Boston Elev. R. Co.* 180 Mass. 458, 57 L. R. A. 292, 91 Am. St. Rep. 324, 62 N. E. 737, holding carrier liable for nervous shock to passenger resulting from being thrown against seat of car causing jar to nervous system; *Ford v. Schliessman*, 107 Wis. 483, 83 N. W. 761, holding that fright unaccompanied by physical injury not element of damage; *Cameron v. New England Teleph. & Teleg. Co.* 182 Mass. 311, 65 N. E. 385, sustaining right of woman to recover for injuries resulting from fall, where she arose from chair in consequence of fright from explosion.

Cited in footnotes to *Gulf, C. & S. F. R. Co. v. Hayter*, 47 L. R. A. 325, which authorizes recovery for physical injury resulting from fright; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 77, which holds effects of nervous shock included in damages for injuries in railroad collision; *Watson v. Dilts*, 57 L. R. A. 559, which holds one liable for frightening woman, causing nervous prostration, by stealthily entering her home in nighttime; *Kline v. Kline*, 58 L. R. A. 397, which sustains right to damages for mental suffering for assault by pointing gun with threat to shoot unless house abandoned; *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong; *Watkins v. Kaolin Mfg. Co.* 60 L. R. A. 617, which sustains right of action for physical injury or disease from fright or nervous shock from negligent acts; *Reed v. Maley*, 62 L. R. A. 900, which holds that merely soliciting woman to sexual intercourse gives her no right of action.

Liability for consequential injuries.

Cited in note (53 L. R. A. 634) on extent of trespasser's liability for consequential injuries resulting from trespass.

47 L. R. A. 325, *GULF, C. & S. F. R. CO. v. HAYTER*, 93 Tex. 239, 77 Am. St. Rep. 856, 54 S. W. 944.

Fright or mental pain as element of damages.

Cited in *St. Louis S. W. R. Co. v. Mitchell*, 25 Tex. Civ. App. 198, 60 S. W. 891, sustaining right to recover for miscarriage resulting from fright; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 84 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, holding that mental anguish will not support action for nondelivery of telegram; *Sanderson v. Northern P. R. Co.* 88 Minn. 166, 60 L. R. A. 405, footnote p. 403, 97 Am. St. Rep. 509, 92 N. W. 542, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong.

Cited in footnotes to *Smith v. Postal Teleg. Cable Co.* 47 L. R. A. 323, which denies recovery for sickness due to fright caused by grossly negligent act of one knowing such result would follow; *Homans v. Boston Elev. R. Co.* 57 L. R. A.

292, which holds carrier liable for nervous shock to passenger from jar to nervous system, accompanying blow; *Watson v. Dilts*, 57 L. R. A. 559, which holds one liable for frightening woman, causing nervous prostration, by stealthily entering her home in nighttime; *Kline v. Kline*, 58 L. R. A. 397, which sustains right to damages for mental suffering for assault by pointing gun with threat to shoot unless house abandoned; *Watkins v. Kaolin Mfg. Co.* 60 L. R. A. 617, which sustains right of action for physical injury or disease from fright or nervous shock from negligent acts; *Reed v. Maley*, 62 L. R. A. 900, which holds that merely soliciting woman to sexual intercourse gives her no right of action.

47 L. R. A. 326, *BULLOCK v. SPROWLS*, 93 Tex. 188, 77 Am. St. Rep. 849, 54 S. W. 661.

Avoiding conveyance by lunatic.

Cited in *Williams v. Sapieha*, 94 Tex. 436, 61 S. W. 115, holding lunatic not required to restore consideration before avoiding conveyance, unless money on hand or spent for necessities.

47 L. R. A. 329, *AUTEN v. MANISTEE NAT. BANK*, 67 Ark. 243, 54 S. W. 337.

Notice of dishonor of negotiable paper.

Cited in footnotes to *Williams v. Parks*, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor; *Oakley v. Carr*, 60 L. R. A. 431, which holds notice of dishonor sufficient if sent to last indorser, who is agent for collection only, by first mail of day following dishonor.

Cited in note (61 L. R. A. 901) as to whom should notice of protest or nonpayment be given after appointment of receiver, assignee, or other representative of insolvent.

47 L. R. A. 334, *STANTON v. SINGLETON*, 126 Cal. 657, 59 Pac. 146.

Specific performance of contract.

Cited in *O'Brien v. Perry*, 130 Cal. 530, 62 Pac. 927, holding that contract by father to give house for life and part of estate by will to daughter, in consideration of support and care of father, not specifically enforceable by either; *Moore v. Tuohy*, 142 Cal. 347, 75 Pac. 896, denying specific performance of contract to convey land, where plaintiff was bound to do many acts before he could demand performance, and such acts have become impossible of performance.

Cited in footnote to *Bomer Bros. v. Canady*, 55 L. R. A. 328, which denies specific performance of indefinite contract to purchase standing timber on fourteen different tracts in two counties, scattered over 5,000 acres.

47 L. R. A. 338, *JOHNSON v. GOODYEAR MIN. CO.* 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304.

Benefits in assessing damages in eminent domain proceedings.

Cited in *Beveridge v. Lewis*, 137 Cal. 631, 59 L. R. A. 584, 92 Am. St. Rep. 188, 67 Pac. 1040 (dissenting opinion), majority holding that general benefit to land not taken cannot be set off against damages for taking property for railroad right of way.

47 L. R. A. 345, **HUDSON v. WILBER**, 114 Mich. 116, 68 Am. St. Rep. 465, 72 N. W. 162.

Garnishment of receiver.

Cited in *Van Bianchi v. Wayne Circuit Judge*, 124 Mich. 462, 83 N. W. 26, and *Campau v. Detroit Driving Club*, 130 Mich. 425, 90 N. W. 49, holding receivers subject to garnishment proceedings by leave of court.

Garnishment of unliquidated claims.

Cited in note (59 L. R. A. 387, 391) on garnishment of unliquidated claims.

47 L. R. A. 366, **HENDERSON v. HEYWARD**, 109 Ga. 373, 77 Am. St. Rep. 384, 34 S. E. 590.

City's power to engage in liquor business.

Cited in *Barnesville v. Murphey*, 113 Ga. 781, 39 S. E. 413, raising, without deciding, question as to right to enjoin city against paying bills for liquor furnished dispensary.

Ordinance against work on Christmas.

Cited in *Watson v. Thomson*, 116 Ga. 548, 59 L. R. A. 603, 94 Am. St. Rep. 137, 42 S. E. 747, holding that city cannot, under general welfare clause in charter, prohibit one from running store on Christmas day.

47 L. R. A. 369, **STATE v. HAUN**, 61 Kan. 146, 59 Pac. 340.

Statutes violating right of equal privileges.

Cited in *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 543, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, holding act forbidding discharge of employee for membership in labor organization, void; *State v. Garbroski*, 111 Iowa, 499, 56 L. R. A. 572, 82 Am. St. Rep. 524, 82 N. W. 959, declaring unconstitutional, statute exempting Union soldiers from payment of peddler's tax; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)*, 183 U. S. 108, 46 L. ed. 108, 22 Sup. Ct. Rep. 30, holding act regulating certain stock yards, void; *State v. Mitchell*, 97 Me. 73, 94 Am. St. Rep. 481, 53 Atl. 887, holding statute exempting from payment of peddler's license tax, those who own and pay taxes on \$25 worth of stock in trade, void as arbitrary discrimination; *Rosin v. Lidgerwood Mfg. Co.* 89 App. Div. 255, 86 N. Y. Supp. 49, holding statute requiring employee to serve employer's liability notice as condition of bringing common-law action for personal injuries, void as depriving one of equal protection of law.

Cited in footnotes to *Harbison v. Knoxville Iron Co.* 56 L. R. A. 316, which sustains requirement of redemption on demand, of store orders, etc., given for wages; *Dixon v. Poe*, 60 L. R. A. 308, which holds void, act requiring redemption in money of checks issued in payment of wages.

47 L. R. A. 380, *Re DALTON*, 61 Kan. 257, 59 Pac. 336.

Statutory limitations of hours of labor and control of wages.

Followed in *Atkin v. Kansas*, 191 U. S. 221, 48 L. ed. 157, 24 Sup. Ct. Rep. 124, Affirming 64 Kan. 175, 97 Am. St. Rep. 343, 67 Pac. 519, holding contractor permitting employees to work more than eight hours a day on street paving contract liable to penalty.

Cited in *State v. Wilson*, 65 Kan. 238, 69 Pac. 172, holding one requiring

laborer to work more than eight hours a day in erection of school building liable to penalty; *People ex rel. Rodgers v. Coler*, 166 N. Y. 32, 52 L. R. A. 827, footnote p. 814, 82 Am. St. Rep. 605, 59 N. E. 716 (dissenting opinion), majority denying power of legislature to fix compensation which city must pay for labor.

Cited in footnotes to *Fiske v. People*, 52 L. R. A. 291, which holds void, restriction of hours of labor on city contracts to eight hours per day; *Cleveland v. Clements Bros. Constr. Co.* 59 L. R. A. 775, which holds void, act limiting to eight hours a day work of laborers on public contract; *Street v. Varney Electrical Supply Co.* 61 L. R. A. 154, which denies power of legislature to compel city to pay more for common labor on public improvements than its worth in market; *Re Ten-Hour-Law*, 61 L. R. A. 612, which sustains limitation to ten hours a day of work of street railway employees.

47 L. R. A. 383, *FARLEY v. LAVARY*, 107 Ky. 523, 54 S. W. 840.

47 L. R. A. 385, *LEWIS v. TAPMAN*, 90 Md. 294, 45 Atl. 459.

Statute of frauds.

Disapproved in effect in *Barge v. Haslam*, 63 Neb. 300, 88 N. W. 516, holding mutual promises to marry to be within inhibition of provisions of statute of frauds.

47 L. R. A. 391, *KELLER v. ST. LOUIS*, 152 Mo. 596, 54 S. W. 438.

Liability for support of child after divorce.

Cited in *Meyers v. Meyers*, 91 Mo. App. 155, holding that decree awarding minor children to wife, with no provision for support, gives father right to their earnings and binds him for their support.

Child's right to sue when parent living.

Cited in *Poor v. Watson*, 92 Mo. App. 101, denying minor child's right of action for father's death by negligence, when mother survives.

47 L. R. A. 393, *STATE, ex rel. McCAFFERY v. ALOE*, 152 Mo. 466, 54 S. W. 494.

Validity of law not admitted by demurrer.

Cited in *State ex rel. Hawes v. Withrow*, 154 Mo. 402, 55 S. W. 460, holding constitutionality of law not admitted by demurrer.

Prohibition against illegal proceedings.

Cited in *School Dist. No. 6 v. Burris*, 84 Mo. App. 663, awarding writ of prohibition restraining board of arbitration from determining appeal in proceedings for formation of new school district before annual vote; *State ex rel. Schonhorst v. Cline*, 85 Mo. App. 633, awarding writ prohibiting entry of judgment upon verdict illegally directed by justice of the peace; *Arnold v. Henry*, 155 Mo. 53, 78 Am. St. Rep. 556, 55 S. W. 1089, granting writ of prohibition to prevent circuit court from issuing injunction to determine election commissioner's title to office; *State ex rel. Folk v. Talty*, 166 Mo. 555, 66 S. W. 361, granting writ against circuit court's enforcing order that circuit attorney exhibit information requiring member of house of delegates to show his right to office; *People ex rel. Alexander v. District Court*, 29 Colo. 189, 68 Pac. 242, granting prohibition against

district court proceeding to enjoin assessment for taxation of certain property by state board of assessors; *People ex rel. Hinckley v. District Court*, 29 Colo. 282, 93 Am. St. Rep. 61, 68 Pac. 224, granting writ against district court proceeding to enjoin board of county commissioners from recognizing and seating new member holding certificate of election.

Cited in note (51 L. R. A. 46, 60, 107, 109) on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal.

Injunction to protect political rights and property.

Followed in *State ex rel. Hawes v. Withrow*, 154 Mo. 403, 55 S. W. 460, denying court of chancery's jurisdiction to test police commissioner's right to office on ground of illegality of law under which appointed; *State ex rel. McCaffery v. Eggers*, 152 Mo. 486, 54 S. W. 498, denying jurisdiction to grant injunction against appointee's taking office, upon mere allegation of unconstitutionality of law under which he was appointed; *State ex rel. Kenamore v. Wood*, 155 Mo. 445, 48 L. R. A. 599, 56 S. W. 474, holding that injunction against enforcement of statute requiring inspection of beer will not be granted on ground of unconstitutionality of such statute; *Schubach v. McDonald*, 179 Mo. 186, 65 L. R. A. 143, 101 Am. St. Rep. 452, 78 S. W. 1020, sustaining equity jurisdiction to enjoin ticket brokers from disposing of tickets which they have purchased with notice of their nontransferability.

Cited in footnote to *Weaver v. Toney*, 50 L. R. A. 105, which denies right to enforce in equity right to have inspector of certain party at polls.

Class legislation.

Cited in *State v. Cantwell*, 179 Mo. 261, 78 S. W. 569, sustaining statutory prohibition against working of miners more than eight hours a day; *Ex parte Loving*, 178 Mo. 203, 77 S. W. 508, sustaining act to regulate treatment of neglected and delinquent children in certain counties.

Restrictions as to remedies.

Cited in *State ex rel. Hamilton v. Guinotte*, 156 Mo. 528, 50 L. R. A. 795, 57 S. W. 281, holding existence of remedy by appeal not sufficient to bar certiorari to review order revoking letters of administration.

47 L. R. A. 400, *NOYES v. ROSS*, 23 Mont. 425, 75 Am. St. Rep. 543, 59 Pac. 367.

Chattel mortgage giving mortgagor power of sale.

Distinguished in *Stevens v. Curran*, 28 Mont. 372, 72 Pac. 753, declaring chattel mortgage void which permits mortgagor to retain possession and sell goods, with no provision for accounting to mortgagee.

Payment of partner's individual debts.

Cited in footnote to *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate with other partners' consent, interest in firm to pay individual, in preference to firm, debts.

47 L. R. A. 409, *BROWN v. SOUTHERN P. CO.* 36 Or. 128, 78 Am. St. Rep. 761, 58 Pac. 1104.

47 L. R. A. 413, *FIRST NAT. BANK v. McGUIRE*, 12 S. D. 226, 76 Am. St. Rep. 598, 80 N. W. 1074.

Disqualification of judge.

Followed without discussion in *First Nat. Bank v. Keenan*, 12 S. D. 241, 80 N. W. 1135.

Cited in *Re Taber*, 13 S. D. 71, 82 N. W. 398, holding acts of judge in administration proceedings in which son is attorney, employed on contingent fee, voidable; *First Nat. Bank v. McCarthy*, 13 S. D. 365, 83 N. W. 423, holding judge disqualified to try action to foreclose mortgage by bank in which his wife is stockholder; *State ex rel. Bullion & Exchange Bank v. Mack*, 26 Nev. 442, 69 Pac. 862, holding judge who is stockholder in corporation disqualified to pass on claim against insolvent estate.

Cited in footnote to *State ex rel. Perez v. Wall*, 49 L. R. A. 548, which holds judge disqualified in suit by sister of father-in-law.

47 L. R. A. 416, *SMITH v. JACKSON*, 103 Tenn. 673, 54 S. W. 981.

Who are engaged in interstate commerce.

Cited in footnotes to *Williams v. Fears*, 50 L. R. A. 685, which sustains license tax on emigrant agent; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *French v. State*, 52 L. R. A. 160, which holds agent of non-resident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 198, which holds interstate commerce, delivery of portraits and frames by agent previously taking order for nonresident manufacturer.

47 L. R. A. 417, *GALUSHA v. SHERMAN*, 105 Wis. 263, 81 N. W. 495.

What constitutes duress.

Cited in *Rochester Mach Tool Works v. Weiss*, 108 Wis. 547, 84 N. W. 866, holding court warranted in taking issue of duress from jury, where account stated signed under charge of grand larceny and threat of prosecution; *Batavian Bank v. North*, 114 Wis. 646, 90 N. W. 1016, holding communication of intention to sue in case of failure to effect settlement, not constitute duress.

Recovery of money paid under duress.

Cited in footnote to *First Nat. Bank v. Sargent*, 59 L. R. A. 296, which sustains right to recover back money paid under duress.

Transfer without consideration.

Cited in *First Nat. Bank v. Henry*, 156 Ind. 11, 58 N. E. 1057, holding transfer before maturity of note and mortgage to secure advances, without consideration.

47 L. R. A. 427, *HOFFMAN v. MAFFIOLI*, 104 Wis. 630, 80 N. W. 1032.

Indefiniteness and lack of mutuality as affecting contracts.

Cited in *Teipel v. Meyer*, 106 Wis. 43, 81 N. W. 982, holding not enforceable, contract to sell beer of certain brands which party should order; *Brittingham & H.*

Lumber Co. v. Manson, 108 Wis. 230, 84 N. W. 183, holding contract for timber to be cut, logged, and removed from certain tract, estimated of certain quality, sufficiently definite; Woodward v. Smith, 109 Wis. 610, 85 N. W. 424, holding contract with drillers to drill till flowing well obtained or ordered to quit, at fixed price per foot, not void for lack of mutuality; Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 287, 62 N. E. 367, holding that agreement to buy all iron one may desire to sell, both cast and wrought, constitutes binding contract; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L. R. A. 699, footnote p. 696, 52 C. C. A. 29, 114 Fed. 81, holding accepted offer to deliver at specified prices during specified period, articles in such quantities as acceptor may desire, void; Excelsior Wrapper Co. v. Messinger, 116 Wis. 555, 93 N. W. 459, holding contract to furnish "what roll rag paper (same as has been furnished during last twelve months)" at certain price, F. O. B. and certain place during specified time, to be taken as ordered, not void for lack of mutuality; Higbie v. Rust, 112 Ill. App. 221, holding contract to buy what jelly pails party may want, void for lack of mutuality, although price fixed.

Cited in footnotes to Hickey v. O'Brien, 49 L. R. A. 594, which sustains contract by sellers of ice to purchase all ice necessary to carry on business for five years; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. 61 L. R. A. 402, which sustains contract for purchase of entire consumption for term of years of phosphate rock in manufacturing fertilizer, estimated at specified amount, with right to demand double of such estimate.

47 L. R. A. 433, FIELD v. SIEGEL, 99 Wis. 605, 75 N. W. 397.

Actionable fraud.

Cited in Hubbard v. McLean, 115 Wis. 16, 90 N. W. 1077, holding attorney liable for false representation as to legal effect of execution of notes and mortgage.

Fraud as defense.

Cited in Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 465, 84 N. W. 838, holding statement of corporation's intention to build plants, made to induce subscription to stock, no defense to action on subscription contract.

Remedies of creditor.

Cited in footnote to Bigby v. Warnock, 57 L. R. A. 754, which holds wife personally liable to husband's creditor for amount of loan to her, secured by property fraudulently conveyed to her by her husband.

47 L. R. A. 441, ADAMS v. BELOIT, 105 Wis. 363, 81 N. W. 869.

Adoption of general statute by amendment to charter.

Cited in State *ex rel.* Boycott v. La Crosse, 107 Wis. 658, 84 N. W. 242 (distinguished in dissenting opinion), holding amendment of city charter by adopting portion of general charter law and omitting material portions relating to street improvement, fatal; Oshkosh Waterworks Co. v. Oshkosh, 109 Wis. 227, 95 Am. St. Rep. 870, 85 N. W. 376, holding amendment of city charter providing no claim shall be sued before disallowance by council does not impair contract by changing remedy; Davey v. Janesville, 111 Wis. 635, 87 N. W. 813, holding court bound to notice provision as to amendment of city charter by adoption of general laws by ordinance.

Validity of special legislation.

Cited in *Wagner v. Milwaukee County*, 112 Wis. 607, 88 N. W. 577, holding act authorizing issue of bonds to construct viaducts void because only one county has sufficient assessed valuation to raise necessary sum; *Battles v. Doll*, 113 Wis. 361, 89 N. W. 187, holding act authorizing taxation by counties to aid towns in building bridges not invalid because exempting municipal corporations maintaining its own bridges.

Assessment for local improvements.

Cited in footnote to *Re Orkney Street*, 48 L. R. A. 274, which denies right to assess property abutting on *cul de sac* for extension converting same into open street.

47 L. R. A. 450, *UNITED FIREMEN'S INS. CO. v. THOMAS*, 27 C. C. A. 42, 34 C. C. A. 240, 53 U. S. App. 517, 82 Fed. 406, 92 Fed. 127.

Agent's authority to bind company.

Cited in *Modern Woodmen v. Tevis*, 54 C. C. A. 297, 117 Fed. 373, holding beneficial association not bound by agent's failure to require delinquent members to furnish warranty of good health, according to by-laws, nor by his extending time for payments.

What constitutes waiver.

Cited in *Rice v. Fidelity & D. Co.* 43 C. C. A. 278, 103 Fed. 435, holding receipt by obligor in bond, of check signed by agent of obligees without countersignature of bookkeeper, insufficient to prove obligor's waiver of right to enforce contract requiring bookkeeper's signature; *Burnham v. Interstate Casualty Co.* 117 Mich. 153, 75 N. W. 445 (dissenting opinion), majority holding company waived breach of warranty in policy by furnishing blanks for proofs of death, without disclosing defense and permitting beneficiary to incur expense in preparing report.

Proof of waiver.

Cited in *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 624, 69 Pac. 938, holding that insured must show company's ratification of agent's waiver of clear space clause in policy covering lumber; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 340, 46 L. ed. 227, 22 Sup. Ct. Rep. 133, Reversing 41 C. C. A. 212, 101 Fed. 82, holding that agent's authority from company to waive forfeiture for other insurance must be shown to recover on policy.

Agent for insurer or insured.

Cited in *Mannheim Ins. Co. v. Hollander*, 112 Fed. 551, holding insurance brokers agents of company as to collection of premiums, and of assured as to issuance of policy.

47 L. R. A. 459, *ROBERTSON v. BLAINE COUNTY*, 32 C. C. A. 512, 61 U. S. App. 242, 90 Fed. 63.

County's right to plead statute of limitations.

Cited in *Greer County v. Clarke & Courts*, 12 Okla. 217, 70 Pac. 206, holding that county cannot plead statute of limitations to action to enforce obligation payable for particular fund, without first showing such fund has been provided.

47 L. R. A. 466, *Re WARD*, 127 Cal. 489, 59 Pac. 894.

47 L. R. A. 467, *GRUNDEL v. UNION IRON WORKS*, 127 Cal. 438, 78 Am. St. Rep. 75, 59 Pac. 826.

47 L. R. A. 469, *BLAIR v. OSTRANDER*, 109 Iowa, 204, 77 Am. St. Rep. 532, 80 N. W. 330.

Curing defect in statute by enactment of another.

Cited in *Ferry v. Campbell*, 110 Iowa, 300, 50 L. R. A. 97, 81 N. W. 604, sustaining retroactive amendment curing defect in collateral inheritance tax law by making provision for notice of proceedings to fix amount.

47 L. R. A. 480, *WALROD v. WEBSTER COUNTY*, 110 Iowa, 349, 81 N. W. 598.
Proximate cause of injury.

Cited in *Harvey v. Clarinda*, 111 Iowa, 532, 82 N. W. 994, holding absence of railings upon approach to bridge, not fright of horse, proximate cause of injury; *Parmenter v. Marion*, 113 Iowa, 304, 85 N. W. 90, holding platform wrongfully maintained in street, from which bale of hay fell upon pedestrian, not proximate cause of injury; *Overhouser v. American Cereal Co.* 118 Iowa, 422, 92 N. W. 74, holding city liable for death of bicyclist where it would not have occurred but for small stones scattered in street; *Pautz v. Plankinton Packing Co.* 118 Wis. 50, 94 N. W. 654, holding defective condition of wooden wheel by which power applied to iron wheed used in packing house to lift animals, proximate cause of injury resulting from breaking of iron wheel.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors, which are blown on track by severe gale, not proximate cause of derailment of engine.

Liability as affected by third party's negligence.

Cited in footnotes to *Griffin v. Jackson Light & P. Co.* 55 L. R. A. 318, which denies electric light company's liability for injury to stranger attempting to use defectively insulated movable light which storekeeper has continued to use; *Louisville & E. Mail Co. v. Barnes*, 64 L. R. A. 574, which holds that negligence of steamer company does not prevent recovery for death of passenger by drowning while attempting to disembark, from other steamboat company whose negligence was also responsible for his death.

Liability for failure to build railings.

Cited in *Eginoire v. Union County*, 112 Iowa, 561, 84 N. W. 758, holding county liable for failure to protect approach to bridge.

Instructions to jury.

Cited in *Meyer v. Boepple Button Co.* 112 Iowa, 52, 83 N. W. 809, holding instructions pointing out entire issue to jury, sufficient; *Welch v. Union Cent. L. Ins. Co.* 117 Iowa, 399, 90 N. W. 828, holding stating issues to jury by reading pleadings in full, no error.

47 L. R. A. 483, *NICHOLS v. EATON*, 110 Iowa, 509 80 Am. St. Rep. 319, 81 N. W. 792.

Proof of malice in actions for libel.

Cited in *Cherry v. Des Moines Leader*, 114 Iowa, 300, 54 L. R. A. 857, 89 Am.

St. Rep. 365, 86 N. W. 323, sustaining directed verdict in action for publication of exaggerated account of silly entertainment, in absence of proof of malice.

Justification for libel.

Cited in *State v. Keenan*, 111 Iowa, 293, 82 N. W. 792, holding justification for publication of defamatory matter concerning candidate for superintendent of schools, for jury to determine.

47 L. R. A. 486, *BAGWELL v. ATLANTA CONSOL. STREET R. CO.* 109 Ga. 611, 34 S. E. 1018.

47 L. R. A. 487, *VALPARAISO v. BOZARTH*, 153 Ind. 536, 55 N. E. 439.

Abatement of nuisances.

Cited in *Martin v. Marks*, 154 Ind. 555, 57 N. E. 249, granting mandatory injunction to compel removal of fence constructed in highway; *Coverdale v. Edwards*, 155 Ind. 383, 58 N. E. 495, sustaining city's right to remove electric light poles after termination of license and notice to remove; *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 460, 66 N. E. 179, holding ordinance requiring gas company to fulfil contract to supply gas, and in case of failure directing marshal to sever connections and exclude pipes from streets, not declaration within statute that pipes were nuisance.

Cited in footnote to *Western & A. R. Co. v. Atlanta*, 54 L. R. A. 294, which holds power to abate nuisance in city in police court only.

Right of action for obstruction in street.

Cited in *O'Brien v. Central Iron & Steel Co.* 158 Ind. 221, 57 L. R. A. 509, 63 N. E. 302, sustaining abutter's right to damages for cutting off access to property by erection of permanent obstruction in street.

Presumption of grant.

Distinguished in *New Castle v. Lake Erie & W. R. Co.* 155 Ind. 26, 57 N. E. 516, holding railroad company's occupation of street for thirty years raises presumption of grant.

47 L. R. A. 489, *BANK OF COMMERCE v. WILTSIE*, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224.

Dismissed for want of jurisdiction in 189 U. S. 506, 47 L. ed. 921, 23 Sup. Ct. Rep. 851.

Statutes extending municipal powers.

Cited in *Smith v. Indianapolis Street R. Co.* 158 Ind. 435, 63 N. E. 849, sustaining act empowering certain cities to extend franchise and rights of street railway companies.

Questions considered on rehearing.

Cited in *Armstrong v. Hufty*, 156 Ind. 631, 60 N. E. 1080, refusing to consider questions not presented at original hearing.

47 L. R. A. 495, *ASLANIAN v. DOSTUMIAN*, 174 Mass. 328, 75 Am. St. Rep. 348, 54 N. E. 845.

47 L. R. A. 497, *WYANT v. CENTRAL TELEPH. CO.* 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928.

Right to remove or trim shade trees.

Cited in *Stretch v. Cassapolis*, 125 Mich. 169, 51 L. R. A. 346, 84 Am. St. Rep. 567, 84 N. W. 51, holding municipality liable for removal of shade trees from highway without notice to abutting owner; *Miller v. Detroit, Y. & A. A. R. Co.* 125 Mich. 172, 51 L. R. A. 957, footnote p. 955, 84 Am. St. Rep. 569, 84 N. W. 49, sustaining street railway company's right to remove obstructing shade trees without compensation to abutter; *Bronson v. Albion Teleph. Co. (Neb.)* 60 L. R. A. 427, footnote p. 426, 93 N. W. 201, which holds telephone company liable to abutter for injury to trees along street; *Hazlehurst v. Mayes (Miss.)* 64 L. R. A. 807, footnote p. 805, 36 So. 33, which denies owner's right of action for necessary trimming of trees in highway for instalation of electric lighting system for city.

47 L. R. A. 499, *THOMAS v. FLINT*, 123 Mich. 10, 81 N. W. 936.

Absence of notice of defect.

Followed in *Pearl v. Benton Twp.* 123 Mich. 414, 82 N. W. 226, denying town's liability for injury resulting from defective condition of bridge, in absence of knowledge of defect.

47 L. R. A. 512, *STATE ex rel. NEW ORLEANS CANAL & BKG. CO. v. HEARD*, 47 La. Ann. 1679, 18 So. 746.

Repeal of ordinance as ground for refusal to perform duty.

Cited in *State ex rel. Crescent City R. Co. v. Bell*, 49 La. Ann. 680, 21 So. 724, denying city engineer's right to refuse to furnish lines and levels of contemplated road on ground of repeal of ordinance.

Right to question validity of statute.

Cited in *Park v. Candler*, 113 Ga. 679, 39 S. E. 89 (dissenting opinion), majority raising, without deciding, question as to treasurer's power to question constitutionality of statute.

Deed of public land to private corporation.

Cited in *State ex rel. Texarkana, S. & N. R. Co. v. Smith*, 104 La. 373, 29 So. 40, denying mandamus to compel board of levee commissioners to obey ordinance and execute deed of public land to railroad company.

Rights of purchaser of stolen bonds.

Cited in *Mechanics & T. Ins. Co. v. Hart*, 48 La. Ann. 585, 19 So. 569 (dissenting opinion), majority holding purchaser of stolen state bonds entitled to reimbursement for sum paid.

47 L. R. A. 525, *DREW v. TIFFT*, 79 Minn. 175, 79 Am. St. Rep. 446, 81 N. W. 839.

Constitutionality of inheritance tax.

Followed in *State ex rel. Frye v. Bazille*, 87 Minn. 501, 94 Am. St. Rep. 718, 92 N. W. 415, holding inheritance tax law unconstitutional as taxing collateral and lineal descendants unequally; *State ex rel. Russell v. Harvey*, 90 Minn. 181, 95 N. W. 764, holding inheritance tax void as doubling rate in certain cases.

Cited in footnotes to *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax; *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate given with remainder to lineal descendants, but exempting lineal descendants taking fee.

47 L. R. A. 529, *MILTON v. JOHNSON*, 79 Minn. 170, 81 N. W. 842.

47 L. R. A. 532, *GODBOUT v. ST. PAUL UNION DEPOT CO.* 79 Minn. 188, 81 N. W. 835.

Carrier's right to grant exclusive privileges.

Cited in *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, footnote p. 140, 57 C. C. A. 364, 120 Fed. 217, sustaining carrier's power to give to one hackman exclusive right to solicit patrons within station; *Hedding v. Gallagher*, 72 N. H. 394, 64 L. R. A. 821, footnote p. 811, 57 Atl. 225, which sustains right of railroad company to give to one teamster exclusive right to enter railroad property to solicit privilege of carrying baggage and passengers.

Cited in footnotes to *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* 50 L. R. A. 722, which sustains special privilege to baggage transfer company to another depot to solicit business; *Boston & A. R. Co. v. Brown*, 52 L. R. A. 418, which holds driver of public carriage entering railroad grounds to get passenger ordering carriage, a trespasser on soliciting other passengers; *Pennsylvania Co. v. Chicago*, 53 L. R. A. 223, which denies carrier's power to prevent others than lessee occupying hack stands in street.

47 L. R. A. 537, *ROGERS v. ST. PAUL*, 79 Minn. 5, 81 N. W. 539.

Recovery of payment of assessment for local improvement.

Followed in *Rogers v. St. Paul*, 86 Minn. 100, 90 N. W. 155, holding complaint defective in failing to allege money accruing from assessments not expended on local improvements.

Cited in *Germania Bank v. St. Paul*, 79 Minn. 33, 81 N. W. 542, holding demurrable, complaint in action to recover money paid for local improvements not finished, it not appearing that money not honestly expended in general plan of improvement.

47 L. R. A. 540, *PAUL v. CRAGNAS*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983.

Damages for tort.

Cited in note (52 L. R. A. 50) on damages for tort as affected by loss of profits.

Sufficiency of exception.

Cited in *Schwartz v. Stock*, 26 Nev. 150, 65 Pac. 351, refusing to consider action of trial court when exception not particularly stated in record as required by statute.

47 L. R. A. 546, *FELT v. FELT*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105.

Domicil as affecting right to divorce.

Cited in *Kempson v. Kempson*, 58 N. J. Eq. 96, 43 Atl. 97, Later appeals in 61 N. J. Eq. 309, 48 Atl. 244, 63 N. J. Eq. 785, 58 L. R. A. 485, 92 Am. St. Rep. L. R. A. AN.—VOL. IV.—70.

682, 52 Atl. 360, restraining husband's prosecution of divorce suit in North Dakota, where he had gone for that purpose; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 564, 78 Am. St. Rep. 630, 41 Atl. 876, holding void, foreign decree of divorce obtained upon false allegations of residence; *McGean v. McGean*, 60 N. J. Eq. 23, 46 Atl. 656, holding residence not established by wife's spending most of her time in another state, after removing here for purpose of obtaining divorce; *Wallace v. Wallace*, 62 N. J. Eq. 513, 50 Atl. 788, holding that wife who moves into state for express purpose of procuring divorce acquires no domicile giving court jurisdiction.

Credit due foreign decree of divorce.

Cited in *Atherton v. Atherton*, 181 U. S. 169, 45 L. ed. 802, 21 Sup. Ct. Rep. 544, holding that decree of divorce, granted in state which was matrimonial residence of parties and from which wife departed, and did not appear after service of notice, should have full credit in state into which wife moved.

Cited in footnotes to *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony, though subject to alteration, final for enforcement in other state.

Married woman's liability on contract.

Cited in *Thompson v. Taylor*, 66 N. J. L. 258, 54 L. R. A. 588, 88 Am. St. Rep. 485, 49 Atl. 544, Reversing 65 N. J. L. 109, 46 Atl. 567, holding statute preventing married women from becoming sureties not declaration of public policy, preventing suit on such contract valid where made.

47 L. R. A. 548, *YOUNG v. STATE*, 36 Or. 417, 59 Pac. 812, 60 Pac. 711.

47 L. R. A. 551, *STATE ex rel. CROW v. KRAMER*, 150 Mo. 89, 51 S. W. 716.

Power of appointment to office.

Second appeal in 152 Mo. 516, 47 L. R. A. 563, 54 S. W. 221, holding vacancy in office of justice of peace, to be filled by appointment, not created by failure to elect.

Cited in *State ex rel. Crow v. Towns*, 153 Mo. 109, 54 S. W. 552, holding statute directing court to appoint defeated candidate in place of one ousted for corrupt practice in elections, void, giving governor power to make appointment.

47 L. R. A. 560, *STATE ex rel. CROW v. SMITH*, 152 Mo. 512, 54 S. W. 221.

Right of officer to hold over.

Cited in *State ex rel. Crow v. Lund*, 167 Mo. 250, 67 S. W. 572 (dissenting opinion), majority holding that city comptroller holds till term of office expires, not till successor has qualified.

Decision of tie vote.

Cited in note (47 L. R. A. 552, 559) on decision of tie vote at election.

47 L. R. A. 566, *Ex parte TOD*, 12 S. D. 386, 76 Am. St. Rep. 616, 81 N. W. 637.

Who are subject to extradition.

Cited in footnote to *People ex rel. Corkran v. Hyatt*, 60 L. R. A. 774, which

holds one not corporeally present in state when crime committed not fugitive from justice in other state.

Who may grant requisition.

Cited in footnote to *State ex rel. Nichols v. Justus*, 55 L. R. A. 325, which holds requisition for extradition "by the acting governor" made by chief magistrate.

47 L. R. A. 569, *STATE ex rel. TOMPKINS v. CHICAGO, ST. P. M. & O. R. CO.* 12 S. D. 305, 81 N. W. 503.

47 L. R. A. 572, *ST. LAWRENCE v. GROSS*, 12 S. D. 350, 76 Am. St. Rep. 612, 81 N. W. 640.

47 L. R. A. 574, *NORFOLK v. YOUNG*, 97 Va. 728, 34 S. E. 886.

Assessment for local improvements.

Cited in *Harrisburg v. McPherran*, 14 Pa. Super. Ct. 495, sustaining cost of street improvements assessed on basis of front-foot rule.

Party's right to be heard on question of local improvements.

Cited in footnote to *Chicago & E. R. Co. v. Keith*, 60 L. R. A. 525, which holds void, statute for construction of ditch to drain off water along railroad right of way on petition of adjoining owner, without giving company opportunity to be heard.

47 L. R. A. 577, *MAIA v. EASTERN STATE HOSPITAL*, 97 Va. 507, 34 S. E. 617.

Public corporation's liability for negligence, nuisance, or failure to pass ordinance.

Cited in *Jones v. Williamsburg*, 97 Va. 724, 47 L. R. A. 299, 34 S. E. 883, denying municipal corporation's liability for injury to person struck by bicycle ridden by another on walk, by reason of failure to enact ordinance prohibiting riding on walks; *Duncan v. Lynchburg*, 2 Va. Dec. 706, 48 L. R. A. 333, 34 S. E. 964, sustaining demurrer to complaint alleging injury as result of city's erection of privy on bank of stream for use of employees in its quarry; *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 125, 109 Fed. 296, holding public hospital corporation under private management not liable for negligence of nurse in leaving bag of hot water against patient's side; *White v. Alabama Insane Hospital*, 138 Ala. 483, 35 So. 454, denying liability of state hospital for injuries to employee due to negligent operation of coal mine operated on premises to supply institution with fuel.

Cited in footnotes to *Moody v. State's Prison*, 53 L. R. A. 855, which denies liability of state to prison guard for injuries by defective ladder; *Overholser v. National Home for Disabled Volunteer Soldiers*, 62 L. R. A. 937, which holds national home for disabled soldiers a part of United States government not subject to action sounding in tort.

Distinguished in *Trevett v. Prison Asso.* 98 Va. 334, 50 L. R. A. 565, footnote p. 564, 81 Am. St. Rep. 727, 36 S. E. 373, holding prison association not controlled by state, liable for pollution of stream.

Liability of department store for malpractice.

Cited in footnote to *Hannon v. Siegel-Cooper Co.* 52 L. R. A. 429, which holds

department store representing itself as carrying on dental business estopped to deny responsibility for malpractice of dentist.

Railroad relief department as charitable institution.

Cited in *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 443, 74 S. W. 456, holding relief department of railroad corporation maintained by deductions from employees' wages not charitable institution, as employee entitled to benefit only on release of company from liability.

47 L. R. A. 581, *SANDERS v. COLEMAN*, 97 Va. 690, 34 S. E. 621.

Disease as defense to action for breach of promise to marry.

Cited in *Trammell v. Vaughan*, 158 Mo. 222, 51 L. R. A. 856, footnote p. 854, 81 Am. St. Rep. 302, 59 S. W. 79, holding breach of marriage contract justified by loathsome disease making it unsafe for man to marry; *Smith v. Compton*, 67 N. J. L. 552, 58 L. R. A. 482, footnote p. 480, 52 Atl. 386, requiring illness, to excuse breach of promise to marry, to be such as renders marital intercourse impossible.

Distinguished in *Vierling v. Binder*, 113 Iowa, 340, 85 N. W. 621, holding that plea of woman's diseased condition pleaded merely to negative existence of contract, cannot be considered on trial as excuse for nonperformance.

47 L. R. A. 583, *ADKINS v. RICHMOND*, 98 Va. 91, 81 Am. St. Rep. 702, 34 S. E. 967.

Right to take orders in interstate business.

Cited in *State v. Caldwell*, 127 N. C. 525, 37 S. E. 138, holding ordinance taxing peddler engaged in selling portraits not void as applied to agent of foreign firm, to whom pictures sent, which he put together and delivered to fill orders previously taken.

Original packages and interstate commerce.

Cited in footnote to *Re Wilson*, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil.

Who are engaged in interstate commerce.

Cited in footnotes to *Williams v. Fears*, 50 L. R. A. 685, which sustains license tax on emigrant agent; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 198, which holds as interstate commerce, delivery of portraits and frames by agent previously taking orders for nonresident manufacturer.

Jurisdiction of appellate court.

Cited in *Valley Turnp. Co. v. Moore*, 100 Va. 706, 42 S. E. 675, holding that one seeking appeal must establish court's jurisdiction to hear it.

47 L. R. A. 588, *MAY v. POINDEXTER*, 98 Va. 143, 34 S. E. 971.

Right to take advantage of one's own wrong.

Cited in footnote to *Hahn v. Bettingen*, 50 L. R. A. 669, which denies right of one suing for breach of promise, to recover for loss from breaking previous engagement to other man at defendant's request.

47 L. R. A. 593, *McGRAW v. MARION*, 98 Ky. 673, 34 S. W. 18.

Municipal liability.

Cited in *Clayton v. Henderson*, 103 Ky. 235, 44 L. R. A. 476, 44 S. W. 667, holding city liable for erection of outhouse near residence, within half mile of city limits, in violation of statute; *Georgetown v. Com.* 115 Ky. 387, 61 L. R. A. 678, 73 S. W. 1011, holding city not subject to indictment for failure to compel abatement of nuisance consisting of emptying filth into open drain; *Simpson v. Whatcom*, 33 Wash. 398, 63 L. R. A. 818, 99 Am. St. Rep. 951, 74 Pac. 577, holding city not liable in damages for acts of officers in prosecuting one, in attempt to enforce void ordinance imposing license fee upon bicyclists using streets.

Cited in note (44 L. R. A. 799) on liability of municipalities for false imprisonment and unlawful arrest.

Distinguished in *Twyman v. Frankfort* (Ky.) 64 L. R. A. 573, 78 S. W. 446, holding municipal corporation not liable for acts of its officers in removing small-pox patient to outhouse so overcrowded that he dies from exposure.

License tax on peddlers.

Cited in footnote to *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt.

47 L. R. A. 597, *HANLEY v. CALIFORNIA BRIDGE & CONSTR. CO.* 127 Cal. 232, 59 Pac. 577.

Motion for nonsuit.

Cited in *Allen v. Florence & C. C. R. Co.* 15 Colo. App. 214, 61 Pac. 491, holding plaintiff entitled to every legitimate inference deducible from evidence upon motion for nonsuit.

Duty to furnish safe place to work and to warn of dangers.

Cited in *Tedford v. Los Angeles Electric Co.* 134 Cal. 80, 54 L. R. A. 92, 66 Pac. 76, holding it duty of electric company to warn of danger, inexperienced employee hired to dig holes, repair poles, and work among wires.

Cited in footnotes to *Ellsworth v. Metheney*, 51 L. R. A. 389, which holds mine owner required to properly guard electric wire in passageway where miners accustomed to go; *Finn v. Cassidy*, 53 L. R. A. 877, which holds safe place *per se* not provided by contractor having employees work in tunnel under foundation of chimney, with knowledge that undisturbed earth saturated with water.

Vice principalship as determined by injury.

Cited in note (54 L. R. A. 151) on vice principalship as determined with reference to character of act which caused injury.

Contributory negligence.

Cited in *Swensen v. Bender*, 51 C. C. A. 663, 114 Fed. 7, holding inexperienced servant not guilty of contributory negligence, as matter of law, by working in tunnel not properly timbered, where master assured him that place was safe.

1110 L. R. A. CASES AS AUTHORITIES. [47 L. R. A.]

Cited in footnote to *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L. R. A. 146, which holds contributory negligence of employee in using defective ladder to adjust belt after complaining to manager and being told that it was all right, question for jury.

47 L. R. A. 601, *ROMEO v. MARTUCCI*, 72 Conn. 504, 77 Am. St. Rep. 327, 45 Atl. 199.

Factor's right to sell goods.

Cited in *Foerderer v. Tradesmen's Nat. Bank*, 46 C. C. A. 245, 107 Fed. 220, denying owner's right of recovery for wool seized in replevin by creditor of factor and acquired from another factor by stipulation to retain wool and pay value.

Cited in footnote to *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* 53 L. R. A. 775, which sustains factor's power to sell principal's goods on reasonable credit.

Rights of purchaser from one without title.

Cited in *Harrison v. Clark*, 74 Conn. 23, 49 Atl. 186, holding that one who owns horse and gives it to creditor to put in possession of third party to keep till debt is paid has title superior to vendee from such third person, whom creditor directed to sell, stating horse to be his own.

Cited in footnote to *Oliver Ditson Co. v. Bates*, 57 L. R. A. 289, which sustains lessor's right to piano purchased from retail dealer leasing it, two years after sale.

47 L. R. A. 608, *WALLING v. CHRISTIAN & C. GROCERY CO.* 41 Fla. 479, 27 So. 46.

Right of married woman to sue or contract.

Cited in footnotes to *Williams v. Pope Mfg. Co.* 50 L. R. A. 816, which sustains nonresident married woman's right to bring in own name, according to law of domicil, action for tort to her person; *Thompson v. Taylor*, 54 L. R. A. 585, which holds written promise of married woman, valid where made, enforceable in New Jersey, though void if made therein.

Cited in note (57 L. R. A. 514, 524) on conflict of laws as to capacity of married woman to contract.

What laws govern.

Cited in footnote to *Smith v. Ingram*, 61 L. R. A. 878, which holds law of place where land located governs as to privy examination of married woman.

47 L. R. A. 614, *CAHILL v. MARYLAND L. INS. CO.* 90 Md. 333, 45 Atl. 180.

47 L. R. A. 617, *COLTON v. MAYER*, 90 Md. 711, 78 Am. St. Rep. 456, 45 Atl. 874.

Recovery of corporate assets and offsets thereto.

Cited in *James Clark Co. v. Colton*, 91 Md. 216, 49 L. R. A. 706, 46 Atl. 386, holding that payment by insolvent bank of note on which directors are indorsers may be recovered by receivers as fraudulent preference; *Cahill v. Original Big Gun Beneficial & Pleasure Asso.* 94 Md. 355, 89 Am. St. Rep. 434, 50 Atl. 1044, holding that stockholders liable to corporate creditors to extent of shares of

stock, may set off debt due him by corporation; *Strauss v. Denny*, 95 Md. 694, 53 Atl. 571, holding stockholder required to pay receiver of bank amount of note declared to be preference, on which he was indorsee, may offset amount against his liability as stockholder.

Effect of failure to file receivership bill.

Cited in *James Clark Co. v. Colton*, 91 Md. 206, 49 L. R. A. 702, 46 Atl. 386, holding that failure to file receivership bill confers no rights upon corporate officers at whose instance court made decree of dissolution.

47 L. R. A. 622, *COVINGTON v. BUFFETT*, 90 Md. 569, 45 Atl. 204.

47 L. R. A. 624, *LAKE STREET ELEV. R. CO. v. CHICAGO*, 183 Ill. 75, 55 N. E. 721.

Liability of railway for paving assessment.

Cited in footnotes to *Chicago, R. I. & P. R. Co. v. Ottumwa*, 51 L. R. A. 763, which denies liability of railroad running along side of street to street-paving assessment; *Fielders v. North Jersey Street R. Co.* 59 L. R. A. 455, which holds void, ordinance requiring street railway companies to pave and keep in repair, space between tracks.

Description of property assessed.

Cited in *South Chicago City R. Co. v. Chicago*, 196 Ill. 496, 63 N. E. 1046, holding assessment petition describing property as "right of way, franchise, and interest of railway company in and upon certain streets," sufficiently definite

Railroad right of way as "landed property."

Cited in footnote to *United R. & Electric Co. v. Baltimore*, 52 L. R. A. 772, which holds railroad right of way and tracks not within provision as to increasing taxation on "landed property."

47 L. R. A. 627, *STATE v. OHIO OIL CO.* 150 Ind. 21, 49 N. E. 809.

Affirmed in 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576.

State's right to sue.

Cited in *State ex rel. Delmar Jockey Club v. Zachritz*, 166 Mo. 314, 89 Am. St. Rep. 711, 65 S. W. 999, denying writ of prohibition judge exercising jurisdiction of action by attorney general to cancel license fraudulently obtained.

Gas as property.

Cited in *Chandler v. Pittsburgh Plate Glass Co.* 20 Ind. App. 167, 50 N. E. 400, holding grantee of land entitled to rents accruing under gas lease.

Prohibiting waste of gas or water.

Followed without discussion in *Ohio Oil Co. v. State*, 150 Ind. 698, 50 N. E. 1124.

Cited in *Lippincott Glass Co. v. Ohio Oil Co.* 150 Ind. 695, 49 N. E. 1106, holding that glass company may enjoin gas company from wasting natural gas, diminishing fuel supply to injury of business; *Huber v. Merkel*, 117 Wis. 337, 62 L. R. A. 595, 98 Am. St. Rep. 933, 94 N. W. 354, holding that police power does not justify legislation prohibiting waste of water from artesian wells.

Right to use gas or oil pump.

Cited in *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 474, 50 L. R. A. 774, footnote p. 768, 57 N. E. 912, holding unlawful, pumping of natural gas to injury of others having wells supplied from same reservoir.

Cited in footnote to *Jones v. Forest Oil Co.* 48 L. R. A. 748, which authorizes use of gas pump to increase production of oil well, though production of adjoining wells diminished.

Regulation of gas rates.

Cited in *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 106, 60 L. R. A. 828, 66 N. E. 436, sustaining power of municipal corporation to enjoin gas company from violating contract as to gas rate.

Petition to establish pipe line.

Cited in *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 568, 66 N. E. 765, holding that petition of gas company to establish pipe line must show that company is furnishing gas to public.

47 L. R. A. 637, *RUSSELL v. MEYER*, 7 N. D. 335, 75 N. W. 262.

47 L. R. A. 641, *McCABE v. ÆTNA INS. CO.* 9 N. D. 19, 81 N. W. 426.

Agent's admissions binding company.

Cited in footnote to *Hall v. Union Cent. L. Ins. Co.* 51 L. R. A. 288, which holds admissions by insurance agent after death of insured, that all premiums paid, binding on company.

47 L. R. A. 646, *OWEN v. COOK*, 9 N. D. 134, 81 N. W. 285.

47 L. R. A. 650, *WILDEY CASUALTY CO. v. SHEPPARD*, 61 Kan. 351, 59 Pac. 651.

Voluntary exposure to danger.

Cited in footnotes to *Smith v. Ætna L. Ins. Co.* 56 L. R. A. 272, which holds injury by fall from steps of moving train covered by policy, where assured was not intending to alight; *Smith v. Ætna L. Ins. Co.* 64 L. R. A. 117, which holds steeple-chase riding by one giving occupation as cotton merchant, voluntary exposure to unnecessary danger; *Small v. Travelers' Protective Asso.* 63 L. R. A. 510, which holds attempt by experienced traveling man to board train running 8 or 10 miles an hour, voluntary exposure to danger.

47 L. R. A. 652, *CROWLEY v. WEST*, 52 La. Ann. 526, 78 Am. St. Rep. 355, 27 So. 53.

Uniform operation of ordinance.

Cited in *Mandeville v. Bank*, 111 La. 808, 35 So. 915, holding void, ordinance regulating sale of liquors, and which does not operate uniformly.

47 L. R. A. 656, *PRIETO v. ST. ALPHONSUS CONVENT OF MERCY*, 52 La. Ann. 631, 27 So. 153.

Habeas corpus by husband against wife.

Cited in *State ex rel. Lasserre v. Michel*, 105 La. 745, 54 L. R. A. 929, footnote

p. 927, 30 So. 122, holding habeas corpus by husband against wife for custody of child not "suit" within statutory prohibition.

Right to custody of child.

Cited in footnote to *Stapleton v. Poynter*, 53 L. R. A. 784, which upholds taking custody of child against its will from wealthy grandparent and giving to parent of moral habits.

47 L. R. A. 681, *McCOY v. NORTHWESTERN MUT. RELIEF ASSO.* 92 Wis. 577, 66 N. W. 697.

Suicide as affecting liability on policy.

Cited in *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 123, 42 L. R. A. 258, 69 Am. St. Rep. 899, 75 N. W. 980, holding policy not violated by intentional suicide while sane, in absence of exception in contract.

Distinguished in *Supreme Lodge K. of P. v. Stein*, 75 Miss. 119, 37 L. R. A. 778, 65 Am. St. Rep. 589, 21 So. 559, holding antisuicide clause in application for insurance by Knight of Pythias not binding upon applicant when provision adopted by board without power to impose condition.

Waiver of forfeiture of policy.

Cited in *Kidder v. Knights Templars & M. Life Indemnity Co.* 94 Wis. 548, 69 N. W. 364, holding forfeiture of policy waived by forwarding blanks for proofs of loss and requiring amendment showing insured's place of residence and death, necessitating expense in correcting proofs; *Ledebuhr v. Wisconsin Trust Co.* 112 Wis. 662, 88 N. W. 607, holding issuance of benefit certificate a waiver of by-law violated by insured designating beneficiary in will.

Conflict between by-laws and certificates.

Cited in *Laker v. Royal Fraternal Union*, 95 Mo. App. 366, holding that when by-laws of benefit association conflict with certificate, they are to be construed in favor of insured.

47 L. R. A. 685, *RICKETSON v. MILWAUKEE*, 105 Wis. 591, 81 N. W. 864.

Municipal contract for work.

Cited in *Mueller v. Eau Claire County*, 108 Wis. 310, 84 N. W. 430, holding that contract for construction of insane asylum must be let to lowest bidder, not to one apparently more favorable to county; *State ex rel. O'Donnell v. Benzenberg*, 108 Wis. 439, 84 N. W. 858, denying mandamus to compel board of public works to enter into contract, accepted by council, when no plan of work on file; *Packard v. Hayes*, 94 Md. 251, 51 Atl. 32, holding no contract can legally be let under advertisement requiring each bidder to submit specifications.

Distinguished in *Madison v. American Sanitary Engineering Co.* 118 Wis. 511, 95 N. W. 1097, holding that surety on bond for performance of contract to construct sewage purification plant for city, cannot defend upon ground of illegal manner of awarding contract.

47 L. R. A. 691, *SELLECK v. JANESVILLE*, 104 Wis. 579, 76 Am. St. Rep. 892, 80 N. W. 944.

Stare decisis.

Cited in *Cawley v. La Crosse City R. Co.* 106 Wis. 240, 82 N. W. 197, holding

that conclusions reached in action by wife for personal injuries control husband's action as to same facts.

Right of wife to sue in own name.

Cited in *Lonstorf v. Lonstorf*, 118 Wis. 163, 95 N. W. 961, denying wife's right to maintain action for alienation of husband's affections under statute giving her right of action for injury to person or character.

Photographs as evidence.

Cited in *Hupfer v. National Distilling Co.* 114 Wis. 287, 90 N. W. 191, holding photographs of hoops of bursted vat inadmissible, proof not showing them to be same hoops which bursted; *Paulson v. State*, 118 Wis. 105, 94 N. W. 771, holding photographs of ruins of house burned to conceal murder and robbery admissible in criminal prosecution; *State v. Miller*, 43 Or. 328, 74 Pac. 658, holding admission of photographs which did not explain anything and which were not true representations, error.

Cited in footnotes to *Livermore Foundry & Mach. Co. v. Union Compress & Storage Co.* 53 L. R. A. 482, which holds photographs of wrecked machinery, taken immediately after accident, admissible; *Geneva v. Burnett*, 58 L. R. A. 287, which holds X-ray picture admissible.

Liability for personal injury.

Cited in *Green v. Nebagamain*, 113 Wis. 515, 89 N. W. 520, reversing judgment including damages for loss of services and expense of sickness, in action by wife for personal injuries; *Joliet v. Le Pla*, 109 Ill. App. 340, holding city not relieved of liability for personal injuries resulting from hole in street, on ground that one injured did not use care in selecting physician; *Texas & P. R. Co. v. McKenzie*, 30 Tex. Civ. App. 296, 70 S. W. 237, holding aggravation of injury by unskilled treatment no defense to railroad company for negligent injury.

Cited in footnotes to *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians; *Maguire v. Sheehan*, 59 L. R. A. 496, which sustains liability for entire injury caused through negligence, though shock brought on delirium tremens, retarding recovery; *Texas & P. R. Co. v. White*, 62 L. R. A. 90, which denies liability of person causing injury, for aggravation due to injured person's neglect to obtain surgical assistance.

47 L. R. A. 695, *FINLEY v. PRESCOTT*, 104 Wis. 614, 80 N. W. 930.

Signature by mark.

Cited in *Iowa Loan & T. Co. v. Greenman*, 63 Neb. 270, 88 N. W. 518, holding judicial appraisal of land signed legally when attested by mark.

47 L. R. A. 696, *SAMPLE v. LONDON & L. F. INS. CO.* 46 S. C. 491, 57 Am. St. Rep. 701, 24 S. E. 334.

When limitation begins to run against suit on policy.

Cited in *Boston Marine Ins. Co. v. Scales*, 101 Tenn. 641, 49 S. W. 743, holding that period within which action must be brought on policy begins at expiration of the sixty days reserved for arbitration; *Farmer's Co-op. Creamery Co. v. Iowa State Ins. Co.* 112 Iowa, 610, 84 N. W. 904, holding statute as to time within which actions may be brought, without effect on rights under policy, vested before enactment.

47 L. R. A. 709, HARRISON v. HARTFORD F. INS. CO. 102 Iowa, 112, 71 N. W. 220.

Revocation of stipulation to arbitrate.

Second appeal in 112 Iowa, 78, 83 N. W. 820, holding commencement of suit on policy, revocation of stipulation to arbitrate.

Commencement of actions.

Cited in Smith v. Callanan, 103 Iowa, 223, 42 L. R. A. 484, 72 N. W. 513, holding delivery of notice to sheriff for service, commencement of action to redeem from tax sale and quiet title; Farmer's Co-op. Creamery Co. v. Iowa State Ins. Co. 112 Iowa, 609, 84 N. W. 904, holding statute as to time within which actions may be brought without effect upon rights under policy, vested before enactment; Garretson v. Merchants & B. F. Ins. Co. 114 Iowa, 20, 86 N. W. 32, and Wilhelm v. Des Moines Ins. Co. 103 Iowa, 537, 72 N. W. 685, sustaining limitation as to time within which suit may be brought on policy; Hawley v. Grillin, 121 Iowa, 697, 97 N. W. 86, holding that action by heirs of insane person to redeem from tax sale must be commenced within year from latter's death.

Cited in note (47 L. R. A. 711) as to when stipulation limiting time for suit on insurance policy begins to run.

47 L. R. A. 715, SULLIVAN v. DUNHAM, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923.

Liability for consequential injuries.

Cited in Lersner v. McDonald, 38 Misc. 735, 78 N. Y. Supp. 1125, and Wheeler v. Norton, 92 App. Div. 371, 86 N. Y. Supp. 1095, holding contractors liable for damages resulting from breaking of water main by explosion of blast; Curley v. Electric Vehicle Co. 68 App. Div. 20, 74 N. Y. Supp. 35, holding dismissal of complaint in action for damages resulting from backing electric cab against horse at cab stand, error; Fries v. New York & H. R. Co. 169 N. Y. 284, 62 N. E. 358, denying railroad's company's liability for consequential damages sustained by erection of steel viaduct under legislative direction; Fitz Simons & C. Co. v. Braun, 94 Ill. App. 537, holding contractor liable for injuries to building resulting from underground blasting; Sadlier v. New York, 40 Misc. 85, 81 N. Y. Supp. 308, holding city liable for damages to building resulting from water and slush falling upon it from bridge; Duerr v. Consolidated Gas Co. 86 App. Div. 20, 83 N. Y. Supp. 714, holding both owner and contractor liable for injuries resulting from bursting of water tank through weakened condition of iron plates, due to owner's direction that rivet holes be punched instead of drilled.

Cited in footnotes to Osborne v. Van Dyke, 54 L. R. A. 367, which holds one unlawfully beating his horse liable for injury from unintentional blow to bystander; Cleghorn v. Thompson, 54 L. R. A. 402, which denies liability of both master and servant for accidental shooting of man by servant while lawfully shooting at troublesome dogs; Texas & P. R. Co. v. Carlin, 60 L. R. A. 462, which sustains liability for negligence likely to produce injury, though particular injury not anticipated.

Contributory negligence.

Cited in Cary v. Morrison, 65 L. R. A. 663, footnote p. 659, 63 C. C. A. 271, 129 Fed. 181, holding it question for jury whether one guilty of contributory

negligence by remaining in dangerous proximity to blast after repeated warnings to leave.

Review of questions not excepted to on trial.

Cited in *Wangner v. Grimm*, 169 N. Y. 427, 62 N. E. 569, holding that failure to take exceptions on trial to questions of law bars review on appeal.

47 L. R. A. 721, *Re RUTLEDGE*, 162 N. Y. 31, 56 N. E. 511.

Right to extra allowance.

Cited in *Re Bicknell*, 31 Misc. 307, 64 N. Y. Supp. 360, denying assignee's right to compensation for services performed by attorney, which he should have done himself; *Re Welling*, 51 App. Div. 358, 64 N. Y. Supp. 1025, denying surrogate's authority to grant unsuccessful legatee's or remaindermen extra allowances.

47 L. R. A. 725, *HOWARTH v. ANGLE*, 162 N. Y. 179, 56 N. E. 489.

Enforceability of stockholder's liability.

Cited in *Wigton v. Kenney*, 51 App. Div. 215, 64 N. Y. Supp. 924, holding that receiver of insolvent foreign corporation may enforce stockholder's individual liability in state; *Bank of China v. Morse*, 168 N. Y. 481, 56 L. R. A. 148, footnote p. 139, 85 Am. St. Rep. 676, 61 N. E. 774, holding assessment under English statute in proceedings to wind up corporation for benefit of reorganization scheme, not enforceable against resident; *Sigua Iron Co. v. Brown*, 171 N. Y. 502, 64 N. E. 194, sustaining foreign receiver's right to sue resident for unpaid calls upon assessable capital stock; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 136, 83 N. W. 36, sustaining assessment upon resident stockholders of foreign insolvent corporation; *Commonwealth Mut. F. Ins. Co. v. Hayden Bros.* 61 Neb. 457, 85 N. W. 443, denying power of court having jurisdiction over affairs of insolvent corporation, to render personal judgment against stockholder not party; *Tompkins v. Blakey*, 70 N. H. 588, 49 Atl. 111; *Childs v. Cleaves*, 95 Me. 516, 50 Atl. 714; *Howarth v. Lombard*, 175 Mass. 579, 49 L. R. A. 307, footnote p. 301, 56 N. E. 888,—authorizing suit to enforce stockholder's liability to foreign corporation; *Pfaff v. Gruen*, 92 Mo. App. 572, overruling demurrer to complaint to enforce stockholder's liability to insolvent foreign corporation; *Aldrich v. McClaine*, 45 C. C. A. 634, 106 Fed. 794, holding stockholder bears contractual relation to national bank, so that action to enforce individual liability is maintainable within three years after accrual of right; *Kirtley v. Holmes*, 52 L. R. A. 743, footnote p. 738, 46 C. C. A. 107, 107 Fed. 6, sustaining right to enforce stockholder's liability in courts of his domicile; *Hutchinson v. Stadler*, 85 App. Div. 437, 83 N. Y. Supp. 509, holding director of foreign corporation liable to account for part of dividends declared illegally.

Cited in footnotes to *Finney v. Guy*, 49 L. R. A. 486, which holds action to enforce stockholder's liability not maintainable out of state; *Fidelity Ins. Trust & S. D. Co. v. Mechanics' Sav. Bank*, 56 L. R. A. 228, which holds stockholder's liability enforceable in Federal court, or any court where personal service obtainable; *Blair v. Newbegin*, 58 L. R. A. 644, which sustains right to enforce stockholder's liability in other state without making corporation a party.

Law of comity as to perjury statute.

Cited in *People v. Martin*, 175 N. Y. 322, 96 Am. St. Rep. 628, 67 N. E. 589, holding that section of penal Code relating to false swearing applies to oaths taken in compliance with laws of another state.

47 L. R. A. 731, GRAHAM v. PEOPLE, 181 Ill. 477, 55 N. E. 179.

Sufficiency of indictment.

Cited in *Gilmore v. People*, 87 Ill. App. 129, holding indictment for conspiracy to obtain money by false pretenses, charging crime in language of statute, sufficient; *Bolen v. People*, 184 Ill. 339, 56 N. E. 408, sustaining indictment charging incest in language of statute.

Cited in footnote to *Blum v. State*, 56 L. R. A. 322, which sustains indictment for conspiring to obtain money by false pretenses, which states offense in generic terms without setting out particulars.

Jurisdiction of crime committed in different counties.

Cited in footnote to *Coleman v. State*, 64 L. R. A. 807, which holds commencement of prosecution, in either county, for death in one county from fatal blow struck in another, bar to subsequent prosecution in the other county.

47 L. R. A. 737, MERCHANTS' & M. NAT. BANK v. BARNES, 18 Mont. 335, 56 Am. St. Rep. 586, 45 Pac. 218.

Assignment of money due or to become due.

Cited in *State ex rel. Harmon v. Conrow*, 19 Mont. 109, 47 Pac. 640, holding cashier's notice to tenant to pay rent to bank, to which he executed bill of sale, sufficient to give bank interest in fund as against subsequent attaching creditor; *Oppenheimer v. First Nat. Bank*, 20 Mont. 196, 50 Pac. 419, holding consent of bank unnecessary to make valid debtor's assignment of deposit; *Gillette v. Murphy*, 7 Okla. 103, 54 Pac. 413, holding that creditors have equitable interest in judgment for sheriff's salary by virtue of assignments of portions of salary executed prior to action.

Right to maintain suit upon erroneous theory as to damages.

Cited in *Wolf v. New Orleans Tailor-Made Pants Co.* 52 La. Ann. 1368, 27 So. 893, raising, without deciding, question as to right to maintain action upon wrong theory as to measure of damages.

47 L. R. A. 742, FIRST NAT. BANK v. ELLIOTT, 125 Ala. 646, 82 Am. St. Rep. 268, 27 So. 7.

Payment of deficiency judgment as condition to right to redeem.

Followed in *Williams v. Rouse*, 124 Ala. 161, 27 So. 16, holding redeeming judgment creditor of mortgagor not required to pay mortgage debt remaining after foreclosure.

47 L. R. A. 750, TIRRELL v. TIRRELL, 72 Conn. 567, 45 Atl. 153.

47 L. R. A. 752, LYNN v. HOOPER, 93 Me. 46, 44 Atl. 127.

Liability for fright of horse.

Cited in *Barber v. Manchester*, 72 Conn. 682, 45 Atl. 1014, holding it not negligence *per se* to operate ensilage cutter and carrier within 15 feet of highway, so as to render operator liable for fright of horse.

47 L. R. A. 755, *AUSTIN v. AUGUSTA TERMINAL R. CO.* 108 Ga. 671, 34 S. E. 852.

Abutter's right to damages.

Cited in *Long v. Elberton*, 109 Ga. 30, 46 L. R. A. 430, 77 Am. St. Rep. 363, 34 S. E. 333, denying municipal corporation's liability for erection of prison, causing depreciation in value of abutting property; *Macon v. Wing*, 113 Ga. 91, 38 S. E. 392, affirming abutter's right to damages for injuries sustained by change of grade and narrowing of street.

Cited in footnote to *Louisville R. Co. v. Foster*, 50 L. R. A. 813, which denies abutter's right to recover for noises, smells, and disturbances, from operation of street railway and turntable in street.

Right to injunction against noises.

Cited in *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 77, 42 S. E. 315, sustaining right to injunction against noises from operation of trains near park on Sundays, but not on other days.

Cited in footnotes to *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228, which sustains right to injunction against construction of boilers and tanks and hammering of sheet iron in open air; *Hill v. McBurney Oil & F. Co.* 52 L. R. A. 399, which authorizes injunction against blowing of factory whistle at unreasonable hours in populous community.

47 L. R. A. 782, *RUDOLPH v. PENNSYLVANIA S. VALLEY R. CO.* 186 Pa. 541, 40 Atl. 1083.

Reaffirmed on second appeal in 186 Pa. 555, 40 Atl. 1134.

Damages for diversion of water.

Cited in *Irving v. Media*, 10 Pa. Super. Ct. 145, 7 Del. Co. Rep. 381, 44 W. N. C. 134, holding that village cannot deprive riparian mill owner of right to natural flow of stream without compensation; *Aberdeen v. Bradford*, 94 Md. 680, 51 Atl. 614, holding lower riparian owner entitled to damages for municipal corporation's diversion of water by intake wells intercepting underground channel.

Land taken by eminent domain.

Cited in *Kossler v. Pittsburg, C. C. & St. L. R. Co.* 208 Pa. 57, 57 Atl. 66, denying right to consider second lot in assessing damages to one for right of way, where they are separated by stream and unconnected by bridge.

Cited in note (57 L. R. A. 947) on what lands are to be deemed part of tract damaged by taking portion thereof under eminent domain.

Damages for pollution of stream.

Cited in footnote to *Weston Paper Co. v. Pope*, 56 L. R. A. 890, which sustains liability for pollution of stream by discharge from strawboard works, though business skilfully conducted.

Right to take sand from stream.

Cited in *Hunt v. Graham*, 15 Pa. Super. Ct. 47, denying liability for death of boy drowned while bathing, by falling into hole made by dredge in removing sand.

47 L. R. A. 788, *McANALLY v. PENNSYLVANIA R. CO.* 194 Pa. 464, 45 Atl. 326.

Injury sustained while boarding car.

Cited in *Shuart v. Consolidated Traction Co.* 15 Pa. Super. Ct. 28, affirming re-

covery for injury due to premature starting of street car while passenger attempting to board.

47 L. R. A. 790, *McKENNA v. BRIDGEWATER GAS CO.* 193 Pa. 633, 45 Atl. 52.

Liability for explosion.

Cited in footnote to *Purdy v. Westinghouse Electric & Mfg. Co.* 51 L. R. A. 881, which holds use of barrels, formerly containing explosive substance, for shipping iron, not render one liable for injury to employee by explosion.

47 L. R. A. 792, *STRONG v. BRENNAN*, 183 Ill. 97, 55 N. E. 675.

47 L. R. A. 795, *PEOPLE ex rel. TRADERS' F. INS. CO. v. VAN CLEAVE*, 183 Ill. 330, 55 N. E. 698.

Validity of statute determined by mandamus.

Cited in *People ex rel. Hildel Lodge No. 72, I. O. B. B. v. Rose*, 207 Ill. 376, 69 N. E. 762, dissenting opinion by Magruder, J., who holds that constitutionality of act requiring annual report from corporations may be determined on petition for mandamus for cancelation of charter.

47 L. R. A. 798, *CHICAGO TITLE & T. CO. v. BROWN*, 183 Ill. 42, 55 N. E. 632.

Conclusiveness of probate.

Explained in *Davis v. Upson*, 209 Ill. 211, 70 N. E. 602, holding that order admitting will to probate cannot be attacked by proceedings to contest will.

Competency of subscribing witness.

Cited in *Sloan v. Sloan*, 184 Ill. 582, 56 N. E. 952, holding wife of legatee not competent subscribing witness.

47 L. R. A. 802, *LASHER v. PEOPLE*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663.

Class legislation.

Cited in *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 250, 66 N. E. 349, sustaining act exempting building and loan associations from provisions for making affidavit as to connection with illegal combinations.

Cited in footnote to *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others, whose business less than \$1,000.

Grant of franchise or license.

Cited in *Cain v. Wyoming*, 104 Ill. App. 541, holding that ordinance granting right to use streets for water system confers license, not franchise.

Distinguished in *Morrison v. People*, 196 Ill. 454, 63 N. E. 989, holding that act authorizing president of county board to appoint civil service commission does not confer franchise upon him.

47 L. R. A. 806, *HOPE v. FLENTGE*, 140 Mo. 390, 41 S. W. 1002.

Marking official ballots.

Followed without discussion in *Morgan v. Brase*, 140 Mo. 415, 41 S. W. 1101;

Howard v. Caldwell, 140 Mo. 416, 41 S. W. 1101; Drum v. Ude, 140 Mo. 417, 41 S. W. 1100; Frissell v. Cotner, 140 Mo. 418, 41 S. W. 1101.

Cited in McKay v. Minner, 154 Mo. 617, 55 S. W. 866, holding void, ballots containing initials of only one judge; Duvall v. Miller, 94 Md. 715, 51 Atl. 570, holding that cross not wholly within square vitiates ballots; Morris v. Board of Canvassers, 49 W. Va. 256, 38 S. E. 500, holding ballots containing names voted on, void because not all in same column; Coulehan v. White, 95 Md. 716, 53 Atl. 786, holding ballot not vitiated by election judge's marking "A. Schr." instead of initials.

Cited in footnote to Parker v. Hughes, 56 L. R. A. 275, which sustains ballot with cross marks opposite name of candidate at each place it appears on ballot.

Presence of election judges.

Distinguished in Sanders v. Lacks, 142 Mo. 262, 43 S. W. 653, holding vote not void because four judges present instead of six, as required by law.

Review of findings of lower court.

Cited in Harding v. Harding, 140 Cal. 692, 74 Pac. 284, holding that findings, in action for divorce, as to fact of desertion and bona fides of residence, will not be disturbed on appeal.

47 L. R. A. 830, McMAHON v. POLK, 10 S. D. 296, 73 N. W. 77.

Identifying marks on ballots.

Cited in Church v. Walker, 10 S. D. 452, 74 N. W. 198, holding cross outside circle on ballot, identifying mark, but ink blots presumed unintentional; Moody v. Davis, 13 S. D. 92, 82 N. W. 410, holding ballot vitiated by voters placing crosses in two circles.

47 L. R. A. 842, SLAYMAKER v. PHILLIPS, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049.

Marking official ballots.

Cited in Cole v. Tucker, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681; Miller v. Schallern, 8 N. D. 400, 79 N. W. 865; Orr v. Bailey, 59 Neb. 140, 80 N. W. 495,—sustaining statute requiring official stamp on back of ballots; Coulehan v. White, 95 Md. 716, 53 Atl. 786, holding ballot not vitiated by election judge's marking "A. Schr." instead of initials.

Cited in footnote to State *ex rel.* McCarthy v. Moore, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election.

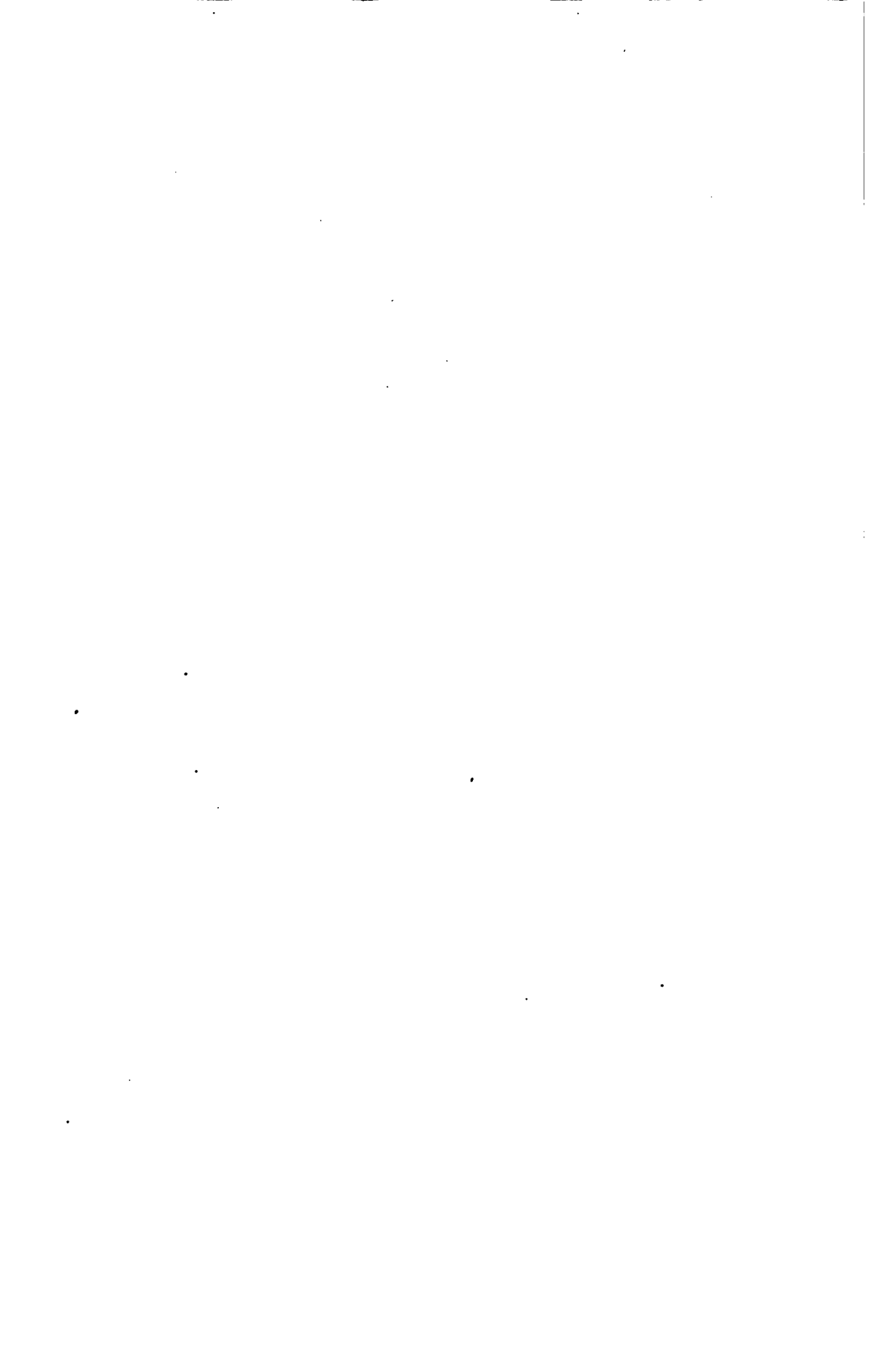
47 L. R. A. 859, SULLIVAN v. STRAHORN-HUTTON-EVANS COMMISSION CO. 152 Mo. 268, 53 S. W. 912.

Privileged communications.

Cited in Jones v. Brownlee, 161 Mo. 266, 53 L. R. A. 448, 61 S. W. 795, holding designation of person with whom plaintiff committed adultery in cross-bill in divorce proceedings, privileged.

— Matter for jury.

Cited in Wagner v. Scott, 164 Mo. 301, 63 S. W. 1107, holding that evidence of abuse of privilege makes prima facie case for jury. *o*





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